MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

July 29, 2017 through June 14, 2018

KATHRYN L. LOOMIS
REPORTER OF DECISIONS

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SUPREME COURT

December 6, 2017

Back row left to right: Justices KURTIS T. WILDER, DAVID F. VIVIANO, RICHARD H. BERNSTEIN, and JOAN L. LARSEN.

Front row left to right: Justice BRIAN K. ZAHRA, Chief Justice STEPHEN J. MARKMAN, and Justice BRIDGET M. MCCORMACK.

SUPREME COURT

	Term Expires January 1 of
Chief Justice	
STEPHEN J. MARKMAN	2021
Justices	
BRIAN K. ZAHRA	2023
BRIDGET M. McCORMACK	2021
DAVID F. VIVIANO	2025
RICHARD H. BERNSTEIN	2023
JOAN L. LARSEN	2019[1]
KURTIS T. WILDER	2019
ELIZABETH T. CLEMENT	2019[2]

Commissioners

DANIEL C. BRUBAKER, Chief Commissioner

TIMOTHY J. RAUBINGER	KATHLEEN M. DAWSON[6]
SHARI M. OBERG	SAMUEL R. SMITH
DEBRA A. GUTIERREZ-McGUIRE	ANNE E. ALBERS
ANNE-MARIE HYNOUS VOICE	AARON J. GAUTHIER
DON W. ATKINS[3]	STACI STODDARD
JÜRGEN O. SKOPPEK[4]	MARK E. PLAZA
MICHAEL S. WELLMAN	MOLLY E. HENNESSEY[7]
GARY L. ROGERS	REGINA T. DELMASTRO[8]
RICHARD B. LESLIE[5]	CHRISTOPHER M. THOMPSON[9]

CHRISTOPHER M. SMITH[10]

State Court Administrator

MILTON L. MACK, Jr.

Clerk: LARRY S. ROYSTER
Reporter of Decisions: KATHRYN L. LOOMIS
Crier: DAVID G. PALAZZOLO[11]
JEFFREY A. MILLS[12]

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[1] To November 3, 2017.

[2] From November 17, 2017.

[3] To January 5, 2018.

[4] To January 31, 2018.

[5] To January 4, 2018.

[6] To August 31, 2017.

[7] From August 14, 2017.

[8] From October 2, 2017.

[9] From October 2, 2017.

[10] From December 18, 2017.

[11] The Supreme Court mourns the loss of David G. Palazzolo, who died on October 14, 2017, after a brief illness. Mr. Palazzolo served as crier for more than 25 years.

[12] From February 26, 2018.

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
MICHAEL J. TALBOT	2021[1]
CHRISTOPHER M. MURRAY	2021[2]
Chief Judge Pro Tem	
CHRISTOPHER M. MURRAY	2021[3]
JANE M. BECKERING	2019[4]
Judges	
DAVID SAWYER	2023
WILLIAM B. MURPHY	2019
MARK J. CAVANAGH	2021
KATHLEEN JANSEN	2019
HENRY WILLIAM SAAD	2021[5]
JOEL P. HOEKSTRA	2023
JANE E. MARKEY	2021
PETER D. O'CONNELL	2019
PATRICK M. METER	2021
KIRSTEN FRANK KELLY	2019
KAREN FORT HOOD	2021
STEPHEN L. BORRELLO	2019
DEBORAH A. SERVITTO	2019
JANE M. BECKERING	2019[6]
ELIZABETH L. GLEICHER	2019
CYNTHIA DIANE STEPHENS	2023
MICHAEL J. KELLY	2021
DOUGLAS B. SHAPIRO	2019
AMY RONAYNE KRAUSE	2021
MARK T. BOONSTRA	2021
MICHAEL J. RIORDAN	2019
MICHAEL F. GADOLA	2023
COLLEEN A. O'BRIEN	2023
BROCK A. SWARTZLE	2019
THOMAS C. CAMERON	2019
JONATHAN TUKEL	2019[7]

Chief Clerk: JEROME W. ZIMMER, Jr.
Research Director: JULIE ISOLA RUECKE

[1] To April 24, 2018.

[2] From April 25, 2018.

[3] To April 24, 2018.

[4] From April 25, 2018.

[5] To November 30, 2017.

[6] To April 24, 2018.

[7] From December 1, 2017.

CIRCUIT JUDGES

		Term Expires January 1 of
1.	MICHAEL R. SMITH	2021
2.	JOHN M. DONAHUE	2023
	CHARLES T. LaSATA	2023
	ANGELA PASULA	2019
	SCOTT SCHOFIELD	2021
3.	DAVID J. ALLEN	2021
	MARIAM BAZZI	2021
	ANNETTE J. BERRY	2019
	GREGORY D. BILL	2019
	ULYSSES W. BOYKIN	2021
	KAREN Y. BRAXTON	2019
	MEGAN MAHER BRENNAN	2021[1]
	JEROME C. CAVANAGH	2019
	ERIC WILLIAM CHOLACK	2023
	JAMES R. CHYLINSKI	2023
	ROBERT J. COLOMBO, Jr.	2019
	KEVIN J. COX	2019
	MELISSA ANNE COX	2023
	PAUL JOHN CUSICK	2019
	CHRISTOPHER D. DINGELL	2021
	PRENTIS EDWARDS, Jr.	2019[2]
	CHARLENE M. ELDER	2021
	VONDA R. EVANS	2021
	WANDA EVANS	2023
	EDWARD EWELL, Jr.	2019
	PATRICIA SUSAN FRESARD	2023
	SHEILA ANN GIBSON	2023
	JOHN H. GILLIS, Jr.	2021
	ALEXIS GLENDENING	2023
	DAVID ALAN GRONER	2023
	RICHARD B. HALLORAN, Jr.	2019

[1] To April 25, 2018.

[2] From August 2, 2017.

		Term Expires January 1 of
	ADEL A. HARB	2019
	CYNTHIA GRAY HATHAWAY	2023
	DANA MARGARET HATHAWAY	2019
	DANIEL ARTHUR HATHAWAY	2021
	THOMAS M. J. HATHAWAY	2023
	CHARLES S. HEGARTY	2019
	CATHERINE HEISE	2019
	SUSAN L. HUBBARD	2023
	MURIEL D. HUGHES	2023
	EDWARD JOSEPH	2021
	CONNIE MARIE KELLEY	2021
	TIMOTHY MICHAEL KENNY	2023
	DONALD KNAPP	2021[3]
	QIANA D. LILLARD	2019
	KATHLEEN M. McCARTHY	2019
	BRUCE U. MORROW	2023
	JOHN A. MURPHY	2023
	LYNNE A. PIERCE	2021
	LITA MASINI POPKE	2023
	KELLY RAMSEY	2023
	RICHARD M. SKUTT	2021[4]
	MARK T. SLAVENS	2023
	LESLIE KIM SMITH	2019
	VIRGIL C. SMITH	2019
	MARTHA M. SNOW	2023
	CRAIG S. STRONG	2021
	BRIAN R. SULLIVAN	2023
	LAWRENCE S. TALON	2021
	DEBORAH A. THOMAS	2019
	MARGARET MARY VanHOUTEN	2021
	SHANNON N. WALKER	2021
4.	SUSAN BEEBE JORDAN	2023
	RICHARD N. LaFLAMME	2023
	JOHN G. McBAIN, Jr.	2021
	THOMAS D. WILSON	2019
5.	AMY McDOWELL	2021
6.	JAMES M. ALEXANDER	2021
	MARTHA ANDERSON	2021
	LEO BOWMAN	2019
	MARY ELLEN BRENNAN	2021
	RAE LEE CHABOT	2023

[3] From April 16, 2018.

[4] To February 5, 2018.

		Term Expires January 1 of
	LISA ORTLIEB GORCYCA	2021
	NANCI J. GRANT	2021
	HALA Y. JARBOU	2023
	SHALINA D. KUMAR	2021
	DENISE LANGFORD-MORRIS	2019
	LISA LANGTON	2023
	JEFFREY S. MATIS	2021
	CHERYL A. MATTHEWS	2023
	KAREN D. McDONALD	2019
	PHYLLIS C. McMILLEN	2019
	DANIEL PATRICK O'BRIEN	2023
	WENDY LYNN POTTS	2019
	VICTORIA ANN VALENTINE	2023
	MICHAEL D. WARREN, Jr.	2019
7.	DUNCAN M. BEAGLE	2023
	CELESTE D. BELL	2019[5]
	JOSEPH J. FARAH	2023
	JUDITH A. FULLERTON	2019
	JOHN A. GADOLA	2021
	ARCHIE L. HAYMAN	2019[6]
	GEOFFREY L. NEITHERCUT	2019
	DAVID J. NEWBLATT	2023
	MICHAEL J. THEILE	2021
	RICHARD B. YUILLE	2021
8.	SUZANNE KREEGER	2021
	RONALD J. SCHAFER	2023
9.	PAUL J. BRIDENSTINE	2019
	GARY C. GIGUERE, Jr.	2021
	STEPHEN D. GORSALITZ	2023
	PAMELA L. LIGHTVOET	2019
	ALEXANDER C. LIPSEY	2023
10.	JANET M. BOES	2019
	JAMES T. BORCHARD	2023
	ANDRÉ R. BORRELLO	2023
	DARNELL JACKSON	2019
	ROBERT L. KACZMAREK	2021[7]
	MANVEL TRICE, III	2021[8]
11.	WILLIAM W. CARMODY	2021

[5] From February 20, 2018.

[6] To December 31, 2017.

[7] To December 1, 2017.

[8] From December 11, 2017.

		Term Expires January 1 of
12.	CHARLES R. GOODMAN	2021
13.	KEVIN ELSENHEIMER	2021
	THOMAS G. POWER	2023
14.	TIMOTHY G. HICKS	2023
	KATHY HOOGSTRA	2021
	WILLIAM C. MARIETTI	2023
	ANNETTE ROSE SMEDLEY	2019
15.	P. WILLIAM O'GRADY	2021
16.	JAMES M. BIERNAT, Jr.	2019
	RICHARD L. CARETTI	2023
	DIANE M. DRUZINSKI	2021
	JENNIFER FAUNCE	2019
	JAMES M. MACERONI	2021
	CARL J. MARLINGA	2023
	RACHEAL RANCILIO	2023
	EDWARD A. SERVITTO, Jr.	2019
	MICHAEL E. SERVITTO	2023
	MARK S. SWITALSKI	2019
	MATTHEW S. SWITALSKI	2021
	JOSEPH TOIA	2021
	KATHRYN A. VIVIANO	2023
	TRACEY A. YOKICH	2019
17.	PAUL J. DENENFELD	2023
	KATHLEEN A. FEENEY	2021
	DONALD A. JOHNSTON, III	2019
	DENNIS B. LEIBER	2019
	DEBORAH McNABB	2023
	GEORGE JAY QUIST	2023
	J. JOSEPH ROSSI	2023
	PAUL J. SULLIVAN	2021
	MARK A. TRUSOCK	2019
	CHRISTOPHER P. YATES	2019
	DANIEL V. ZEMAITIS	2021
18.	HARRY P. GILL	2023
	JOSEPH K. SHEERAN	2021
19.	DAVID A. THOMPSON	2021
20.	KENT D. ENGLE	2023
	JON H. HULSING	2021
	KAREN J. MIEDEMA	2023
	JON VAN ALLSBURG	2019
21.	PAUL H. CHAMBERLAIN	2023
	MARK H. DUTHIE	2019
22.	ARCHIE CAMERON BROWN	2023
	PATRICK J. CONLIN, Jr.	2021

		Term Expires January 1 of
	TIMOTHY P. CONNORS	2019
	CAROL ANNE KUHNKE	2019
	DAVID S. SWARTZ	2021
23.	DAVID C. RIFFEL	2023
24.	DONALD A. TEEPLE	2021
25.	JENNIFER MAZZUCHI	2021
26.	MICHAEL G. MACK	2021
27.	ROBERT D. SPRINGSTEAD	2019
28.	WILLIAM M. FAGERMAN	2021
29.	MICHELLE M. RICK	2023
	RANDY L. TAHVONEN	2021
30.	ROSEMARIE ELIZABETH AQUILINA	2021
	LAURA BAIRD	2019
	CLINTON CANADY, III	2023
	WILLIAM E. COLLETTE	2021
	JOYCE DRAGANCHUK	2023
	JAMES S. JAMO	2019
	JANELLE A. LAWLESS	2021
31.	DANIEL J. KELLY	2021
	CYNTHIA A. LANE	2023
	MICHAEL L. WEST	2019
32.	MICHAEL POPE	2021
33.	ROY C. HAYES, III	2021
34.	ROBERT BENNETT	2023
35.	MATTHEW J. STEWART	2021
36.	KATHLEEN BRICKLEY	2019
	JEFFREY J. DUFON	2021
37.	JOHN A. HALLACY	2019
	TINA YOST JOHNSON	2023
	BRIAN KIRKHAM	2023
	SARAH SOULES LINCOLN	2021
38.	MARK S. BRAUNLICH	2019
	MICHAEL A. WEIPERT	2023
	DANIEL WHITE	2021
39.	ANNA MARIE ANZALONE	2019
	MARGARET MURRAY-SCHOLZE NOE	2021
40.	NICK O. HOLOWKA	2023
	BYRON KONSCHUH	2021
41.	MARY BROUILLETTE BARGLIND	2023
	RICHARD J. CELELLO	2021[9]
	CHRISTOPHER S. NINOMIYA	2021[10]

[9] To December 31, 2017.

[10] From January 4, 2018.

		Term Expires January 1 of
42.	MICHAEL J. BEALE	2021
	STEPHEN CARRAS	2019
43.	MARK A. HERMAN	2023
44.	MICHAEL P. HATTY	2019
	DAVID READER	2023
45.	PAUL E. STUTESMAN	2019
46.	COLIN G. HUNTER	2023
	GEORGE J. MERTZ	2021
47.	JOHN B. ECONOMOPOULOS	2023
48.	MARGARET BAKKER	2023
	KEVIN W. CRONIN	2021[11]
	ROBERTS KENGIS	2021[12]
49.	KIMBERLY L. BOOHER	2021
	SCOTT P. HILL-KENNEDY	2019
50.	JAMES P. LAMBROS	2019
51.	SUSAN K. SNIEGOWSKI	2021
52.	GERALD M. PRILL	2021
53.	SCOTT LEE PAVLICH	2023
54.	AMY GIERHART	2019
55.	THOMAS R. EVANS	2021
	ROY G. MIENK	2019
56.	JANICE K. CUNNINGHAM	2019
	JOHN DOUGLAS MAURER	2021
57.	CHARLES W. JOHNSON	2019

[11] To January 12, 2018.

[12] From March 19, 2018.

DISTRICT JUDGES

		Term Expires January 1 of
1.	TERRENCE P. BRONSON	2019
	JAROD M. CALKINS	2021[1]
	JACK VITALE	2023
2A.	JONATHAN L. POER	2021
	LAURA J. SCHAEDLER	2023
2B.	SARA S. LISZNYAI	2021
3A.	BRENT R. WEIGLE	2021
3B.	JEFFREY C. MIDDLETON	2021
	ROBERT PATTISON	2019
4.	STACEY A. RENTFROW	2021
5.	GARY J. BRUCE	2023
	ARTHUR J. COTTER	2021
	DONNA B. HOWARD	2021
	STERLING R. SCHROCK	2019
	DENNIS M. WILEY	2023
7.	ARTHUR H. CLARKE, III	2021
	MICHAEL T. McKAY	2023
8.	ANNE E. BLATCHFORD	2019
	CHRISTOPHER HAENICKE	2019
	KATHLEEN P. HEMINGWAY	2021
	JULIE K. PHILLIPS	2021
	RICHARD A. SANTONI	2021
	VINCENT C. WESTRA	2023
10.	PAUL K. BEARDSLEE	2021
	SAMUEL I. DURHAM, Jr.	2023
	FRANKLIN K. LINE, Jr.	2021
	JAMES D. NORLANDER	2019
12.	JOSEPH S. FILIP	2023
	DANIEL GOOSTREY	2019
	MICHAEL J. KLAEREN	2021
	R. DARRYL MAZUR	2021
14A.	RICHARD E. CONLIN	2021
	J. CEDRIC SIMPSON	2019
	KIRK W. TABBEY	2023
14B.	CHARLES POPE	2021
15.	JOSEPH F. BURKE	2019

[1] To June 1, 2018.

		Term Expires January 1 of
	ELIZABETH POLLARD HINES	2023
	KAREN Q. VALVO	2021
16.	SEAN P. KAVANAGH	2021
	KATHLEEN J. McCANN	2019
17.	KAREN KHALIL	2023
	CHARLOTTE L. WIRTH	2021
18.	SANDRA A. CICIRELLI	2019
	MARK A. McCONNELL	2021
19.	L. EUGENE HUNT, Jr.	2023
	SAM A. SALAMEY	2019
	MARK W. SOMERS	2021
20.	MARK J. PLAWECKI	2021
	DAVID TURFE	2019
21.	RICHARD L. HAMMER, Jr.	2021
22.	SABRINA JOHNSON	2019
23.	GENO SALOMONE	2019
	JOSEPH D. SLAVEN	2021
24.	JOHN T. COURTRIGHT	2021
	RICHARD A. PAGE	2023
25.	GREGORY A. CLIFTON	2021
	DAVID J. ZELENAK	2023
27.	RANDY L. KALMBACH	2019
28.	JAMES A. KANDREVAS	2021
29.	LAURA REDMOND MACK	2019
30.	BRIGETTE R. OFFICER-HILL	2023
31.	ALEXIS G. KROT	2021
32A.	DANIEL S. PALMER	2021
33.	JENNIFER COLEMAN HESSON	2023
	JAMES KURT KERSTEN	2021
	MICHAEL K. McNALLY	2019
34.	TINA BROOKS GREEN	2019
	BRIAN A. OAKLEY	2023
	DAVID M. PARROTT	2021
35.	MICHAEL J. GEROU	2023
	RONALD W. LOWE	2019
	JAMES A. PLAKAS	2021
36.	LYDIA NANCE ADAMS	2023
	ROBERTA C. ARCHER	2019
	CHRISTOPHER MICHAEL BLOUNT	2019
	NANCY McCAUGHAN BLOUNT	2021
	IZETTA F. BRIGHT	2023
	DEMETRIA BRUE	2021
	ESTHER LYNISE BRYANT-WEEKES	2021
	DONALD COLEMAN	2019
	KAHLILIA YVETTE DAVIS	2023
	PRENTIS EDWARDS, Jr.	2019[2]
	DEBORAH GERALDINE FORD	2023

[2] To August 1, 2017.

		Term Expires January 1 of
	RUTH ANN GARRETT	2019
	WILLIAM AUSTIN GARRETT	2023
	RONALD GILES	2021
	ADRIENNE HINNANT-JOHNSON	2021
	SHANNON A. HOLMES	2021
	PATRICIA L. JEFFERSON	2021
	KENYETTA STANFORD JONES	2023
	ALICIA A. JONES-COLEMAN	2019
	KENNETH J. KING	2021
	DEBORAH L. LANGSTON	2019
	WILLIAM McCONICO	2019
	DONNA R. MILHOUSE	2019
	B. PENNIE MILLENDER	2023
	CYLENTHIA L. MILLER	2023
	DAVID PERKINS	2023
	KEVIN F. ROBBINS	2019
	DAVID S. ROBINSON, Jr.	2019
	ALIYAH SABREE	2019[3]
	MICHAEL E. WAGNER	2021
	LARRY D. WILLIAMS, Jr.	2023
37.	JOHN M. CHMURA	2019
	MICHAEL CHUPA	2021
	SUZANNE M. FAUNCE	2023
	MATTHEW P. SABAUGH	2019
38.	CARL F. GERDS III	2021
39.	JOSEPH F. BOEDEKER	2021
	MARCO A. SANTIA	2019
	CATHERINE B. STEENLAND	2023
40.	MARK A. FRATARCANGELI	2019
	JOSEPH CRAIGEN OSTER	2021
41A.	MICHAEL S. MACERONI	2021
	DOUGLAS P. SHEPHERD	2019
	STEPHEN S. SIERAWSKI	2023
	KIMBERLEY ANNE WIEGAND	2019
41B.	LINDA DAVIS	2021
	CARRIE LYNN FUCA	2023
	SEBASTIAN LUCIDO	2019
42-1.	DENIS R. LeDUC	2021
42-2.	WILLIAM H. HACKELL III	2019
43.	CHARLES G. GOEDERT	2021
	KEITH P. HUNT	2019
	JOSEPH LONGO	2023
44.	DEREK W. MEINECKE	2019
	JAMES L. WITTENBERG	2023
45.	MICHELLE FRIEDMAN APPEL	2023
	DAVID M. GUBOW	2021

[3] From November 6, 2017.

		Term Expires January 1 of
46.	CYNTHIA ARVANT	2023
	SHEILA R. JOHNSON	2021
	DEBRA NANCE	2019
47.	JAMES BRADY	2021
	MARLA E. PARKER	2023
48.	MARC BARRON	2023
	DIANE D'AGOSTINI	2019
	KIMBERLY SMALL	2021
50.	RONDA FOWLKES GROSS	2019
	MICHAEL C. MARTINEZ	2021
	PRESTON G. THOMAS	2023
	CYNTHIA THOMAS WALKER	2021
51.	TODD A. FOX	2019
	RICHARD D. KUHN, Jr.	2021
52-1.	ROBERT BONDY	2019
	THOMAS DAVID LAW	2023
	TRAVIS REEDS	2021
52-2.	JOSEPH G. FABRIZIO	2021
	KELLEY RENAE KOSTIN	2023
52-3.	LISA L. ASADOORIAN	2019
	NANCY TOLWIN CARNIAK	2023
	JULIE A. NICHOLSON	2021
52-4.	KIRSTEN NIELSEN HARTIG	2023
	MAUREEN M. McGINNIS	2021
53.	THERESA M. BRENNAN	2021
	L. SUZANNE GEDDIS	2023
	CAROL SUE READER	2019
54A.	LOUISE ALDERSON	2023
	STACIA J. BUCHANAN	2021[4]
	PATRICK F. CHERRY	2021[5]
	HUGH B. CLARKE, Jr.	2023
	FRANK J. DeLUCA	2019
54B.	RICHARD D. BALL	2023
	ANDREA ANDREWS LARKIN	2019
55.	DONALD L. ALLEN	2023
	THOMAS P. BOYD	2021
56A.	JULIE O'NEILL	2023
	JULIE H. REINCKE	2021
56B.	MICHAEL LEE SCHIPPER	2019
57.	WILLIAM A. BAILLARGEON	2019
	JOSEPH S. SKOCELAS	2021
58.	CRAIG E. BUNCE	2019
	SUSAN A. JONAS	2021
	BRADLEY S. KNOLL	2021
	JUDITH K. MULDER	2023

[4] From September 12, 2017.

[5] To August 9, 2017.

		Term Expires January 1 of
59.	PETER P. VERSLUIS	2023
60.	HAROLD F. CLOSZ, III	2021
	MARIA LADAS HOOPES	2021
	RAYMOND J. KOSTRZEWA	2019
	GEOFFREY THOMAS NOLAN	2023
61.	DAVID J. BUTER	2021
	MICHAEL J. DISTEL	2019
	CHRISTINA ELMORE	2023
	JENNIFER FABER	2023
	JEANINE NEMESI LaVILLE	2019
	KIMBERLY A. SCHAEFER	2021
62A.	PABLO CORTES	2021
	STEVEN M. TIMMERS	2019
62B.	WILLIAM G. KELLY	2021
63.	JEFFREY J. O'HARA	2021
	SARA J. SMOLENSKI	2021
64A.	RAYMOND P. VOET	2021
64B.	DONALD R. HEMINGSEN	2021
65A.	MICHAEL E. CLARIZIO	2021
65B.	STEWART D. McDONALD	2021
66.	WARD L. CLARKSON	2019
	TERRANCE P. DIGNAN	2021
67-1.	DAVID J. GOGGINS	2021
67-2.	MARK W. LATCHANA	2023
	JENNIFER J. MANLEY	2021
67-3.	VIKKI BAYEH HALEY	2021
67-4.	MARK C. McCABE	2021
	CHRISTOPHER ODETTE	2019
67-5.	WILLIAM H. CRAWFORD, II	2019
	G. DAVID GUINN	2021
	HERMAN MARABLE, Jr.	2019
	NATHANIEL C. PERRY, III	2021
70-1.	TERRY L. CLARK	2019
	M. RANDALL JURRENS	2023
70-2.	ELIAN FICHTNER	2021[6]
	ALFRED T. FRANK	2021
	DAVID D. HOFFMAN	2019
	MANVEL TRICE, III	2021[7]
71A.	LAURA CHEGER BARNARD	2021
71B.	KIM DAVID GLASPIE	2021
72.	MICHAEL L. HULEWICZ	2023
	JOHN D. MONAGHAN	2019
	CYNTHIA SIEMEN PLATZER	2021
74.	MARK E. JANER	2023

[6] From April 17, 2018.

[7] To December 10, 2017.

		Term Expires January 1 of
	TIMOTHY J. KELLY	2019
	DAWN A. KLIDA	2021
75.	MICHAEL CARPENTER	2021
76.	ERIC JANES	2021
77.	PETER JAKLEVIC	2021
78.	H. KEVIN DRAKE	2021
79.	PETER J. WADEL	2021
80.	JOSHUA M. FARRELL	2021
82.	RICHARD E. NOBLE	2021
84.	AUDREY D. VAN ALST	2021
86.	THOMAS J. PHILLIPS	2019
	MICHAEL STEPKA	2023
89.	MARIA L. BARTON	2021
90.	JAMES N. ERHART	2021
92.	BETH GIBSON	2021
93.	MARK E. LUOMA	2021
94.	STEVE PARKS	2021
95A.	JEFFREY G. BARSTOW	2021
95B.	JULIE ANN LaCOST	2021[8]
	CHRISTOPHER S. NINOMIYA	2021[9]
96.	ROGER W. KANGAS	2021
	KARL WEBER	2023
97.	MARK A. WISTI	2021

[8] From February 23, 2018.

[9] To January 3, 2018.

MUNICIPAL JUDGES

	Term Expires January 1 of
RUSSELL F. ETHRIDGE	2020
CARL F. JARBOE	2020
THEODORE A. METRY	2020
MATTHEW R. RUMORA	2020

PROBATE JUDGES

County		Term Expires January 1 of
Alcona	LAURA A. FRAWLEY	2019
Alger/Schoolcraft	CHARLES C. NEBEL	2019
Allegan	MICHAEL L. BUCK	2019
Alpena	THOMAS J. LaCROSS	2019
Antrim	NORMAN R. HAYES	2019
Arenac	RICHARD E. VOLLBACH, Jr.	2019
Baraga	TIMOTHY S. BRENNAN	2019
Barry	WILLIAM M. DOHERTY	2019
Bay	JAN A. MINER	2019
Benzie	JOHN MEAD	2019
Berrien	BRIAN BERGER	2019
Berrien	MABEL JOHNSON MAYFIELD	2021
Branch	KIRK A. KASHIAN	2019
Calhoun	MICHAEL L. JACONETTE	2023
Cass	SUSAN L. DOBRICH	2019
Cheboygan	ROBERT JOHN BUTTS	2019
Chippewa	ERIC BLUBAUGH	2021
Clare/Gladwin	MARCY A. KLAUS	2019
Clinton	LISA SULLIVAN	2019
Crawford	MONTE BURMEISTER	2019
Delta	ROBERT E. GOEBEL, Jr.	2019
Dickinson	THOMAS D. SLAGLE	2019
Eaton	THOMAS K. BYERLEY	2019
Emmet/Charlevoix	VALERIE SYNDER	2019
Genesee	JENNIE E. BARKEY	2021
Genesee	F. KAY BEHM	2019
Gogebic	JOEL L. MASSIE	2019
Grand Traverse	MELANIE STANTON	2019
Gratiot	KRISTIN M. BAKKER	2019
Hillsdale	MICHELLE SNELL BIANCHI	2019
Houghton	FRASER T. STROME	2019
Huron	DAVID L. CLABUESCH	2019
Huron	DAVID B. HERRINGTON	2021
Ingham	R. GEORGE ECONOMY	2019

County		Term Expires January 1 of
Ingham	RICHARD JOSEPH GARCIA	2021
Ionia	ROBERT SYKES, Jr.	2019
Iosco	CHRISTOPHER P. MARTIN	2019
Iron	C. JOSEPH SCHWEDLER	2019
Isabella	WILLIAM T. ERVIN	2019
Jackson	DIANE M. RAPPLEYE	2019
Kalamazoo	TIFFANY ANKLEY	2021
Kalamazoo	CURTIS J. BELL	2019
Kalamazoo	G. SCOTT PIERANGELI	2023
Kalkaska	LYNNE MARIE BUDAY	2019
Kent	TERENCE ACKERT	2023
Kent	PATRICIA D. GARDNER	2019
Kent	G. PATRICK HILLARY	2019
Kent	DAVID M. MURKOWSKI	2021
Keweenaw	JAMES G. JAASKELAINEN	2019
Lake	MARK S. WICKENS	2019
Lapeer	JUSTUS C. SCOTT	2019
Leelanau	LARRY J. NELSON	2019
Lenawee	GREGG P. IDDINGS	2019
Livingston	MIRIAM CAVANAUGH	2019
Luce/Mackinac	W. CLAYTON GRAHAM	2019
Macomb	KATHRYN A. GEORGE	2021
Macomb	SANDRA A. HARRISON	2019
Manistee	THOMAS N. BRUNNER	2019
Marquette	CHERYL L. HILL	2019
Mason	JEFFREY C. NELLIS	2019
Mecosta/Osceola	TYLER O. THOMPSON	2019
Menominee	DANIEL E. HASS	2019
Midland	DORENE S. ALLEN	2019
Missaukee	CHARLES R. PARSONS	2019
Monroe	FRANK L. ARNOLD	2021
Monroe	CHERYL E. LOHMEYER	2019
Montcalm	CHARLES W. SIMON, III	2019
Montmorency	BENJAMIN T. BOSLER	2019
Muskegon	GREGORY C. PITTMAN	2019
Muskegon	BRENDA E. SPRADER	2023
Newaygo	GRAYDON W. DIMKOFF	2019
Oakland	JENNIFER S. CALLAGHAN	2023
Oakland	LINDA S. HALLMARK	2019
Oakland	DANIEL A. O'BRIEN	2021
Oakland	KATHLEEN A. RYAN	2023
Oceana	BRADLEY G. LAMBRIX	2019
Ogemaw	SHANA A. LAMBOURN	2019

County		Term Expires January 1 of
Ontonagon	JANIS M. BURGESS	2019
Oscoda	KATHRYN JOAN ROOT	2019
Otsego	MICHAEL K. COOPER	2019
Ottawa	MARK A. FEYEN	2019
Presque Isle	DONALD J. McLENNAN	2019
Roscommon	MARK JERNIGAN	2019
Saginaw	PATRICK J. McGRAW	2019
Saginaw	BARBARA L. METER	2021
St. Clair	ELWOOD L. BROWN	2021
St. Clair	JOHN TOMLINSON	2019
St. Joseph	DAVID C. TOMLINSON	2019
Sanilac	GREGORY S. ROSS	2021
Shiawassee	THOMAS J. DIGNAN	2019
Tuscola	NANCY THANE	2019
Van Buren	DAVID DiSTEFANO	2019
Washtenaw	DARLENE A. O'BRIEN	2019
Washtenaw	JULIA OWDZIEJ	2021
Wayne	JUNE E. BLACKWELL-HATCHER	2019
Wayne	DAVID BRAXTON	2021
Wayne	FREDDIE G. BURTON, Jr.	2019
Wayne	JUDY A. HARTSFIELD	2021
Wayne	TERRANCE A. KEITH	2021
Wayne	LISA MARIE NEILSON	2023
Wayne	LAWRENCE PAOLUCCI	2023
Wayne	FRANK S. SZYMANSKI	2019
Wexford	EDWARD Van ALST	2019[1]

[1] From December 15, 2017.

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Alcona	Harrisville	23
Alger	Munising	11
Allegan	Allegan	48
Alpena	Alpena	26
Antrim	Bellaire	13
Arenac	Standish	23
Baraga	L'Anse	12
Barry	Hastings	5
Bay	Bay City	18
Benzie	Beulah	19
Berrien	St. Joseph	2
Branch	Coldwater	15
Calhoun	Marshall, Battle Creek	37
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	56
Emmet	Petoskey	57
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	Suttons Bay	13
Lenawee	Adrian	39
Livingston	Howell	44
Luce	Newberry	11
Mackinac	St. Ignace	11
Macomb	Mount Clemens	16
Manistee	Manistee	19
Marquette	Marquette	25
Mason	Ludington	51
Mecosta	Big Rapids	49
Menominee	Menominee	41
Midland	Midland	42
Missaukee	Lake City	28
Monroe	Monroe	38
Montcalm	Stanton	8
Montmorency	Atlanta	26
Muskegon	Muskegon	14
Newaygo	White Cloud	27
Oakland	Pontiac	6
Oceana	Hart	27
Ogemaw	West Branch	34
Ontonagon	Ontonagon	32
Osceola	Reed City	49
Oscoda	Mio	23
Otsego	Gaylord	46
Ottawa	Grand Haven	20
Presque Isle	Rogers City	53
Roscommon	Roscommon	34
Saginaw	Saginaw	10
St. Clair	Port Huron	31
St. Joseph	Centreville	45
Sanilac	Sandusky	24
Schoolcraft	Manistique	11
Shiawassee	Corunna	35
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Van Buren	Paw Paw	36
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ADMINISTRATIVE ORDER No. 2017-02

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 19TH CIRCUIT COURT, THE 85TH DISTRICT COURT, AND THE BENZIE AND MANISTEE COUNTY PROBATE COURTS

Entered September 20, 2017, effective immediately (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 immediately:

• The 19th Circuit Court, the 85th District Court, and the Benzie and Manistee County Probate Courts.

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

Amendments to 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. 2017-3

MERGER OF THE STATE APPELLATE DEFENDER OFFICE (SADO) AND MICHIGAN APPELLATE ASSIGNED COUNSEL SYSTEM (MAACS)

Entered November 15, 2017, effective immediately (File No. 2014-36)—REPORTER.

Michigan's Appellate Defender Act, 1978 PA 620, established an Appellate Defender Commission to oversee a system of criminal appellate defense services for indigents. The Act provides in part that "[t]he appointment of criminal appellate defense services for indigents shall be made by the trial court from the roster provided by the commission or shall be referred to the office of the state appellate defender." MCL 780.712(6).

In Administrative Order No. 1981-7, this Court directed the Commission to "establish an Appellate Assigned Counsel Administrator's Office which shall be coordinated with but separate from the State Appellate Defender Office." The office was "to compile and maintain a statewide roster of attorneys eligible and willing to accept criminal appellate defense assignments," and the Court approved regulations to govern both the appointment process and the assigned counsel roster. In 1985, however, the Court determined that under the Appellate Defender Act, "the regulations governing a system for appointment of appellate coun-

sel for indigents in criminal cases" should fall to "the Appellate Defender Commission and not to this Court." See Administrative Order No. 1985-3. See also Administrative Order No. 1989-3. The same year, the Michigan Appellate Assigned Counsel System (MAACS) began operating as an independent state agency under regulations adopted by the Commission.

In 2014, at the request of the Appellate Defender Commission, the Court ordered an operational merger of MAACS with the State Appellate Defender Office (SADO) under the management of the State Appellate Defender "to promote efficiency and improve the administration of assigned appellate counsel for indigent defendants." Administrative Order No. 2014-18. The Court directed the Commission "to review operations of the MAACS and submit a proposed administrative order that reflects the consolidation of the two offices and incorporates proposed updates or revisions that the commission recommends."

The Commission has overseen the merger of SADO and MAACS and conducted an exhaustive review of operations to improve indigent criminal appellants' access to competent counsel with shared resources and expertise. As part of that review, the Commission has monitored a pilot project approved by the Court to "assess the feasibility, costs, and benefits associated with structural reforms" including the regional consolidation of trial court assignment lists, the voluntary implementation of a uniform attorney fee policy, the trial courts' delegation of certain administrative responsibilities to MAACS, the pre-screening of counsel, and the electronic transfer of documents related to the appointment process. See Administrative Order No. 2015-9. The Commission reports that these reforms

have improved the speed and efficiency of the assignment process as well as the quality of assigned appellate representation, and have been well-received by courts and counsel alike.

Therefore, at the request of the Appellate Defender Commission, the Court orders that the Commission shall remain responsible for enacting regulations to govern the MAACS roster and the selection of felony appellate assigned counsel, including SADO's appropriate share of appellate appointments under MCL 780.716(c). The Commission may approve policies to facilitate the regional consolidation of appellate assignment lists for private assigned counsel, including a voluntary attorney fee and expense policy for participating trial courts.

Trial courts shall address all requests for the appointment of felony appellate counsel under the regulations and procedures approved by the Commission and in conformity with applicable court rules. The Court has reviewed the regulations adopted by the Commission on September 20, 2017, and directs the Commission to notify the Court of any updates or changes to these regulations.

This Order supersedes Administrative Orders 1981-7, 1985-3, and 1989-3.

AMENDED ADMINISTRATIVE ORDER No. 2007-3

E-FILING RULES FOR THE 6TH CIRCUIT COURT
(OAKLAND COUNTY)

Entered December 20, 2017, effective immediately (File No. 2002-37)—REPORTER.

On order of the Court, the following order amending Administrative Order No. 2007-3 is adopted, effective immediately.

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

1-3 [Unchanged.]

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

(a)-(b) [Unchanged.]

(c) ~~E-filings may be submitted to the court at any time, but shall only be reviewed and accepted for filing by the Oakland County Clerk's Office 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). Electronic filing is not restricted by the operating hours of the court and any document submitted at or before 11:59 p.m. of a business day is~~

~~deemed filed on that business day. Any document submitted on a weekend or court holiday is deemed filed on the next business day.~~ The clerk shall process electronic submissions on a first-in, first-out basis.

(d)-(h) [Unchanged.]

5-15 [Unchanged.]

AMENDED ADMINISTRATIVE ORDER No. 2010-4

E-FILING RULES FOR THE 13TH CIRCUIT COURT

Entered February 28, 2018, effective immediately (File No. 2002-37)—REPORTER.

On order of the Court, the following order amending Administrative Order No. 2010-4 is adopted, effective immediately.

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

1-3 [Unchanged.]

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

(a)-(b) [Unchanged.]

(c) ~~E-filings may be submitted to the court at any time, but shall only be reviewed and accepted for filing by the clerk's office during the normal business hours of 8:00 a.m. to 5:00 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).~~ Electronic filing is not restricted by the operating hours of the court and any document submitted at or before 11:59 p.m. of a business day is deemed filed on that business day. Any document submitted on a week-

end or court holiday is deemed filed on the next business day. The clerk shall process electronic submissions on a first-in, first-out basis.

(d)-(h) [Unchanged.]

5-15 [Unchanged.]

AMENDED ADMINISTRATIVE ORDER No. 2010-6

E-FILING RULES FOR THE 16TH CIRCUIT COURT
(MACOMB COUNTY)

Entered February 28, 2018, effective immediately (File No. 2002-37)—REPORTER.

On order of the Court, the following order amending Administrative Order No. 2010-6 is adopted, effective immediately.

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

1-3 [Unchanged.]

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

(a)-(c) [Unchanged.]

(d) ~~E-filings may be submitted to the Court at any time (with the exception of periodic maintenance), but shall only be reviewed and accepted for filing by the Macomb County Clerk's Office during normal business hours. E-filings submitted after the close of normal business hours shall be deemed filed on the next business day.~~ Electronic filing is not restricted by the operating hours of the court and any document submitted at or before 11:59 p.m. of a business day is

deemed filed on that business day. Any document submitted on a weekend or court holiday is deemed filed on the next business day. The clerk shall process electronic submissions on a first-in, first-out basis. Although the system may be used on a 24-hour basis, technical support will generally only be available during regular business hours.

(e)-(i) [Unchanged.]

5-15 [Unchanged.]

AMENDED ADMINISTRATIVE ORDER No. 2011-4

E-FILING RULES FOR THE 20TH CIRCUIT COURT, THE OTTAWA COUNTY PROBATE COURT, AND THE 58TH DISTRICT COURT

Entered February 28, 2018, effective immediately (File No. 2002-37)—REPORTER.

On order of the Court, the following order amending Administrative Order No. 2011-4 is adopted, effective immediately.

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

1-3 [Unchanged.]

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

(a)-(b) [Unchanged.]

(c) ~~E-filings may be submitted to the participating courts at any time, but shall only be reviewed and accepted for filing by the clerk's office during the normal business hours of 8:00 a.m. to 5:00 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).~~ Electronic filing is not restricted by the operating hours of the court and any document submitted at or before 11:59 p.m. of a business day is deemed filed on that business day. Any

document submitted on a weekend or court holiday is deemed filed on the next business day. The clerk shall process electronic submissions on a first-in, first-out basis.

(d)-(h) [Unchanged.]

5-15 [Unchanged.]

AMENDED ADMINISTRATIVE ORDER No. 2011-1

E-FILING RULES FOR THE 3RD CIRCUIT COURT
(WAYNE COUNTY)

Entered February 28, 2018, effective immediately (File No. 2002-37)—REPORTER.

On order of the Court, the following order amending Administrative Order No. 2011-1 is adopted, effective immediately.

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

1-3 [Unchanged.]

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

(a) [Unchanged.]

(b) ~~E-filings may be submitted to the court at any time, but shall only be reviewed and accepted for filing by the clerk's office during the normal business hours of 8:30 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).~~ Electronic filing is not restricted by the operating hours of the court and any document submitted at or before 11:59 p.m. of a business day is deemed filed on

that business day. Any document submitted on a weekend or court holiday is deemed filed on the next business day. The clerk shall process electronic submissions on a first-in, first-out basis.

(c)-(g) [Unchanged.]

5-15 [Unchanged.]

ADMINISTRATIVE ORDER No. 2018-1

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 34TH CIRCUIT COURT, THE 82ND DISTRICT COURT, AND THE OGEMAW AND ROSCOMMON COUNTY PROBATE COURTS

Entered March 14, 2018, effective immediately (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 immediately:

• The 34th Circuit Court, the 82nd District Court, and the Ogemaw County and Roscommon County Probate Courts.

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

Amendments to 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. 2018-2

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 8TH CIRCUIT COURT, THE 64TH DISTRICT COURT, AND THE IONIA AND MONTCALM COUNTY PROBATE COURTS

Entered May 16, 2018, effective immediately (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 immediately:

- The 8th Circuit Court, the 64th District Court, and the Ionia County and Montcalm County Probate Courts.

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

Amendments to 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*.

MICHIGAN RULE CHANGES

Adopted September 20, 2017, effective date deferred until further order of the Court by order entered December 20, 2017, 501 Mich ccix, and revised rule changes adopted by order entered May 30, 2018, 501 Mich cclxxviii (File No. 2002-37)—REPORTER.

On order of the Court, this is to advise that the amendments of Rules 1.109, 2.107, 2.113, 2.114, 3.206, 3.901, 3.931, 3.961, 4.302, 5.113, 5.114, 6.001, 6.101, 8.117, and 8.119 of the Michigan Court Rules are adopted and will become effective January 1, 2018, pending comment and public hearing. Immediate adoption of these rules is necessary for the development of the statewide electronic-filing system. This notice is given to afford interested persons the opportunity to comment on the form or the merits of the amended rules. 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.109 COURT RECORDS DEFINED; DOCUMENT DEFINED; FILING STANDARDS; SIGNATURES; ELECTRONIC FILING AND SERVICE;~~and~~ ACCESS.

(A) Court Records Defined.

(1) Court records are defined by MCR 8.119 and this subrule. Court records are recorded information of any kind that has been created by the court or filed with the court in accordance with Michigan Court Rules. Court records may be created using any means and may be maintained in any medium authorized by these court rules provided those records comply with other provisions of law and these court rules.

(a) [Unchanged.]

(b) For purposes of this subrule:

(i)-(ii) [Unchanged.]

(iii) Data refers to any information entered in the case management system that is not ordinarily reduced to a document~~,~~ but that is still recorded information, and any data entered into or created by the statewide electronic-filing system.

(iv) [Unchanged.]

(2) [Unchanged.]

(B) Document Defined. A document means a record produced on paper or a digital image of a record originally produced on paper or originally created by an approved electronic means, the output of which is readable by sight and can be printed to 8½ x 11 inch paper without manipulation.

(C) Filing With Court Defined. Pleadings and other documents and materials filed with the court as required by these court rules must be filed with the clerk of the court in accordance with MCR 1.109(D), except that the judge to whom the case is assigned may accept materials for filing when circumstances warrant. A judge who does so shall note the filing date on the materials and immediately transmit them to the clerk. It is the responsibility of the party who presented the materials to the judge to confirm that

they have been filed with the clerk. If the clerk records the receipt of materials on a date other than the filing date, the clerk shall record the filing date in the case history.

(D) Filing Standards.

(1) Form and Captions of Documents.

(a) All ~~pleadings and other~~ documents prepared for filing in the courts of this state and all documents prepared by the court for placement in a case file must be legibly printed in the English language, comply with standards established by the State Court Administrative Office~~MCR 8.119(C)~~, and be ~~filed~~ on good quality 8½ by 11 inch paper or transmitted through an approved electronic means ~~or created electronically by the court~~ and maintained ~~in~~as a digital image. The print must be no smaller than 10 characters per inch (nonproportional) or 12-point (proportional), except with regard to forms approved by the State Court Administrative Office. An affidavit must be verified by oath or affirmation.

(b) The first part of every document must contain a caption stating:

(i) the name of the court;

(ii) the names of the parties or the title of the action, subject to (c);

(iii) the case number, including a prefix of the year filed and a two-letter suffix for the case-type code from a list provided by the State Court Administrator pursuant to MCR 8.117 according to the principal subject matter of the proceeding;

(iv) the identification of the document;

(v) the name, business address, telephone number, and state bar number of each attorney appearing in the case; and

(vi) the name, address, and telephone number of each party appearing without an attorney.

(c) In a civil case initiating document, the title of the action must include the names of all the parties, with the plaintiff's name placed first. In subsequent documents, it is sufficient to state the name of the first party on each side with an appropriate indication of other parties, such as "et al."

(d) In a domestic relations case initiating document, the title of the action must also include whether a party is a minor or an incompetent person as defined by MCR 2.201(E).

(e) In a case filed under the juvenile code, the caption must also contain a petition number, where appropriate.

(2) Case Initiation Information. A party filing a case initiating document and a party filing any response or answer to a case initiating document shall provide specified case information in the form and manner established by the State Court Administrative Office and as specified in other applicable rules. In addition, it must include:

(a) in a civil action, either of the following statements:

(i) There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint, or

(ii) A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in [this court]/ [_____ Court], where it was given docket number _____ and was assigned to Judge _____. The action [remains]/[is no longer] pending.

(b) in a criminal action, either of the following statements:

(i) There are no pending or resolved cases in any jurisdiction that involve a minor child of the family or individual family member of the defendant, or

(ii) There are pending or resolved cases that involve a minor child of the family or individual family member of the defendant and that could affect jurisdiction, judicial assignment, venue, or consolidation under MCR 3.204, or notice under MCR 3.205. Attached is a completed family case inventory form identifying these individuals as required by MCR 6.101(A).

(c) in a family division or probate action, except for outgoing requests to other states and incoming registration actions filed under the Revised Uniform Reciprocal Enforcement of Support Act, MCL 780.151 *et seq*., and the Uniform Interstate Family Support Act, MCL 551.1101 *et seq*., either of the following statements:

(i) There are no pending or resolved cases in any jurisdiction that involve a minor child of the family or individual family member of the parties to the case, or

(ii) There are pending or resolved cases that involve a minor child of the family or individual family member of the parties to the case, and that could affect jurisdiction, judicial assignment, venue, or consolidation under MCR 3.204, or notice under MCR 3.205. Attached is a completed family case inventory form identifying these individuals as required by MCR 3.206(A)(3).

(3) Verification. Except when otherwise specifically provided by rule or statute, a document need not be verified or accompanied by an affidavit. If a document is required or permitted to be verified, it may be verified by

(a) oath or affirmation of the party or of someone having knowledge of the facts stated; or

(b) except as to an affidavit, including the following signed and dated declaration:

(i) in documents filed in the probate court or under the juvenile code, "I declare under the penalties of perjury that this _____ has been examined by me and that its contents are true to the best of my information, knowledge, and belief." Any requirement of law that a document filed with the court must be sworn may be met by this declaration.

(ii) in all other documents, "I declare that the statements above are true to the best of my information, knowledge, and belief."

In addition to the sanctions provided by subrule (E), a person who knowingly makes a false declaration under this subrule may be found in contempt of court.

(~~2~~4) All other materials submitted for filing shall be prepared in accordance with this rule and standards established by the State Court Administrative Office. An attachment or discovery material that is submitted for filing shall be made part of the public case file unless otherwise confidential.

(~~3~~5) Except where electronic filing is implemented, ~~A~~all original documents filed on paper may be reproduced and maintained by the court as a digital image in place of the paper original in accordance with standards ~~and guidelines~~ established by the State Court Administrative Office. Any document reproduced under this subrule replaces the paper as the official record.

(~~4~~6) A clerk of the court may reject nonconforming documents as prescribed by MCR 8.119.

(7) Electronic filing and electronic service of documents is governed by subrule (G) and the policies and standards of the State Court Administrative Office.

(8) Filing Documents Under Seal. Public documents may not be filed under seal without a court order. A document may be sealed before the order is entered only as follows:

(a) A filer may request that a public document be filed under seal by filing a motion for leave to file under seal. As part of the filing, the filer shall provide a proposed order granting the motion and shall identify each document that is to be sealed under the order. The filer shall bear the burden of establishing good cause for sealing the document.

(b) Pending the court's order, the filer shall serve copies of the motion, each document to be sealed, and the proposed order on all parties. The clerk of the court shall ensure that the sealed documents are accessible only to court staff and parties.

(c) Before entering an order sealing a document under this rule, the court shall comply with MCR 8.119(I). On entry of the order on the motion, the clerk shall maintain under seal only those documents stated in the court's order and shall unseal any of the documents that were not stated in the order.

(~~D~~E) Signatures.

(1) [Unchanged.]

(2) Requirement. Every document filed shall be signed by the person filing it or by at least one attorney of record. A party who is not represented by an attorney must sign the document. In probate proceedings, the following also applies:

(a) When a person is represented by an attorney, the signature of the attorney is required on any paper filed

in a form approved by the State Court Administrator only if the form includes a place for a signature.

(b) An application, petition, or other paper may be signed by the attorney for the petitioner, except that an inventory, account, acceptance of appointment, and sworn closing statement must be signed by the fiduciary or trustee. A receipt for assets must be signed by the person entitled to the assets.

(3) Failure to Sign. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party.

(4) An electronic signature is acceptable in accordance with this subrule.

(~~2~~a) An electronic signature means an electronic sound, symbol, or process, attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record. The following form is acceptable: /s/ *John L. Smith*.

(~~3~~b) If a law or court rule requires a signature to be notarized or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law or court rule, is attached to or logically associated with the signature.

(~~4~~c) Retention of a signature electronically affixed to a document that will be retained by the court in electronic format must not be dependent upon the mechanism that was used to affix that signature.

(5) Effect of Signature. The signature of a person filing a document, whether or not represented by an attorney, constitutes a certification by the signer that

(a) he or she has read the document;

(b) 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

(c) 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.

(6) 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.

(7) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

(~~E~~F) Requests for access to public court records shall be granted in accordance with MCR 8.119(H).

(G) Electronic Filing and Service.

(1) Definitions. For purposes of this subrule:

(a) "Authorized user" means a user of the e-filing system who is registered to file, serve, and receive documents and related data through approved electronic means. A court may revoke user authorization for good cause as determined by the court, including but not limited to a security breach.

(b) "Electronic filing" or "e-filing" means the electronic transmission of data and documents to the court

through the electronic-filing system.

(c) "Electronic-filing system" means a system provided by the State Court Administrative Office that permits electronic transmission of data and documents.

(d) "Electronic notification" means the electronic transmission of information from the court to authorized users through the electronic-filing system. This does not apply to service of documents. See subrule (f).

(e) "Electronic service" or "e-service" means the electronic service of information by means of the electronic-filing system under this rule. It does not include service by e-mail under MCR 2.105(C)(4).

(f) "Notice of electronic filing or service" means a notice automatically generated by the e-filing system at the time a document is filed or served.

(2) Electronic-Filing and Electronic-Service Standards. Courts shall implement electronic-filing and electronic-service capabilities in accordance with this rule and shall comply with the standards established by the State Court Administrative Office. Confidential and nonpublic information must be electronically filed or electronically served in compliance with these standards to ensure secure transmission of the information.

(3) Scope and Applicability.

(a) A court shall:

(i) accept electronic filing and permit electronic service of documents;

(ii) comply with the electronic-filing guidelines and plans approved by the State Court Administrative Office; and

(iii) maintain electronic documents in accordance with the standards established by the State Court Administrative Office.

(b) A court may allow documents, including but not limited to exhibits for trial or inventory information for decedent estates, to be transmitted to the court for purposes other than filing in a case file.

(c) Exemption from Electronic Filing. Electronic filing is mandatory under Michigan Supreme Court Administrative Order 2017-XX. A party will be permitted to file documents in paper format with the clerk of the court if the party can demonstrate good cause for an exemption.

(d) Non-Electronic Materials. Courts must accommodate the filing and serving of materials that cannot be filed or served electronically.

(e) Converting Paper Documents. The clerk of the court shall convert to electronic format any document filed on paper.

(f) A court may electronically serve notices, orders, opinions, and other documents by means of the electronic-filing system.

(4) Official Court Record. The electronic version of any document filed with or generated by the court under this rule and any case initiation data transmitted in accordance with subrule (D)(2) is an official court record.

(5) Electronic-Filing Process.

(a) General Provisions.

(i) Specified case information, including e-mail addresses for achieving electronic service, shall be provided electronically by the authorized user in the form and manner established by the State Court Administrative Office pursuant to subrule (D)(2).

(ii) The authorized user has the responsibility of ensuring that a filing has been received by the electronic-filing system. If the authorized user discov-

ers that the version of the document available for viewing through the e-filing system does not depict the document as submitted, the authorized user shall notify the clerk of the court immediately and resubmit the filing if necessary. In the event of a controversy between the clerk of the court and the authorized user, the authorized user may file a motion with the court under subrule (G)(7).

(iii) If the clerk of the court rejects a submitted document pursuant to MCR 8.119(C), the clerk shall notify the authorized user of the rejection and the reason for the rejection. A rejected document shall not become part of the official court record and the rejection shall be recorded in an electronic-filing transaction from the court to the authorized user in accordance with subrule (c).

(b) Time and Effect of Electronic Filing. A document submitted electronically is considered filed with the court when the transmission to the electronic-filing system is completed and the required filing fees have been paid or waived. A transmission is completed when the transaction is recorded as prescribed in subrule (c). Regardless of the date a filing is accepted by the clerk of the court, the date of filing is the date submitted. Electronic filing is not restricted by the operating hours of a court and any document submitted at or before 11:59 p.m. of a business day is considered filed on that business day.

(c) Electronic-Filing Transaction. On receipt of a submission or on rejection of a submission, the statewide electronic-filing system shall record the filing transaction and send a notice of electronic filing or rejection to the authorized user. The system shall maintain for every court a record of each filing transaction in accordance with the records retention and

disposal schedules and standards established by the State Court Administrative Office. A notice of electronic filing shall include the date and time of filing or rejection, the name of the authorized user filing the document(s), the type of document, the text of the docket entry into the case management system, the name of the authorized user receiving the notice, and a hyperlink to the filed document(s).

(d) Documents Under Seal. A party seeking to file a document under seal must comply with subrule (D)(8).

(6) Electronic-Service Process.

(a) General Provisions.

(i) Service of process of case initiating documents shall be made in accordance with the rules and laws required for the particular case type.

(ii) Service of process of all other documents electronically filed shall be accomplished electronically among authorized users through the electronic-filing system.

(iii) Delivery of documents through the electronic-filing system in conformity with these rules is valid and effective personal service and is proof of service under MCR 2.107(D).

(iv) Except for service of process of initiating documents and as otherwise directed by the court or court rule, service shall be performed simultaneously with filing.

(b) Time and Effect. A document served electronically through the electronic-filing system in conformity with all applicable requirements of this rule is considered served when the transmission to the recipient's e-mail address is completed. A transmission is completed when the transaction is recorded as prescribed in subrule (c).

(c) Electronic-Service Transaction. On transmission of a document, the electronic-filing system shall record the service transaction. The system shall maintain for every court a record of each service transaction in accordance with the state-approved records retention and disposal schedules and standards established by the State Court Administrative Office.

(7) Transmission Failures. In the event the electronic-filing system fails to transmit a document submitted for filing, the authorized user may file a motion requesting that the court enter an order permitting the document to be deemed filed on the date it was first attempted to be sent electronically. The authorized user must prove to the court's satisfaction that:

(a) the filing was attempted at the time asserted by the authorized user;

(b) the electronic-filing system failed to transmit the electronic document; and

(c) the transmission failure was not caused, in whole or in part, by any action or inaction of the authorized user. A transmission failure caused by a problem with a filer's telephone line, ISP, hardware, or software shall be attributed to the filer.

RULE 2.107. SERVICE AND FILING OF PLEADINGS AND OTHER ~~PAPERS~~DOCUMENTS.

(A)-(C) [Unchanged.]

(D) Proof of Service. Except as otherwise provided by MCR 2.104, 2.105, or 2.106, proof of service of ~~papers~~documents required or permitted to be served may be by written acknowledgment of service, or ~~affidavit of the person making the service,~~ a written statement by the individual who served the documents~~regarding the service~~ verified under MCR 1.109(D)(3)~~2.114(B), or~~

~~other proof satisfactory to the court~~. The proof of service may be included at the end of the ~~paper~~document as filed. Proof of service must be filed promptly and at least at or before a hearing to which the paper relates.

(E)-(F) [Unchanged.]

~~(G) Filing With Court Defined. Pleadings and other materials filed with the court as required by these rules must be filed with the clerk of the court in accordance with standards prescribed by MCR 1.109(C), except that the judge to whom the case is assigned may accept materials for filing when circumstances warrant. A judge who does so shall note the filing date on the materials and immediately transmit them to the clerk. It is the responsibility of the party who presented the materials to confirm that they have been filed with the clerk. If the clerk records the receipt of materials on a date other than the filing date, the clerk shall record the filing date on the register of actions.~~

RULE 2.113. FORM, CAPTIONING, SIGNING, AND VERIFYING OF ~~PLEADINGS AND OTHER PAPERS~~DOCUMENTS.

(A) Applicability. The ~~rules on the~~ form, captioning, signing, and verifying of ~~pleadings apply to~~ all ~~motions, affidavits, and other papers~~documents are ~~provided for by these rules~~prescribed in MCR 1.109(D). ~~However, an affidavit must be verified by oath or affirmation.~~

~~(B) Preparation. Every pleading must be legibly printed in the English language and in compliance with MCR 1.109.~~

~~(C) Captions.~~

~~(1) The first part of every pleading must contain a caption stating~~

~~(a) the name of the court;~~

(b) the names of the parties or the title of the action, subject to subrule (D);

(c) the case number, including a prefix of the year filed and a two-letter suffix for the case-type code form a list provided by the State Court Administrator pursuant to MCR 8.117 according to the principal subject matter of the proceeding;

(d) the identification of the pleading (see MCR 2.110[A]);

(e) the name, business address, telephone number, and state bar number of the pleading attorney;

(f) the name, address, and telephone number of a pleading party appearing without an attorney; and

(g) the name and state bar number of each other attorney who has appeared in the action.

(2) The caption of a complaint must also contain either (a) or (b) as a statement of the attorney for the plaintiff, or of a plaintiff appearing without an attorney.

(a) There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint.

(b) A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in [this court]/ [_____ Court], where it was given docket number _____ and was assigned to Judge _____. The action [remains]/[is no longer] pending.

(3) ____ If an action has been assigned to a particular judge in a multi-judge court, the name of that judge must be included in the caption of a pleading later filed with the court.

~~(D) Names of Parties.~~

~~(1) In a complaint, the title of the action must include the names of all the parties, with the plaintiff's name placed first.~~

~~(2) In other pleadings, it is sufficient to state the name of the first party on each side with an appropriate indication of other parties, such as "et al."~~

(~~E~~B)-(~~G~~D) [Relettered but otherwise unchanged.]

~~RULE 2.114. SIGNATURES OF ATTORNEYS AND PARTIES; VERIFICATION; EFFECT; SANCTIONS.~~

~~(A) Applicability. This rule applies to all pleadings, motions, affidavits, and other papers provided for by these rules. See MCR 2.113(A). In this rule, the term "document" refers to all such papers.~~

~~(B) Verification.~~

~~(1) Except when otherwise specifically provided by rule or statute, a document need not be verified or accompanied by an affidavit.~~

~~(2) If a document is required or permitted to be verified, it may be verified by~~

~~(a) oath or affirmation of the party or of someone having knowledge of the facts stated; or~~

~~(b) except as to an affidavit, including the following signed and dated declaration: "I declare that the statements above are true to the best of my information, knowledge, and belief."~~

~~In addition to the sanctions provided by subrule (E), a person who knowingly makes a false declaration under subrule (B)(2)(b) may be found in contempt of court.~~

~~(C) Signature.~~

~~(1) Requirement. Every document of a party represented by an attorney shall be signed by at least one~~

~~attorney of record. A party who is not represented by an attorney must sign the document.~~

~~(2) Failure to Sign. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party.~~

~~(3) An electronic signature is acceptable provided it complies with MCR 1.109(D).~~

~~(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~~

~~(1) he or she has read the document;~~

~~(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.~~

~~(F) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.~~

RULE 3.206. ~~PLEADING~~INITIATING A CASE.

(A) Information in ~~Complaint~~Case Initiating Document.

(1) The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D).

(~~1~~2) Except for matters considered confidential by statute or court rule, in all domestic relations actions, the complaint or other case initiating document must state

(a) the allegations required by applicable statutes; and

(b) the residence information required by statute;

~~(c) the complete names of all parties; and~~

~~(d) the complete names and dates of birth of any minors involved in the action, including all minor children of the parties and all minor children born during the marriage~~.

~~(2) In a case that involves a minor, or if child support is requested, the complaint also must state whether any Michigan court has prior continuing jurisdiction of the minor. If so, the complaint must specify the court and the file number.~~

~~(3) In a case in which the custody of a minor is to be determined, the complaint or an affidavit attached to the complaint also must state the information required by MCL 722.1209.~~

~~(4) The caption of the complaint must also contain either (a) or (b) as a statement of the attorney for the plaintiff or petitioner, or of a plaintiff or petitioner appearing without an attorney:~~

~~(a) There is no other pending or resolved action within the jurisdiction of the family division of the~~

~~circuit court involving the family or family members of the person[s] who [is/are] the subject of the complaint or petition.~~

~~(b) An action within the jurisdiction of the family division of the circuit court involving the family or family members of the person[s] who [is/are] the subject of the complaint or petition has been previously filed in [this court]/[_____Court], where it was given docket number _____ and was assigned to Judge _____. The action [remains]/[is no longer] pending.~~

(3) Except for outgoing requests to other states and incoming registration actions filed under the Revised Uniform Reciprocal Enforcement of Support Act, MCL 780.151 *et seq*., and the Uniform Interstate Family Support Act, MCL 551.1101 *et seq*., when any pending or resolved domestic relations or family division case exists in any jurisdiction that involves the family or individual family members named in the document filed under subrule (1), the filing party must attach to the case initiating document a completed family case inventory, on a form approved by the State Court Administrative Office. Each case listed on the inventory must specify:

(a) the court name and location,

(b) the case name,

(c) the court case number,

(d) the assigned judge,

(e) the status of the case,

(f) whether the court in the listed case has continuing jurisdiction over any minor named in the document, or over any of the minor's siblings of the same parents, and if so, whether any support, custody, or parenting time orders remain in effect.

(~~5~~4) [Renumbered but otherwise unchanged.]

(6~~7~~5) [Renumbered but otherwise unchanged.]

(7~~8~~6) [Renumbered but otherwise unchanged.]

(B) In a case in which the custody or parenting time of a minor is to be determined or modified, the filing party shall file a Uniform Child Custody Jurisdiction Enforcement Act Affidavit, on a form approved by the State Court Administrative Office, as required by MCL 722.1209(1).

(~~B~~C) [Relettered but otherwise unchanged.]

(~~C~~D) [Relettered but otherwise unchanged.]

RULE 3.901. APPLICABILITY OF RULES.

(A) Scope.

(1) The rules in this subchapter, in subchapter 1.100, ~~in MCR 5.113,~~ and in subchapter 8.100 govern practice and procedure in the family division of the circuit court in all cases filed under the Juvenile Code.

(2)-(3) [Unchanged.]

(B) [Unchanged.]

RULE 3.931. INITIATING DELINQUENCY PROCEEDINGS.

(A) Commencement of Proceeding. Any request for court action against a juvenile must be by written petition. The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D).

(B) Content of Petition. A petition must contain the following information:

(1) [Unchanged.]

(2) the names and addresses, if known, of

(a)-(c) [Unchanged.]

(d) the juvenile's membership or eligibility for membership in an Indian tribe, if any, and the identity of the tribe~~, and~~

~~(e) any court with prior continuing jurisdiction~~;

(3)-(5) [Unchanged.]

(6) the court action requested; and

(7) if applicable, the notice required by MCL 257.732(8), and the juvenile's Michigan driver's license number~~; and~~

~~(8) information required by MCR 3.206(A)(4), identifying whether a family division matter involving members of the same family is or was pending~~.

RULE 3.961. INITIATING CHILD PROTECTIVE PROCEEDINGS.

(A) Form. Absent exigent circumstances, a request for court action to protect a child must be in the form of a petition. The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D).

(B) Content of Petition. A petition must contain the following information, if known:

(1) [Unchanged.]

(2) The names and addresses of:

(a) the child's mother and father,

(b) the parent, guardian, legal custodian, or person who has custody of the child, if other than a mother or father, and

(c) the nearest known relative of the child, if no parent, guardian, or legal custodian can be found~~, and~~

~~(d) any court with prior continuing jurisdiction~~.

(3)-(6) [Unchanged.]

~~(7) The information required by MCR 3.206(A)(4), identifying whether a family division matter involving members of the same family is or was pending.~~

RULE 4.302. STATEMENT OF CLAIM.

(A) Contents. The statement of the claim must be in

an affidavit in substantially the form approved by the state court administrator. Affidavit forms shall be available at the clerk's office. The nature and amount of the claim must be stated in concise, nontechnical language, and the affidavit must state the date or dates when the claim arose. The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D).

RULE 5.113. ~~PAPERS~~; FORM, CAPTIONING, SIGNING, AND VERIFYING OF DOCUMENTS~~AND FILING~~.

(A) Form~~s~~ of ~~Papers~~Documents Generally. The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D). Documents must be substantially in the form approved by the State Court Administrator, if a form has been approved for the use.

~~(1) An application, petition, motion, inventory, report, account, or other paper in a proceeding must~~

~~(a) comply with MCR 1.109 and be legibly typewritten or printed in ink in the English language, and~~

~~(b) include the~~

~~(i) name of the court and title of the proceeding in which it is filed;~~

~~(ii) case number, if any, including a prefix of the year filed and a two-letter suffix for the case-type code (see MCR 8.117) according to the principal subject matter of the proceeding, and if the case is filed under the juvenile code, the petition number which also includes a prefix of the year filed and a two-letter suffix for the case-type code.~~

~~(iii) character of the paper; and~~

~~(iv) name, address, and telephone number of the attorney, if any, appearing for the person filing the paper, and~~

~~(c) be substantially in the form approved by the State Court Administrator, if a form has been approved for the use.~~

~~(2) A judge or register may reject nonconforming documents in accordance with MCR 8.119.~~

(B) [Unchanged.]

(C) Filing by Registered Mail. Where e-filing is implemented, ~~A~~a~~n~~y document required by law to be filed in or delivered to the court by registered mail, shall be filed through the electronic-filing system~~may be filed or delivered by certified mail, return receipt requested~~.

(D) [Unchanged.]

~~RULE 5.114. SIGNING AND AUTHENTICATION OF PAPERS.~~

~~(A) Signing of Papers.~~

~~(1) The provisions of MCR 2.114 regarding the signing of papers apply in probate proceedings except as provided in this subrule.~~

~~(2) When a person is represented by an attorney, the signature of the attorney is required on any paper filed in a form approved by the State Court Administrator only if the form includes a place for a signature.~~

~~(3) An application, petition, or other paper may be signed by the attorney for the petitioner, except that an inventory, account, acceptance of appointment, and sworn closing statement must be signed by the fiduciary or trustee. A receipt for assets must be signed by the person entitled to the assets.~~

~~(B) Authentication by Verification or Declaration.~~

~~(1) An application, petition, inventory, accounting, proof of claim, or proof of service must be either authenticated by verification under oath by the person making it, or, in the alternative, contain a statement~~

~~immediately above the date and signature of the maker: "I declare under the penalties of perjury that this _____ has been examined by me and that its contents are true to the best of my information, knowledge, and belief." Any requirement of law that a document filed with the court must be sworn may be met by this declaration.~~

~~(2) In addition to the sanctions provided by MCR 2.114(E), a person who knowingly makes a false declaration under subrule (B)(1) is in contempt of court.~~

RULE 6.001. SCOPE; APPLICABILITY OF CIVIL RULES; SUPERSEDED RULES AND STATUTES.

(A) [Unchanged.]

(B) Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006, 6.101, 6.102(D) and (F), 6.103, 6.104(A), 6.106, 6.125, 6.202, 6.427, 6.435, 6.440, 6.445(A)-(G), and the rules in subchapter 6.600 govern matters of procedure in criminal cases cognizable in the district courts.

(C)-(E) [Unchanged.]

RULE 6.101. THE COMPLAINT.

(A) Definition and Form. A complaint is a written accusation that a named or described person has committed a specified criminal offense. The complaint must include the substance of the accusation against the accused and the name and statutory citation of the offense. At the time of filing, specified case initiation information shall be provided in the form and manner approved by the State Court Administrative Office as required by MCR 1.109(D)(2). In addition, when any pending or resolved domestic relations or family division case exists in any jurisdiction in which the defendant is a party, a completed family case inventory shall be attached to the complaint, on a

form approved by the State Court Administrative Office. Each case listed on the inventory must specify:

(1) the court name and location,

(2) the case name,

(3) the court case number,

(4) the assigned judge,

(5) the status of the case,

(6) whether the court in the listed case has continuing jurisdiction over any minor named in the document, or over any of the minor's siblings of the same parents, and if so, whether any support, custody, or parenting time orders remain in effect.

(B)-(C) [Unchanged.]

RULE 8.117. CASE CLASSIFICATION CODES.

Use of Case-Type Code. As required by MCR ~~2.113(C)(1)(c)~~1.109(D)(1)(b)(iii), the ~~plaintiff~~ person filing a case initiating document must assign one case-type code from a list provided by the State Court Administrator according to the principal subject matter of the action (not the nature of the proceedings), and shall ~~include~~provide this code ~~in the caption of the complaint~~with other case initiation information required by MCR 1.109(D)(2). The case code must be included in the caption of all ~~papers~~other documents ~~thereafter~~ filed in the case. ~~The current case classification codes may be found at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/cf_casetypecodes.pdf~~

RULE 8.119. COURT RECORDS AND REPORTS; DUTIES OF CLERKS.

(A) [Unchanged.]

(B) Records Standards. ~~The clerk of the court~~ Trial courts shall comply with the records standards in this rule, MCR 1.109, and as prescribed by the Michigan Supreme Court.

(C) Filing of Documents and Other Materials. The clerk of the court shall ~~endorse on the first page of every document the date on which it is filed~~process and maintain documents filed with the court as prescribed by~~. Documents and other materials filed with the court as defined in MCR 2.107(G) must comply with~~ Michigan Court Rules and the Michigan Trial Court ~~Case File~~Records Management Standards and all filed documents must be file stamped in accordance with these standards. The clerk of the court may only reject documents that do not comply with MCR 1.109(D), are not signed in accordance with MCR 1.109(E), or are not accompanied by a filing fee~~meet the following minimum filing requirements:~~

~~(1) standards prescribed by MCR 1.109,~~

~~(2) legibility and language as prescribed by MCR 2.113(B) and MCR 5.113,~~

~~(3) captioning prescribed by MCR 2.113(C)(1) and MCR 5.113,~~

~~(4) signature prescribed by MCR~~ 1.109(E)~~2.114(C) and MCR 5.114, and~~

~~(5) the filing fee is not paid at the time of filing~~, unless waived or suspended by court order.

(D) Records Kept by the Clerk of the Court. The clerk of the court shall maintain the following case records in accordance with the Michigan Trial Court ~~Case File~~Records Management Standards~~, Michigan Trial Court Record Retention and Disposal Standards and Guidelines, and approved records retention and disposal schedules~~. Documents and other materials

made nonpublic or confidential by court rule, statute, or order of the court pursuant to subrule (I) must be designated ~~as confidential~~accordingly and maintained to allow only authorized access. In the event of transfer or appeal of a case, every rule, statute, or order of the court ~~pursuant to~~under subrule (I) that makes a document or other materials in that case nonpublic or confidential applies uniformly to every court in Michigan, irrespective of the court in which the document or other materials were originally filed.

(1) Case History and Case Files. The clerk shall maintain records of each case consisting of case history (known as a register of actions) and, except for civil infractions, a case file in such form and style as may be prescribed by the State Court Administrative Office. Each case shall be assigned a case number on receipt of a ~~complaint, petition, or other~~case initiating document. The case number shall comply with MCR 1.109(D)(1)(b)(iii)~~2.113(C)(1)(c) or MCR 5.113(A)(1)(b)(ii) as applicable~~. In addition to the case number, a separate petition number shall be assigned to each petition filed under ~~Chapter XIIA of the Probate Code~~the juvenile code, MCL 712A.1 *et seq*., as required under MCR ~~5.113(A)(1)(b)(ii)~~1.109(D)(1)(e). The case number (and petition number if applicable) shall be recorded in the court's automated case management system and on the case file. The records shall include the following characteristics:

(a) Case History. The clerk shall create and maintain a case history of each case, known as a register of actions, in the court's automated case management system. The automated case management system shall be capable of chronologically displaying the case history for each case and shall also be capable of searching a case by number or party name (previously known as

numerical and alphabetical indices) and displaying the case number, date of filing, names of parties, and names of any attorneys of record. The case history shall contain both pre- and post-judgment information and shall, at a minimum, consist of the data elements prescribed in the Michigan Trial Court ~~Case File~~ Records Management Standards. Each entry shall be brief, but shall show the nature of each item filed, each order or judgment of the court, and the returns showing execution. Each entry shall be dated with not only the date of filing, but with the date of entry and shall indicate the person recording the action.

(b) Case File. The clerk of the court shall maintain a file of each action, bearing the case number assigned to it, for all pleadings, process, written opinions and findings, orders, and judgments filed in the action, and any other materials prescribed by court rule, statute, or court order to be filed with the clerk of the court. If case file records are maintained separately from the case files, the clerk shall maintain them as prescribed by the Michigan Trial Court ~~Case File~~Records Management Standards.

(2) [Unchanged.]

(3) Abolished Records.

(a) [Unchanged.]

(b) Dockets. ~~A register of actions~~Case history replaces a docket. Wherever these rules or applicable statutes require entries on a docket, those entries shall be entered in the court's automated case management system.

(4) Official Court Record. There is only one official court record, regardless whether original or suitable-duplicate and regardless of the medium. Suitable-duplicate is defined in the Michigan Trial Court

Records Management Standards. Documents electronically filed with the court or generated electronically by the court are original records and are the official court record. A paper printout of any electronically filed or generated document is a copy and is a nonrecord for purposes of records retention and disposal.

(E)-(G) [Unchanged.]

(H) Access to Records. Except as otherwise provided in subrule (F), only case records as defined in subrule (D) are public records, subject to access in accordance with these rules. The clerk ~~may~~shall not permit any case record to be taken from the court without the order of the court. A court may provide access to the public case history information through a publicly accessible website, and business court opinions may be made available as part of an indexed list as required under MCL 600.8039; however, all other public information in its case files may be provided through electronic means only upon request. The court may provide access to any case record that is not available in paper or digital image, as defined by MCR 1.109(B), if it can reasonably accommodate the request. Any materials filed with the court pursuant to MCR 1.109~~(C)(2)~~(D), in a medium for which the court does not have the means to readily access and reproduce those materials, may be made available for public inspection using court equipment only. The court is not required to provide the means to access or reproduce the contents of those materials if the means is not already available.

(1) Unless access to a case record or information contained in a record as defined in subrule (D) is restricted by statute, court rule, or an order entered pursuant to subrule (I), any person may inspect that record and may obtain copies as provided in subrule

(J). In accordance with subrule (J), the court may collect a fee for the cost of ~~this service~~providing copies~~, including the cost of providing the new record in a particular medium~~.

(2) [Unchanged.]

(I) [Unchanged.]

(J) Access and Reproduction Fees.

(1) A court may not charge ~~an access~~a fee to access public case history information or to retrieve or inspect a case document irrespective of the medium in which the case record is retained, the manner in which access to the case record is provided, and the technology used to create, store, retrieve, reproduce, and maintain the case record.

(2) A court may charge a reproduction fee for a document pursuant to MCL 600.1988, except when~~or reproduction fee for a case record that the court is~~ required by law or court rule to provide a copy without charge to a person or other entity~~, irrespective of the medium in which the case record is retained, the manner in which access to the case record is provided, and the technology used to create, store, retrieve, reproduce, and maintain the case record~~.

(~~2~~3) The court may provide access to its public case records in any medium authorized by the records reproduction act, 1992 PA 116; MCL 24.401 to 24.403. ~~If a court maintains its public records in electronic format only,~~

~~(a) the court may not charge a fee to access those case records when access is made on-site through a public terminal or when a verbal request for public information is made on-site to the clerk.~~

~~(b) the court or a contracted entity may charge a fee, in accordance with Supreme Court order, to access~~

~~those case records when the access is made off-site through a document management, imaging, or other electronic records management system.~~

(~~3~~4) Reproduction of a case ~~record~~document means the act of producing a copy of that ~~record~~document through any medium authorized by the records reproduction act, 1992 PA 116; MCL 24.401 to 24.403.

(a) A court may charge only for the actual cost of labor and supplies and the actual use of the system, including printing from a public terminal, to reproduce a case ~~record~~document and not the cost associated with the purchase and maintenance of any system or technology used to store, retrieve, and reproduce ~~a case record~~the document.

(b)-(c) [Unchanged.]

(~~4~~5) [Renumbered but otherwise unchanged.]

(K) Retention Periods and Disposal of Court Records.

For purposes of retention, the records of the trial courts include: (1) administrative and fiscal records, (2) case file and other case records, (3) court recordings, log notes, jury seating charts, and recording media, and (4) nonrecord material. The records of the trial courts shall be retained in the medium prescribed by MCR 1.109. The records of a trial court may not be disposed of except as authorized by the records retention and disposal schedule and upon order by the chief judge of that court. Before disposing of records subject to the order, the court shall first transfer to the Archives of Michigan any records specified as such in the Michigan trial courts approved records retention and disposal schedule. An order disposing of court records shall comply with the retention periods established by the State Court Administrative Office and approved by the state court administrator, Attorney

General, State Administrative Board, Archives of Michigan, and Records Management Services of the Department of Management and Budget, in accordance with MCL ~~399.5~~399.811.

(L) [Unchanged.]

Staff Comment: The amendments in this proposal are intended to begin moving trial courts toward a statewide uniform e-Filing process. The rules are required to be in place to enable SCAO's e-Filing vendor to begin programming the statewide solution. In addition, the proposal would move existing language into MCR 1.109 as a way to, for the first time, include most filing requirements in one single rule, instead of scattered in various rules. The proposal largely mirrors the administrative orders that most e-Filing pilot projects have operated under, but contains some significant new provisions. For example, courts would be required to maintain documents in an electronic document management system, and the electronic record would be the official court record.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by January 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2002-37. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Adopted September 20, 2017, effective January 1, 2018 (File No. 2015-15)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendments of Rule 7.211 of the Michigan Court Rules are adopted, effective January 1, 2018.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.211. MOTIONS IN COURT OF APPEALS.

(A)-(B) [Unchanged.]

(C) Special Motions. If the record on appeal has not been sent to the Court of Appeals, except as provided in subrule (C)(6), the party making a special motion shall request the clerk of the trial court or tribunal to send the record to the Court of Appeals. A copy of the request must be filed with the motion.

(1)-(4) [Unchanged.]

(5) Motion to Withdraw. A court-appointed appellate attorney for an indigent appellant may file a motion to withdraw if the attorney determines, after a conscientious and thorough review of the trial court record, that the appeal is wholly frivolous.

(a) [Unchanged.]

(b) If the appeal is available only by leave of the court, the motion shall be filed within 56 days after the transcript is filed or within the deadline for filing a late application for leave to appeal, whichever comes first. The filing of such a motion, with the accompanying brief required by MCR 7.211(C)(5)(a)(ii), shall be treated as the filing of an application for leave to appeal on behalf of the appellant.

~~(b)~~(c) [Relettered but otherwise unchanged.]

~~(c)~~(d) If the court finds that the appeal is wholly frivolous, it may grant the motion and affirm the conviction or trial court judgment in appeals by right or deny leave to appeal in appeals by leave. If the court ~~grants the motion to withdraw~~ affirms the conviction or trial court judgment or denies leave to appeal, the

appellant's attorney shall mail to the appellant a copy of the transcript within 14 days after the order affirming is certified and file proof of that service. If the court finds any legal point arguable on its merits, it ~~will~~may deny the motion and order the court appointed attorney ~~must file an appellant's brief~~ to proceed in support of the appeal or grant the motion and order the appointment of substitute appellate counsel to proceed in support of the appeal.

Staff Comment: The amendments of MCR 7.211 allow motions to withdraw for frivolous appeal in cases that proceed by leave to be heard in the Court of Appeals. This alternative to the proposal published for comment was recommended to the Court by the Michigan Appellate Assigned Counsel System, and supported by the Court of Appeals.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted September 20, 2017, effective January 1, 2018 (File No. 2016-35)—REPORTER.

On order of the Court, notice of the proposed court rule and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, Rule 6.008 of the Michigan Court Rules is adopted, effective January 1, 2018.

RULE 6.008. CRIMINAL JURISDICTION.

(A) District Court. The district court has jurisdiction over all misdemeanors and all felonies through the preliminary examination and until the entry of an order to bind the defendant over to the circuit court.

(B) Circuit Court. The circuit court has jurisdiction over all felonies from the bindover from the district court unless otherwise provided by law. The failure of the court to properly document the bindover decision

shall not deprive the circuit court of jurisdiction. A party challenging a bindover decision must do so before any plea of guilty or no contest, or before trial.

(C) Pleas and Verdicts in Circuit Court. The circuit court retains jurisdiction over any case in which a plea is entered or a verdict rendered to a charge that would normally be cognizable in the district court.

(D) Sentencing Misdemeanors in Circuit Court. The circuit court shall sentence all defendants bound over to circuit court on a felony that either plead guilty to, or are found guilty of, a misdemeanor.

(E) Concurrent Jurisdiction. As part of a concurrent jurisdiction plan, the circuit court and district court may enter into an agreement for district court probation officers to prepare the presentence investigation report and supervise on probation defendants who either plead guilty to, or are found guilty of, a misdemeanor in circuit court. The case remains under the jurisdiction of the circuit court.

Staff Comment: The addition of Rule 6.008 establishes procedures for a circuit court to follow if a defendant bound over to circuit court on a felony either pleads guilty to, or is convicted of, a misdemeanor in circuit court. Remand to district court would remain a possibility in certain limited circumstances, including where the evidence is insufficient to support the bindover, *People v Miklovich*, 375 Mich 536, 539; 134 NW2d 720 (1965); *People v Salazar*, 124 Mich App 249, 251-252; 333 NW2d 567 (1983), or where there was a defect in the waiver of the right to a preliminary examination, *People v Reedy*, 151 Mich App 143, 147; 390 NW2d 215 (1986); *People v Skowronek*, 57 Mich App 110, 113; 226 NW2d 74 (1975), or where the prosecutor adds a new charge on which the defendant did not have a preliminary examination, *People v Bercheny*, 387 Mich 431, 434; 196 NW2d 767 (1972), adopting the opinion in *People v Davis*, 29 Mich App 443, 463; 185 NW2d 609 (1971), aff'd *People v Bercheny*, 387 Mich 431 (1972). See also MCR 6.110(H).

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted September 20, 2017, effective January 1, 2018 (File No. 2016-41)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendments of Rules 1.0, 1.2, 4.2, and 4.3 of the Michigan Rules of Professional Conduct and Rules 2.107, 2.117, and 6.001 of the Michigan Court Rules are adopted, effective January 1, 2018.

[Additions to the text are indicated in underlining and deleted text is shown by strike-over.]

RULE 1.0. SCOPE AND APPLICABILITY OF RULES AND COMMENTARY.

(a)-(c) [Unchanged.]

Preamble: A Lawyer's Responsibilities [Unchanged until section entitled "Terminology."]

Terminology.

"Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing confirming an oral informed consent. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. [To be inserted after term "Belief" and before term "Consult."]

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably avail-

able alternatives to the proposed course of conduct. [To be inserted after term "Fraud" and before term "Knowingly."]

RULE 1.2. SCOPE OF REPRESENTATION.

(a) [Unchanged.]

(b) A lawyer licensed to practice in the State of Michigan may limit the ~~objectives~~ scope of ~~the~~ a representation, file a limited appearance in a civil action, and act as counsel of record for the limited purpose identified in that appearance, if the ~~client consents after consultation~~ limitation is reasonable under the circumstances and the client gives informed consent, preferably confirmed in writing.

(1) A lawyer licensed to practice in the State of Michigan may draft or partially draft pleadings, briefs, and other papers to be filed with the court. Such assistance does not require the signature or identification of the lawyer, but does require the following statement on the document: "This document was drafted or partially drafted with the assistance of a lawyer licensed to practice in the State of Michigan, pursuant to Michigan Rule of Professional Conduct 1.2(b)."

(2) The filing of such documents is not and shall not be deemed an appearance by the lawyer in the case. Any filing prepared pursuant to this rule shall be signed by the party designated as "self-represented" and shall not be signed by the lawyer who provided drafting preparation assistance. Further, the lawyer providing document preparation assistance without entering a general appearance may rely on the client's representation of the facts, unless the lawyer has reason to believe that such representation is false, seeks objectives that are inconsistent with the lawyer's obligation under the Rules of Professional Conduct, or

asserts claims or defenses pursuant to pleadings or papers that would, if signed by the lawyer, violate MCR 2.114, or which are materially insufficient.

(c)-(d) [Unchanged.]

Comment: [To be added following the paragraph entitled "Services Limited in Objectives or Means," and before the paragraph entitled "Illegal, Fraudulent and Prohibited Transactions."]

Reasonable under the Circumstances. Factors to weigh in deciding whether the limitation is reasonable under the circumstances according to the facts communicated to the attorney include the apparent capacity of the person to proceed effectively with the limited scope assistance given the complexity and type of matter and other self-help resources available. For example, some self-represented persons may seek objectives that are inconsistent with an attorney's obligation under the Rules of Professional Conduct, or assert claims or defenses pursuant to pleadings or motions that would, if signed by an attorney, violate MCR 2.114 [Signatures of Attorneys and Parties; Verification; Effect: Sanctions]. Attorneys must be reasonably diligent to ensure a limited scope representation does not advance improper objectives, and the commentary should help inform lawyers of these considerations.

RULE 4.2. COMMUNICATION WITH A PERSON REPRESENTED BY COUNSEL.

(a) In representing a client, a lawyer shall not communicate about the subject of the representation with a ~~party~~ person whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(b) An otherwise self-represented person receiving limited representation in accordance with Rule 1.2(b) is considered to be self-represented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of limited appearance comporting with MCR 2.117(B)(2)(c) or other written communication advising of the limited scope representation. Oral communication shall be made first to the limited scope representation lawyer, who may, after consultation with the client, authorize oral communications directly with the client as agreed.

(c) Until a notice of termination of limited scope representation comporting with MCR 2.117(B)(2)(c) is filed, or other written communication terminating the limited scope representation is provided, all written communication, both court filings and otherwise, shall be served upon both the client and the limited scope representation attorney.

RULE 4.3. DEALING WITH ~~AN UNR~~ SELF-REPRESENTED PERSON.

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the ~~un~~self-represented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(b) Clients receiving representation under a notice of limited appearance comporting with MCR 2.117(B)(2)(c) or other written communication advising of the limited scope representation are not self-represented persons for matters within the scope of the limited appearance, until a notice of termination of limited appearance representation comporting with

MCR 2.117(B)(2)(c) is filed or other written communication terminating the limited scope representation is in effect. See Rule 4.2.

RULE 2.107. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS.

(A) [Unchanged.]

(B) Service on Attorney or Party.

(1) Service required or permitted to be made on a party for whom an attorney has appeared in the action must be made on the attorney except as follows:

(a)-(c) [Unchanged.]

(d) The court may order service on the party.;

(e) If an attorney files a notice of limited appearance under MCR 2.117 on behalf of a self-represented party, service of every paper later filed in the action must continue to be made on the party, and must also be made on the limited scope attorney for the duration of the limited appearance. At the request of the limited scope attorney, and if circumstances warrant, the court may order service to be made only on the party.

(2)-(3) [Unchanged.]

(C)-(G) [Unchanged.]

RULE 2.117. APPEARANCES.

(A) [Unchanged.]

(B) Appearance by Attorney.

(1) [Unchanged.]

(2) Notice of Appearance.

(a)-(b) [Unchanged.]

(c) Pursuant to MRPC 1.2(b), a party to a civil action may appear through an attorney for limited purposes during the course of an action, including, but not

limited to, depositions, hearings, discovery, and motion practice, if the following conditions are satisfied:

(i) The attorney files and serves a notice of limited appearance with the court before or during the relevant action or proceeding, and all parties of record are served with the limited entry of appearance; and

(ii) The notice of limited appearance identifies the limitation of the scope by date, time period, and/or subject matter.

(d) An attorney who has filed a notice of limited appearance must restrict activities in accordance with the notice or any amended limited appearance. Should an attorney's representation exceed the scope of the limited appearance, opposing counsel (by motion), or the court (by order to show cause), may set a hearing to establish the actual scope of the representation.

(3) Appearance by Law Firm.

(a) A pleading, appearance, motion, or other paper filed by a law firm on behalf of a client is deemed the appearance of the individual attorney first filing a paper in the action. All notices required by these rules may be served on that individual. That attorney's appearance continues until an order of substitution or withdrawal is entered, or a confirming notice of withdrawal of a notice of limited appearance is filed as provided by subrule (C)(3). This subrule is not intended to prohibit other attorneys in the law firm from appearing in the action on behalf of the party.

(b) [Unchanged.]

(C) Duration of Appearance by Attorney.

(1) [Unchanged.]

(2) Unless otherwise stated in this rule, a~~A~~n attorney who has entered an appearance may withdraw from the action or be substituted for only on order of the court.

(3) An attorney who has filed a notice of limited appearance pursuant to MCR 2.117(B)(2)(c) and MRPC 1.2(b) may withdraw by filing a notice of withdrawal from limited appearance with the court, served on all parties of record, stating that the attorney's limited representation has concluded and the attorney has taken all actions necessitated by the limited representation, and providing to the court a current service address and telephone number for the self-represented litigant. If the notice of withdrawal from limited appearance is signed by the client, it shall be effective immediately upon filing and service. If it is not signed by the client, it shall become effective 14 days after filing and service, unless the self-represented client files and serves a written objection to the withdrawal on the grounds that the attorney did not complete the agreed upon services.

(D) Nonappearance of Attorney Assisting in Document Preparation. An attorney who assists in the preparation of pleadings or other papers without signing them, as authorized in MRPC 1.2(b), has not filed an appearance and shall not be deemed to have done so. This provision shall not be construed to prevent the court from investigating issues concerning the preparation of such a paper.

RULE 6.001. SCOPE; APPLICABILITY OF CIVIL RULES; SUPERSEDED RULES AND STATUTES.

(A)-(C) [Unchanged.]

(D) Civil Rules Applicable. The provisions of the rules of civil procedure apply to cases governed by this chapter, except

(1) as otherwise provided by rule or statute,

(2) when it clearly appears that they apply to civil actions only, ~~or~~

(3) when a statute or court rule provides a like or different procedure~~.~~, or

(4) with regard to limited appearances and notices of limited appearance.

Depositions and other discovery proceedings under subchapter 2.300 may not be taken for the purposes of discovery in cases governed by this chapter. The provisions of MCR 2.501(C) regarding the length of notice of trial assignment do not apply in cases governed by this chapter.

(E) [Unchanged.]

Staff Comment: The amendments of Rules 1.0, 1.2, 4.2, and 4.3 of the Michigan Rules of Professional Conduct and Rules 2.107, 2.117, and 6.001 of the Michigan Court Rules were submitted to the Court by the State Bar of Michigan Representative Assembly. The rules are intended to provide guidance for attorneys and clients who would prefer to engage in a limited scope representation. The rules allow for such an agreement "preferably in writing," and enable an attorney to file a notice of LSR with the court when the representation is undertaken as well as a termination notice when the representation has ended. The rules also explicitly allow attorneys to provide document preparation services for a self-represented litigant without having to file an appearance with the court.

The staff comment is not authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted September 27, 2017, effective May 1, 2018 (File No. 2016-40)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendments of Rules 2.625 and 3.101 of the Michigan Court Rules are adopted, effective May 1, 2018.

[Additions to the text are indicated in underlining and deleted text is shown by strike-over.]

RULE 2.625. TAXATION OF COSTS.

(A)-(D) [Unchanged.]

(E) Costs in Garnishment Proceedings brought Pursuant to 3.101(M). Costs in garnishment proceedings to resolve the dispute between a plaintiff and a garnishee regarding the garnishee's liability are allowed as in civil actions. Costs may be awarded to the garnishee defendant as follows:

(1)-(2) [Unchanged.]

(F) Procedure for Taxing Costs at the Time of Judgment.

(1)-(4) [Unchanged.]

(G)-(J) [Unchanged.]

(K) Procedure for Taxing Costs and Fees After Judgment.

(1) A judgment creditor considered a prevailing party to the action under subrule (B) may recover from the judgment debtor(s) the taxable costs and fees expended after a judgment is entered, including all taxable filing fees, service fees, certification fees, and any other costs, fees, and disbursements associated with postjudgment actions as allowed by MCL 600.2405.

(2) Until the judgment is satisfied, the judgment debtor may serve on the judgment creditor a request to review postjudgment taxable costs and fees.

(a) Within 28 days of receipt from a judgment debtor of a request to review postjudgment taxable costs and fees, the judgment creditor shall file with the court a memorandum of postjudgment taxable costs and fees

and serve the same upon the judgment debtor. A memorandum of postjudgment taxable costs and fees shall include an itemized list of postjudgment taxable costs and fees. The memorandum must be verified by oath under MCR 1.109(D)(3)(a).

(b) Within 28 days after receiving the memorandum of postjudgment taxable costs and fees from the judgment creditor, the judgment debtor may file a motion to review postjudgment taxable costs and fees. Upon receipt of a timely motion, the court shall review the memorandum filed by the judgment creditor and issue an order allowing or disallowing the postjudgment costs and fees. The review may be conducted at a hearing at the court's discretion. If the court disallows the postjudgment costs and fees or otherwise amends them in favor of the judgment debtor, the court may order the judgment creditor to deduct from the judgment balance the amount of the motion fee paid by the judgment debtor under this rule.

(c) The judgment creditor shall deduct any costs or fees disallowed by the court within 28 days after receipt of an order from the court disallowing the same.

(d) Any error in adding costs or fees to the judgment balance by the judgment creditor or its attorney is not actionable unless there is an affirmative finding by the court that the costs and fees were added in bad faith.

RULE 3.101. GARNISHMENT AFTER JUDGMENT.

(A) [Unchanged.]

(B) Postjudgment Garnishments.

(1) Periodic garnishments are garnishments of periodic payments, as provided in this rule.

(a) [Unchanged.]

(i) the amount withheld pursuant to the writ equals the amount of the unpaid judgment, interest, and costs stated in the verified statement in support of the writ; however, if the plaintiff has sent a statement to the garnishee in accordance with MCL 600.4012(5)(a), the balance on which may include additional interest and costs, the periodic garnishment is effective until the balance on the most recent statement is withheld or

(ii) [Unchanged.]

(b) [Unchanged.]

(c) If a writ of periodic garnishment is served on a garnishee who is obligated to make periodic payments to the defendant while another order that has priority under MCL 600.4012(2) is in effect, or if a writ or order with higher priority is served on the garnishee while another writ is in effect, the garnishee is not obligated to withhold payments pursuant to the lower priority writ until the ~~expiration of the~~ higher priority ~~one~~writ ceases to be effective under subrule (B)(1)(a). However, in the case of garnishment of earnings, the garnishee shall withhold pursuant to the lower priority writ to the extent that the amount being withheld pursuant to the higher priority order is less than the maximum that could be withheld by law pursuant to the lower priority writ (see, e.g., 15 USC 1673). Upon the expiration of the higher priority writ, the lower priority one becomes effective until it ~~would otherwise have expired~~ceases to be effective under subrule (B)(1)(a). The garnishee shall notify the plaintiff of receipt of any higher priority writ or order and provide the information required by subrule (H)(2)(c).

(2) [Unchanged.]

(C)-(D) [Unchanged.]

(1) [Unchanged.]

(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, which may include the costs associated with filing the current writ of garnishment; the total amount of the postjudgment payments made to date, and the amount of the unsatisfied judgment now due (including interest and costs), which may include the costs associated with filing the current writ of garnishment;

(3) [Unchanged.]

(E)-(F) [Unchanged.]

(G) Liability of Garnishee.

(1) [Unchanged.]

(2) The garnishee is liable for no more than the amount of the unpaid judgment, interest, and costs as stated in the verified statement requesting the writ of garnishment unless a statement is sent to the garnishee in accordance with MCL 600.4012(5)(a), in which case the garnishee is liable for the amount of the remaining judgment balance as provided in the most recent statement. Property or debts exceeding that amount may be delivered or paid to the defendant notwithstanding the garnishment.

(H)-(I) [Unchanged.]

(1)-(2) [Unchanged.]

(3) In the case of periodic earnings, withholding shall cease ~~according to the following provisions~~when the periodic garnishment becomes no longer effective under subrule (B)(1).~~:~~

~~(a) For garnishees with weekly, biweekly, or semimonthly pay periods, withholding shall cease upon the end of the last full pay period prior to the expiration of the writ.~~

~~(b) For garnishees with monthly pay periods, withholding shall continue until the writ expires.~~

(4) [Unchanged.]

(5) If funds have not been withheld because a higher priority writ or order was in effect, and the higher priority writ ceases to be effective before ~~expiration of~~ the lower priority ~~one~~writ ceases to be effective, the garnishee shall begin withholding pursuant to the lower priority writ as of the date ~~of the expiration of~~that the higher priority writ ceases to be effective.

(6) [Unchanged.]

(J) Payment.

(1) [Unchanged.]

(2) For periodic garnishments, all future payments shall be paid as they become due as directed by the court pursuant to subrule (E)(3)(e) until ~~expiration of~~ the garnishment ceases to be effective under subrule (B)(1).

(3) [Unchanged.]

(4) Payment to the plaintiff may not exceed the amount of the unpaid judgment, interest, and costs stated in the verified statement requesting the writ of garnishment; however, if the plaintiff has sent a statement to the garnishee in accordance with MCL 600.4012(5)(a), the balance on which may include additional interest and costs, the garnishee shall pay to the plaintiff the amount provided in the most recent statement. ~~If the plaintiff claims to be entitled to a larger amount, the plaintiff must proceed by motion with notice to the defendant.~~

(5) [Unchanged.]

(6) For periodic garnishments, within 14 days after the ~~expiration of the~~ writ ceases to be effective under subrule (B)(1) or after the garnishee is no longer

obligated to make periodic payments, the garnishee shall file with the court and mail or deliver to the plaintiff and the defendant, a final statement of the total amount paid on the writ. If the garnishee is the defendant's employer, the statement is to be filed within 14 days after the ~~expiration of the~~ writ ceases to be effective, regardless of changes in employment status during the time that the writ was in effect. The statement shall include the following information:

(a)-(c) [Unchanged.]

(d) the total amount withheld~~;~~.

~~(e) the difference between the amount stated in the verified statement requesting the writ and the amount withheld.~~

(7) [Unchanged.]

(K) Objections.

(1) Objections shall be filed with the court within 14 days of the date of service of the writ on the defendant or within 14 days of the date of the most recent statement sent to the defendant pursuant to MCL 600.4012(5)(a). Objections may be filed after the time provided in this subrule but do not suspend payment pursuant to subrule (J) unless ordered by the court. Objections may only be based on defects in or the invalidity of the garnishment proceeding itself or the balance provided on the statement sent pursuant to MCL 600.4012(5)(a), and may not be used to challenge the validity of the judgment previously entered.

(2) [Unchanged.]

(a)-(e) [Unchanged.]

(f) the garnishment was not properly issued or is otherwise invalid~~.~~;

(g) the balance on the statement sent pursuant to MCL 600.4012(5)(a) is incorrect.

(3)-(4) [Unchanged.]

(L)-(Q) [Unchanged.]

(R) Costs and Fees.

(1) [Unchanged.]

(2) ~~If the garnishee is not indebted to the defendant, does not hold any property subject to garnishment, and is not the defendant's employer, the plaintiff is not entitled to recover the costs of that garnishment~~Within 28 days after receipt of the disclosure filed pursuant to subrule (H) by a garnishee of a periodic garnishment disclosing that it does not employ the defendant and is not otherwise liable for periodic payments, or from a garnishee of a nonperiodic garnishment disclosing that it does not hold property subject to garnishment and the defendant is not indebted to the garnishee, the plaintiff shall deduct any costs associated with that garnishment that may have been added to the judgment balance pursuant to MCR 2.625(K), unless the court otherwise directs.

(S)-(T) [Unchanged.]

Staff Comment: The amendments of MCR 2.625 and 3.101, submitted by the Michigan Creditor's Bar Association, address recent amendments of MCL 600.4012, clarify the authority and process for recovering postjudgment costs, and provide clearer procedure for garnishment proceedings.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted September 27, 2017, effective January 1, 2018 (File No. 2017-06)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been

provided, and consideration having been given to the comments received, the following amendments of Rules 7.300 *et seq.* of the Michigan Court Rules are adopted, effective January 1, 2018.

[Additions to the text are indicated in underlining and deleted text is shown by strike-over.]

RULE 7.301. ORGANIZATION AND OPERATION OF SUPREME COURT.

(A) [Unchanged.]

(B) Term and Sessions. The annual term of the Court begins on August 1 and ends on July 31. Except as provided in MCR 7.313(E), the end of a term has no effect on pending cases. Oral arguments are generally scheduled at sessions in October, November, December, January, March, April, and May. The Court will only schedule cases for argument in September, February, June, ~~or~~ July, or August pursuant to an order on the Court's own initiative or upon a showing of special cause by a moving party.

(C)-(D) [Unchanged.]

(E) Reporter of Decisions. The Supreme Court will appoint a reporter of decisions. The reporter shall:

(1)-(2) [Unchanged.]

(3) ensure that opinions are published ~~each opinion~~ in advance sheets as soon as practicable; and

(4) ~~publish~~ ensure that bound volumes are printed as soon as practicable after the last opinion included in a volume is issued.

The reasons for denying leave to appeal, as required by Const 1963, art 6, § 6 and filed in the clerk's office, are not to be published and are not to be regarded as precedent.

(F) [Unchanged.]

RULE 7.302. ELECTRONIC FILING, SERVICE, AND NOTIFICATION.

(A) Electronic Filing. Documents may be filed electronically in lieu of submitting paper copies unless specifically required by court order.

(B) Electronic Service. A document that is electronically filed may be served electronically on registered users of the e-filing system at their registered email addresses.

(C) Electronic Notification. The clerk may electronically transmit or provide electronic access to Court notices, orders, opinions, and other communications to the parties, attorneys, the Court of Appeals, and the trial court or tribunal.

RULE 7.305. APPLICATION FOR LEAVE TO APPEAL.

(A) What to File. To apply for leave to appeal, a party must file:

(1) ~~4~~1 signed copy~~ies~~ of an application for leave to appeal ~~(1 signed)~~ prepared in conformity with MCR 7.212(B) and consisting of the following:

(a)-(f) [Unchanged.]

(2) ~~4~~1 copy~~ies~~ of any opinion, findings, or judgment of the trial court or tribunal relevant to the question as to which leave to appeal is sought and ~~4~~1 copy~~ies~~ of the opinion or order of the Court of Appeals, unless review of a pending case is being sought;

(3)-(4) [Unchanged.]

(B) [Unchanged.]

(C) When to File.

(1) ~~Before Court of Appeals Decision~~ Bypass Application. In an appeal before the Court of Appeals decision, the application must be filed within 42 days after:

(a) [Unchanged.]

(b) an application for leave to appeal is filed in the Court of Appeals; or

(c) an original action is filed in the Court of Appeals.; or

(d) entry of an order of the Court of Appeals granting an application for leave to appeal.

(2) Application After Court of Appeals Decision. Except as provided in subrule (C)(4), the application must be filed within 28 days in termination of parental rights cases, within 42 days in other civil cases, or within 56 days in criminal cases, after: the date of

(a) the Court of Appeals order or opinion disposing of the resolving an appeal or original action, including an order denying an application for leave to appeal,

(b) the Court of Appeals order or opinion remanding the case to the lower court or Tribunal for further proceedings while retaining jurisdiction,

(c)-(d) [Relettered but otherwise unchanged.]

(3) Interlocutory Application from the Court of Appeals. Except as provided in subrules (C)(1) and (C)(2), the application must be filed within 28 days after a Court of Appeals order that does not resolve the appeal or original action, including an order granting an application for leave to appeal.

(3)-(7) [Renumbered (4)-(8) but otherwise unchanged.]

(D) Answer. Any responding party may file 41 signed copyies of an answer (1 signed) within 28 days of after service of the application. The party must file proof that a copy of the answer was served on all other parties.

(E) Reply. ~~A~~ The appellant may file 1 signed copy of a reply ~~may be filed as provided in MCR 7.212(G)~~ within 21 days after service of the answer, along with proof of its service on all other parties. The reply must:

(1) contain only a rebuttal of the arguments in the answer;

(2) include a table of contents and an index of authorities; and

(3) be no longer than 10 pages, exclusive of tables, indexes, and appendixes.

(F)-(G) [Unchanged.]

(H) Decision.

(1) Possible Court Actions. The Court may grant or deny the application for leave to appeal, enter a final decision, direct argument on the application, or issue a peremptory order. The clerk shall issue the order entered and provide either a paper copy~~ies~~ or access to an electronic version to each ~~the~~ party~~ies~~ and to the Court of Appeals clerk.

(2)-(3) [Unchanged.]

(4) Issues on Appeal.

(a) [Unchanged.]

(b) On motion of any party establishing good cause, the Court may grant a request to add additional issues not raised in the application for leave to appeal or not identified in the order granting leave to appeal. Permission to brief and argue additional issues does not extend the time for filing the brief~~s~~ and appendixes.

(I) [Unchanged.]

RULE 7.306. ORIGINAL PROCEEDINGS.

(A) When Available. A complaint may be filed to invoke the Supreme Court's superintending control power:

(1) over a lower court or tribunal, including the Attorney Discipline Board, when an application for leave to appeal could not have been filed under MCR 7.305, or

(2) over the Board of Law Examiners, the Attorney Discipline Board, or the Attorney Grievance Commission.

When a dispute regarding court operations arises between judges within a court that would give rise to a complaint under this rule, the judges shall participate in mediation as provided through the State Court Administrator's Office before filing such a complaint. The mediation shall be conducted in compliance with MCR 2.411(C)(2).

(B) What to File. To initiate an original proceeding, a plaintiff must file with the clerk:

(1) 41 signed copyies of a complaint (1 signed) prepared in conformity with MCR 7.212(B) and entitled, for example,

"[*Plaintiff*] *v* [*Court of Appeals, Board of Law Examiners, Attorney Discipline Board, or Attorney Grievance Commission*]."

The clerk shall retitle a complaint that is named differently.

(2) 41 signed copyies of a brief (1 signed) conforming as nearly as possible to MCR 7.212(B) and (C);

(3) proof that a copy ofthe complaint and brief wereas served on the defendant, and, for a complaint filed against the Attorney Discipline Board or Attorney Grievance Commission, on the respondent in the underlying discipline matter; and

(4) [Unchanged.]

Copies of relevant documents, record evidence, or supporting affidavits may be attached as exhibits to the complaint.

(C) Answer. The defendant must file the following with the clerk within ~~21~~ 28 days ~~of~~ after ~~notice~~ service of the complaint:

(1) ~~Four~~ 1 signed copy~~ies~~ of an answer ~~and a brief (1 signed)~~ in conformity~~ng~~ with MCR 7.212(B) and (D). The grievance administrator's answer to a complaint against the Attorney Grievance Commission must show the investigatory steps taken and any other pertinent information.

(2) [Unchanged.]

(D) Brief by Respondent in Action Against Attorney Grievance Commission or Attorney Discipline Board. A respondent in an action against the Attorney Grievance Commission or Attorney Discipline Board may file a response brief with the clerk within 21 days after service of the complaint, and a proof that a copy of the response brief was served on plaintiff and defendant. A response brief filed under this subsection shall conform ~~with~~ to MCR 7.212(B) and (D).

(E) Reply Brief. ~~4~~1 signed copy~~ies~~ of a reply brief ~~(1 signed)~~ may be filed as provided in MCR ~~7.212(G)~~7.305(E).

(F) [Unchanged.]

(G) Nonconforming Pleading. On its own initiative or on a party's motion, the Court may order a party ~~plaintiff~~ who filed a pleading ~~complaint or supporting brief or a defendant who filed an answer~~ that does not substantially comply with the requirements of this rule to file a conforming pleading within a specified time or else it may strike the nonconforming pleading. The submission to the clerk of a nonconforming pleading does not satisfy the time limitation for filing the pleading if it has not been corrected within the specified time.

(H) Submission and Argument. Original proceedings may be submitted for a decision after service of the reply brief ~~has been filed~~ or the time for filing a reply brief has expired, whichever occurs first. There is no oral argument on an original complaint~~s~~ unless ordered by the Court.

(I) [Unchanged.]

RULE 7.307. CROSS-APPEAL.

(A) Filing. An application for leave to appeal as a cross-appellant may be filed with the clerk within 28 days ~~of~~ after service of the application for leave to appeal. The cross-appellant's application must comply with the requirements of MCR 7.305(A). A late application to cross-appeal will not be accepted.

(B) [Unchanged.]

RULE 7.308. CERTIFIED QUESTIONS AND ADVISORY OPINIONS.

(A) Certified Questions

(1) From Michigan Courts.

(a) Whenever a trial court or tribunal from which an appeal may be taken to the Court of Appeals or to the Supreme Court has pending before it an action or proceeding involving a controlling question of public law, and the question is of such public moment as to require an early determination according to executive message of the governor addressed to the Supreme Court, the Court may authorize the court or tribunal to certify the question to the Court with a statement of the facts sufficient to make clear the application of the question. Further proceedings relative to the case are stayed to the extent ordered by the court or tribunal, pending receipt of a decision of the Supreme Court.

(b)-(c) [Unchanged.]

(d) After the decision of the Court has been sent, the lower court or tribunal will proceed with or dispose of the case in accordance with the Court's answer.

(2) From Other Courts.

(a)-(b) [Unchanged.]

(c3) With the certificate, t Briefing. The parties to the underlying proceeding shall submit briefs in conformity with MCR 7.312 that include a request for oral argument on the title page of the pleading, if oral argument is desired. Unless the Court directs a different time or procedure for filing, or the parties file a written stipulation agreeing to a different schedule;

(ia) briefs conforming with MCR 7.312 the brief and appendixes of the appellant, or the plaintiff if the underlying proceeding was not an appeal, are due within 35 days after the certificate is filed with the Court;

(iib) the brief and appendixes of an appellee, or a defendant if the underlying proceeding was not an appeal, are due within 28 days after service of the appellant's brief a joint appendix conforming with MCR 7.312(D); and

(iiic) a request for oral argument on the title page of the pleading, if oral argument is desired a reply brief is due within 21 days after service of the last timely filed appellee's or defendant's brief.

Joint or individual appendixes may be filed in conformity with MCR 7.312(D).

(d) If the Supreme Court responds to the question certified, the clerk shall send a copy to the certifying court.

~~(e) The Supreme Court shall divide costs equally among the parties, subject to redistribution by the certifying court.~~

(~~3~~4) Submission and Argument. A ~~C~~certified question~~s~~ may be submitted for a decision after receipt of the question and after the reply is filed or the time for filing the reply has passed, whichever occurs first. There is no oral argument on a certified question unless ordered by the Court. ~~Oral argument of a certified question under subrule (2), if properly requested under subrule (2)(c)(iii), or under subrule (1) if desired by the Court, will be scheduled in accordance with MCR 7.313.~~

(5) Decision. The Supreme Court may deny the request for a certified question by order, issue a peremptory order, or render a decision in the ordinary form of an opinion to be published with other opinions of the Court. The clerk shall send a paper copy or provide electronic notice of the Court's decision to the certifying court.

(6) Costs. The Supreme Court shall divide costs equally among the parties, subject to redistribution by the certifying court.

(B) Advisory Opinion

(1) Form of Request. A request for an advisory opinion by either house of the legislature or the governor pursuant to Const 1963, art 3, § 8 may be in the form of letter that includes a copy or verbatim statement of the enacted legislation and identifies the specific questions to be answered by the Court. ~~Four~~ One signed copy~~ies~~ of the request ~~(1 signed)~~ and 1 set of supporting documents are to be filed with the Court.

(2) Briefing. The governor, any member of the house or senate, and the attorney general may file briefs in

support of or opposition to the enacted legislation within 28 days after the request for an advisory opinion is filed. Interested parties may file amicus curiae briefs on motion granted by the Court. The party shall file ~~4~~1 signed copy~~ies~~ of the brief ~~(1 signed), which must~~ that conforms as nearly as possible to MCR 7.2312~~(B) and (C).~~

(3) [Unchanged.]

(4) Decision. The Supreme Court may deny the request for an advisory opinion by order, issue a peremptory order, or render a decision in the ordinary form of an opinion~~,~~ to be published with other opinions of the Court.

RULE 7.310. RECORD ON APPEALS.

(A) Transmission of Record. An appeal is heard on the original papers, which constitute the record on appeal. When requested by the Supreme Court clerk to do so, the Court of Appeals clerk or the lower court clerk shall send to the Supreme Court clerk all papers or electronic documents on file in the Court of Appeals or the lower court, certified by the clerk. For an appeal originating from an administrative board, office, or tribunal, the record on appeal is the certified record filed with the Court of Appeals clerk and the papers or electronic documents filed with the Court of Appeals clerk.

(B) Return of Record. After final adjudication or other disposition of an appeal, the Supreme Court clerk shall return the original record to the Court of Appeals clerk, to the clerk of the ~~lower~~ trial court or tribunal in which the record was made, or to the clerk of the court to which the case has been remanded for further proceedings. Thereafter, the clerk of the lower court or tribunal to which the original record has been

sent shall promptly notify the attorneys of the receipt of the record. The Supreme Court clerk shall ~~forward~~ provide a certified copy of the order or judgment entered by the Supreme Court to the Court of Appeals clerk and to the clerk of the trial court or tribunal from which the appeal was taken.

(C) [Unchanged.]

RULE 7.311. MOTIONS IN SUPREME COURT.

(A) What to File. To have a motion heard, a party must file with the clerk:

(1) ~~4~~1 signed copy~~ies~~ of a motion ~~(1 signed)~~ and supporting papers, except as otherwise provided in this rule, stating briefly but distinctly the grounds on which ~~it~~ the motion is based and the relief requested and including an affidavit supporting any allegations of fact in the motion;

(2) proof that the motion and supporting papers were served on ~~the~~ each opposing party; and

(3) [Unchanged.]

~~Only 2 copies (1 signed) need be filed of a motion to extend time, to place a case on or adjourn a case from the session calendar, or for oral argument.~~

(B) Submission and Argument. Motions are submitted for decisions on Tuesday of each week at least 14 days after they are filed, but administrative orders (e.g., on motions to extend time for filing a pleading, to file an amicus brief, to appear and practice, to exceed the page limit) may be entered earlier to advance the efficient administration of the Court. There is no oral argument on a motion unless ordered by the Court.

(C) Answer. An opposing party may file 1 signed copy of an answer ~~may be filed~~ at any time before an order is entered on the motion.

(D)-(E) [Unchanged.]

(F) Motion for Rehearing.

(1) To move for rehearing, a party must file within 21 days after the opinion was filed:

(a) ~~14~~ signed copy~~ies~~ of a motion for rehearing ~~(1 signed) if the opinion decided a case placed on a session calendar, or 8 copies of a motion (1 signed) if the opinion decided a noncalendar case~~; and

(b) proof that a copy was served on ~~the parties~~ each party.

The motion for rehearing must include reasons why the Court should modify its opinion. Motions for rehearing are subject to the restrictions contained in MCR 2.119(F)(3).

(2) Unless otherwise ordered by the Court, the timely filing of a motion for rehearing postpones issuance of the Court's judgment order until the motion is either denied by the Court or, if granted, until at least 21 days after the filing of the Court's ~~opinion~~ decision on rehearing.

(3) Any party or amicus curiae that participated in the case may answer a motion for rehearing within 14 days after it is served by filing

(a) 1 signed ~~14 or 8~~ copy~~ies~~ of the answer ~~motion (1 signed), in accordance with subrule (F)(1)(a)~~; and

(b) proof that a copy was served on ~~the~~ all other parties.

(4)-(5) [Unchanged.]

(G) [Unchanged.]

RULE 7.312. BRIEFS AND APPENDIXES IN CALENDAR CASES.

(A) Form and Length. Briefs in calendar cases must be prepared in ~~the form provided in~~ conformity with MCR 7.212(B), (C), ~~and~~ (D), and (G) as to form and

length. Briefs shall be printed on only the front side of the page of good quality, white unglazed paper by any printing, duplicating, or copying process that provides a clear image. ~~Original t~~Typewritten, handwritten, or carbon copy pages may be used~~, but not carbon copies~~ so long as the printing is legible.

(B) Citation of Record; Summary of Arguments; ~~Length of Briefs~~.

(1)-(2) [Unchanged.]

~~(3) Except by order of the Court allowing a longer brief, a brief may not exceed 50 pages, excluding the table of contents, index of authorities, and appendixes, but including the summary of argument.~~

(C) Cover. A brief must have a suitable cover of heavy paper. The cover page must follow this general form:

IN THE SUPREME COURT

APPEAL FROM THE [COURT OR TRIBUNAL APPEALED FROM]

[JUDGE OR PRESIDING OFFICER]

[Name of Party],

Plaintiff-[Appellant or Appellee],

MSC No. [leave blank]

v COA No. _____

Trial Ct No. _____

[Name of Party],

Defendant-[Appellant or Appellee].

Brief on Appeal — [Appellant or Appellee]

ORAL ARGUMENT [REQUESTED/NOT REQUESTED]

_____

Attorney for [PL or DF]-[AT or AE]

[Business Address]

_____

_____

_____

~~The cover page of the appellant's brief must be blue; that of the appellee's brief, red; that of an intervenor or amicus curiae brief, green; and that of a reply brief, gray. The cover page of a cross-appeal brief, if filed separately from the primary brief, must be the same color as the primary brief.~~

(D) Appendixes.

(1) Form ~~and Color of Cover~~. Appendixes must be prepared in conformity with MCR 7.212(B), and ~~except that they must be printed on both sides of the page. The cover pages of appendixes shall be printed on yellow paper and~~ shall be similarly endorsed as briefs under MCR 7.312(C) but designated as an appendix. Appendixes must be printed on both sides of the page and, if they encompass more than 20 sheets of paper, must also be submitted on electronic storage media in a file format that can be opened, read, and printed by the Court.

(2) Appellant's Appendix. An appendix filed by the appellant must be entitled "Appellant's Appendix," must be separately bound, and numbered separately from the brief with the letter "a" following each page number (e.g., 1a, 2a, 3a). Each page of the appendix must include a header that briefly describes the character of the document, such as the names of witnesses for testimonial evidence or the nature of the documents for record evidence. The appendix must include a table of contents and, when applicable, must contain:

(a) the relevant docket entries of the ~~lower~~ trial court or tribunal and the Court of Appeals arranged in a single column;

(b)-(e) [Unchanged.]

The items listed in subrules (D)(2)(a) to (e) must be presented in chronological order.

(3)-(4) [Unchanged.]

(E) [Unchanged.]

(F) What to File. ~~The~~ Each party~~ies~~ shall:

(1) file 1~~4~~ signed copy of a brief ~~(1 signed)~~ and 1 set of appendixes with the clerk;

(2)-(4) [Unchanged.]

(G) Cross-Appeal Briefs. The filing and service of cross-appeal briefs are governed by subrule (F). An appellee/cross-appellant may file a combined brief for the primary appeal and the cross-appeal within 35 days after service of the appellant's brief in the primary appeal. An appellant/cross-appellee may file a combined reply brief for the primary appeal and a responsive brief for the cross-appeal within 35 days after service of the cross-appellant's brief. A reply to the cross-appeal may be filed within 21 days after service of the responsive brief.

(H) [Unchanged.]

(I) Supplemental Authority. A party may file 1 signed copy of a supplemental authority ~~as provided~~ in conformity with MCR 7.212(F).

(J) Extending or Shortening Time; Failure to File; Forfeiture of Oral Argument.

(1) [Unchanged.]

(2) If the appellant fails to file the brief and appendixes within the time required, the Court may dismiss the case and award costs to the appellee or affirm the

judgment or order appealed.

(3) [Unchanged.]

RULE 7.313. SUPREME COURT CALENDAR.

(A) [Unchanged.]

(B) Notice of Hearing; Request for Oral Argument.

(1) After the briefs of both parties have been filed or the time for filing the appellant's reply brief has expired, the clerk shall notify the parties that the calendar cases and the cases to be argued on the application under MCR 7.305(H)(1) will be ~~argued~~ heard at a monthly session of the Supreme Court not less than 35 days after the date of the notice. The Court may direct that a case be scheduled for argument at a future monthly session with expedited briefing times or may shorten the 35-day notice period on its own initiative or on motion of a party.

(2) [Unchanged.]

(C) [Unchanged.]

(D) Rearrangement of Calendar; Adjournment. At least 21 days before the first day of a session, the parties may stipulate to have a case specially placed on the calendar, grouped to suit the convenience of the attorneys, or placed at the beginning or end of the call. After that time, changes to the session calendar may be requested only by motion, not by stipulation of the parties. A motion to adjourn a case from the call after the schedule is released will be granted only by order upon a showing of good cause with an explanation of why the motion could not have been filed sooner. Costs payable to the Court may be imposed on the moving party for a late-filed motion to adjourn.

(E) Reargument of Undecided Calendar Cases. When a calendar case remains undecided at the end of

the term in which it was argued, ~~either~~ the parties~~y~~ may file ~~a~~ supplemental briefs. In addition, by directive of the Court or upon a party's written request within 14 days after the beginning of the new term, the clerk shall schedule the case for reargument. This subrule does not apply to a case argued on the application for leave to appeal under MCR 7.305(H)(1) ~~and 7.314(B)(2)~~.

RULE 7.315. OPINIONS, ORDERS, AND JUDGMENTS.

(A)-(B) [Unchanged.]

(C) Orders or Judgments Pursuant to Opinions.

(1) [Unchanged.]

(2) Routine Issuance.

(a) If a motion for rehearing is not timely filed under MCR 7.311(F)(1), the clerk shall send a certified copy of the order or judgment to the Court of Appeals with its file, and to the trial court or tribunal that tried the case with its record, not less than 21 days or more than 28 days after entry of the order or judgment.

(b) [Unchanged.]

(3)-(4) [Unchanged.]

(D) Entry, Issuance, Execution, and Enforcement of Other Orders and Judgments. An order or judgment, other than those by opinion under subrule (C), is entered on the date of filing. Unless otherwise stated, an order or judgment is effective the date it is entered. The clerk must promptly send a copy or provide electronic notification of the order or judgment ~~send a certified copy~~ to each party, ~~to~~ the Court of Appeals, and ~~to~~ the ~~lower~~ trial court or tribunal. A motion may not be decided or an order entered by the Court unless all required documents have been filed and the requisite fees have been paid.

RULE 7.316. MISCELLANEOUS RELIEF.

(A) Relief Obtainable. While a matter is pending in ~~T~~the Supreme Court, the Court may, at any time, in addition to its general powers

(1) exercise any or all of the powers of amendment of the lower court or tribunal~~below~~;

(2)-(9) [Unchanged.]

(B) [Unchanged.]

(C) Vexatious Proceedings; Vexatious Litigator.

(1) The Court may, on its own initiative or the motion of any party filed before a case is placed on a session calendar, dismiss an appeal, assess actual and punitive damages, or take other disciplinary action when it determines that an appeal or original proceeding ~~any of the proceedings in an appeal~~ was vexatious because

(a) the ~~appeal~~ matter was filed ~~taken~~ for purposes of hindrance or delay or is not reasonably well-grounded in fact or warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law ~~without any reasonable basis for belief that there was a meritorious issue to be determined on appeal~~; or

(b) [Unchanged.]

(2) [Unchanged.]

(3) Vexatious Litigator. If a party habitually, persistently, and without reasonable cause engages in vexatious conduct under subrule (C)(1), the Court may, on its own initiative or on motion of another party, find the party to be a vexatious litigator and impose filing restrictions on the party. The restrictions may include prohibiting the party from continuing or instituting legal proceedings in the Court without first obtaining

leave, prohibiting the filing of actions in the Court without the filing fee or security for costs required by MCR 7.209 or MCR 7.319, or other restriction the Court deems just.

RULE 7.317. INVOLUNTARY DISMISSAL; NO PROGRESS.

(A) Designation. If an appellant's brief has not been timely filed under MCR 7.312(E)(1) or within the time period granted by an order extending the time for filing the brief, or if the appellant fails to pay the filing fee or pursue the case in substantial conformity with the rules, the case shall be designated as one in which no progress has been made.

(B) Notice; Dismissal. When a case is designated as one in which no progress is made, the clerk shall mail or provide electronic notice to each party notice that, unless the appellant's brief that conforms with the rules is filed within 21 days or a motion is filed seeking further extension upon a showing of good cause, the case will be dismissed. ~~A copy of a~~An administrative order dismissing an action under this rule will be sent or made electronically accessible to the parties and the lower court or tribunal from which the action arose.

(C) Reinstatement. Within 21 days of the dismissal order, the appellant may seek reinstatement of the action by paying the filing fee or by filing a conforming brief along with a motion showing mistake, inadvertence, or excusable neglect. The clerk shall not accept a late-filed motion to reinstate.

(D) [Unchanged.]

RULE 7.318. VOLUNTARY DISMISSAL.

The parties may file with the clerk a stipulation agreeing to the administrative dismissal by the Chief Justice of an application for leave to appeal, an appeal, or an original proceeding in which leave has not been

granted or argument has not been directed on the application. The Court may deny the stipulation in a matter scheduled, or to be scheduled, for oral argument if it concludes that the matter should be decided notwithstanding the stipulation. Costs payable to the Court may be imposed on the parties in the order granting the stipulated dismissal if the case has been scheduled for oral argument and the stipulation is received less than 21 days before the first day of the monthly session.

RULE 7.319. TAXATION OF COSTS; FEES.

(A)-(B) [Unchanged.]

(C) Fees Paid to Clerk. The Clerk shall collect the following fees, which may be taxed as costs when costs are allowed by the Court:

(1)-(3) [Unchanged.]

(4) 50 cents per page for ~~(a)~~ a certified copy of a paper from a public record or ~~(b)~~ a copy of an opinion~~, although one copy must be provided without charge to the attorney for each party in the case~~;

(5)-(6) [Unchanged.]

A party who is unable to pay a filing fee may ask the Court to waive the fee by filing a motion and an affidavit disclosing the reason for that inability. There is no fee for filing the motion but, if the motion is denied, the party must pay the fee for the underlying filing.

(D) [Unchanged.]

Staff Comment: The amendment of MCR 7.300 *et seq.* would clarify certain practices and procedures in the Supreme Court, especially as they pertain to electronic filing by parties and electronic notification of the Court's opinions and orders, as well as require only the signed originals of documents to be filed in hard copy.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted October 11, 2017, effective January 1, 2018 (File No. 2015-11)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of MRE 404 are adopted, effective January 1, 2018.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES.

(a) [Unchanged.]

(b) *Other crimes, wrongs, or acts.*

(1) [Unchanged.]

(2) The prosecution in a criminal case shall provide ~~reasonable~~ written notice at least 14 days in advance of trial, or orally on the record later ~~during trial~~ if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

Staff Comment: The amendments of MRE 404(b) require written notice to be provided at least 14 days before trial, or orally on the record later if the court finds there is good cause. This notice requirement replaces the former language that required only "reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown." The amendment is not intended to

discourage oral notice provided earlier than 14 days in advance of trial, so long as such notice is then confirmed in writing as provided in the rule.

Adopted December 20, 2017, effective immediately (File No. 2002-37)—REPORTER.

On September 20, 2017, for purposes of proceeding with creation and implementation of a statewide electronic filing system, this Court ordered that various rule amendments take effect January 1, 2018, with the understanding that comments submitted during the comment period and at the public hearing might result in revisions of these amendments. Because it appears that some significant changes will be considered on final review of these amendments in January 2018, the effective date of amendments adopted by order dated September 20, 2017, is deferred until further order of the Court.

Adopted December 20, 2017, effective January 1, 2018 (File No. 2016-11)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rule 3.208 of the Michigan Court Rules are adopted, effective January 1, 2018.

[Additions to the text are indicated in underlining and deleted text is shown by strike-over.]

RULE 3.208. FRIEND OF THE COURT.

(A) General. The friend of the court has the powers and duties prescribed by statute, including those du-

ties in the Friend of the Court Act, MCL 552.501 *et seq*., and the Support and Parenting Time~~Visitation~~ Enforcement Act, MCL 552.601 *et seq*.

(B) Enforcement. The friend of the court is responsible for initiating proceedings to enforce an order or judgment for support, parenting time~~visitation~~, or custody. The procedures in this subrule govern contempt proceedings under the Support and Parenting Time Enforcement Act. MCR 3.606 governs contempt proceedings under MCL 600.1701.

(1) If a party has failed to comply with an order or judgment, the friend of the court may move~~petition~~ for an order to show cause why the party should not be held in contempt. Alternatively, in nonpayment of support cases and as allowed by the court, the friend of the court may schedule a hearing before a judge or referee for the party to show cause why the party should not be held in contempt.

(2) The order to show cause or the notice of the show cause hearing must be served personally, ~~or~~ by ordinary mail at the party's last known address, or in another manner permitted by MCR 3.203.

(3) The notice of the show cause hearing shall comply with requirements for the form of a subpoena under MCR 2.506(D).

(a) For the purpose of this subrule, an authorized signature is one that comports with MCR 1.109(D).

(b) A notice under this subrule must state the amount past due and the source of information regarding the past due amount and act or failure to act that constitutes a violation of the court order. The state court administrator shall develop and approve a show cause hearing and notice form for statewide use. The show cause hearing and notice form may be combined in a single document.

(c) A person must comply with the notice unless relieved by order of the court or written direction of the person who executed the notice.

(43) The show cause hearing ~~on the order to show cause~~ may be held no sooner than seven days after the order or notice is served on the party. If service is by ordinary mail, the hearing may be held no sooner than nine days after the order or notice is mailed.

(54) The court may hold the show cause hearing without the friend of the court unless a party presents evidence that requires the court to receive further information from the friend of the court's records before making a decision. If the party fails to appear at the~~in response to the order to~~ show cause hearing, the court may issue an order for arrest.

(5)-(6) [Renumbered (6)-(7) but otherwise unchanged.]

(C) Allocation and Distribution of Payments.

(1) Except as otherwise provided in this subrule, all payments shall be allocated and distributed as required by the guidelines established by the office of child support~~state court administrator~~ for that purpose.

(2) If the court determines that following the guidelines established by the office of child support~~state court administrator~~ would produce an unjust result in a particular case, the court may order that payments be made in a different manner. The order must include specific findings of fact that set forth the basis for the court's decision, and must direct the payer to designate with each payment the name of the payer and the payee, the case number, the amount, and the date of the order that allows the special payment.

(3) [Unchanged.]

~~(4) A notice of income withholding may not be used by the friend of the court or the state disbursement unit to determine the specific allocation or distribution of payments.~~

(D) Exceptions to Friend of the Court Enforcement.

The friend of the court may inactivate its case and is not required to perform activities under the Friend of the Court Act, MCL 552.501 *et seq*., and the Support and Parenting Time Enforcement Act, MCL 552.601 *et seq*. when the case is no longer eligible for federal funding because a party fails or refuses to take action to allow the friend of the court's activities to receive federal funding or because the federal child support case is closed pursuant to Title IV, Part D of the Social Security Act, 42 USC 651 *et seq*.

Staff Comment: The amendment of MCR 3.208 implements 2014 PA 378 permitting alternate procedures to set contempt proceedings to reduce the steps necessary to schedule a hearing. The amendments also clarify when the friend of the court must participate in a contempt hearing. In addition, the amendments implement 2014 PA 381 making the Office of Child Support responsible for determining allocation and distribution of child support payments, and allow the friend of the court to refrain from enforcing child support orders in situations in which it is inappropriate or unproductive for the friend of the court to continue to enforce child support orders.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted February 28, 2018, effective May 1, 2018 (File No. 2014-29)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 2.602 of the Michigan Court Rules is adopted, effective May 1, 2018.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2.602. ENTRY OF JUDGMENTS AND ORDERS.

(A)-(B) [Unchanged.]

(C) Conditional Dismissal. The court may enter a consent order for conditional dismissal under the following conditions:

(1) A consent order for conditional dismissal shall be signed and approved by all parties and shall clearly state the terms for reinstatement of the case and entry of judgment.

(2) If the breaching party defaults on the terms of the settlement agreement as provided for in the conditional dismissal order, the non-defaulting party may seek entry of an order for reinstatement of the case and entry of judgment.

(a) To obtain an order for reinstatement of the case and entry of judgment, the non-defaulting party shall file with the court an affidavit stating that the breaching party defaulted on the terms of the settlement agreement.

(b) The non-defaulting party shall serve a copy of an affidavit of non-compliance on the breaching party at its current address listed in the court records and file proof of service with the court.

(c) If the order for conditional dismissal states that judgment may be entered without notice or further process, the court shall enter the proposed judgment upon determining the conditions for entry of judgment in the conditional dismissal order are satisfied.

(d) If the order for conditional dismissal does not provide for immediate entry of judgment, the affidavit shall be accompanied by a notice to the breaching party

that an order for reinstatement and for entry of judgment is being submitted to the court for entry if no written objections to its accuracy or completeness are filed with the court clerk within 14 days after service of the notice. Unless an objection is filed within 14 days after service of the notice, an order for reinstatement of the case and entry of judgment shall be signed by the court and entered.

(i) An objection must be verified and state with specificity the reasons that an order for reinstatement of the case and entry of judgment should not enter.

(ii) If an objection is filed, the court shall set a hearing and serve notice of that hearing to all parties.

(iii) This 14-day notice provision may be waived in cases filed pursuant to MCR 4.201 if such waiver is acknowledged in writing.

(3) For the purposes of any statute of limitation, an action conditionally dismissed under this rule is deemed to have been initiated on the date the original complaint was properly filed.

(4) All parties to a conditional dismissal bear the affirmative duty to inform the court with jurisdiction over that case of any change of address until the terms of the settlement agreement have been satisfied.

(C)-(D) [Unchanged, but relettered as (D) & (E).]

Staff Comment: The amendment of MCR 2.602 provides procedural rules regarding entry of consent orders for conditional dismissal.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted February 28, 2018, effective immediately (File No. 2017-04)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Canon 4 of the Michigan Code of Judicial Conduct is adopted, effective immediately.

[Additions to the text are indicated in underlining and deleted text is shown by strike-over.]

CANON 4. A JUDGE MAY ENGAGE IN EXTRAJUDICIAL ACTIVITIES.

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law. A judge should regulate extrajudicial activities to minimize the risk of conflict with judicial duties.

A judge may engage in the following activities:

(A)-(D) [Unchanged.]

(E) Financial Activities.

(1)-(3) [Unchanged.]

(4) Neither a judge nor a family member residing in the judge's household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) A judge may accept a gift or gifts not to exceed a total value of $~~100~~375, incident to a public testimonial; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice.

(b) [Unchanged.]

(c) A judge or family member residing in the judge's household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before the judge, and~~,~~ if ~~its~~the aggregate value of gifts received by a judge or family member residing in the judge's household from any source exceeds $~~100~~375, the judge reports it in the same manner as compensation is reported in Canon 6C. For purposes of reporting gifts under this subsection, any gift with a fair market value of $150 or less need not be aggregated to determine if the $375 reporting threshold has been met.

(5)-(7) [Unchanged.]

(F)-(I) [Unchanged.]

Staff Comment: This amendment increases the acceptable value for a gift given incident to a public testimonial, and likewise increases the threshold amount for disclosure of a gift. This increase is the first revision since the $100 value threshold was adopted in 1974.

The threshold amount for reporting gifts is widely variable among the states and federal government. The disclosure threshold for reporting gifts in other states, established by statute or court rule, ranges from $50 to $500. Many states do not have a threshold amount at all; instead, such states may prohibit the acceptance of gifts from certain classes of donors, or alternatively allow judges to accept a certain class of gifts without regard to value for specific events, such as a wedding, or 25th or 50th wedding anniversary. The Court also considered the increase in the value of money since the $100 threshold was adopted. According to the American Institute for Economic Research, the value of $100 in today's economy is $495.92.

The Court used the federal disclosure rule and threshold as its model. For federal judges, the gift disclosure amount is $375, as established by the Judicial Conference. The instructions for submitting the annual disclosure report require a federal judge to:

> Report information on gifts aggregating more than $375 in value received by the filer, spouse and dependent child from any source other than a relative during the reporting period. Any gift with a fair market value of $150 or less need not be aggregated to determine if the $375 reporting threshold has been met.

Thus, similar to the federal rule, the amendment increases the disclosure threshold to $375, but requires gifts to the judge and his family members from a single source to be aggregated for purposes of reporting. Gifts with value less than $150 would not need to be included in this aggregate amount. Further, the amendment does not change the restriction that a gift may be accepted under this subsection only if the donor is not a party or other person whose interests have come or are likely to come before the judge.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted March 21, 2018, effective immediately (File No. 2017-03)—REPORTER.

On order of the Court, the following amendments are adopted, effective immediately.*

[Additions to the text are indicated in underlining and deleted text is shown by strike-over.]

RULE 2.614. STAY OF PROCEEDINGS TO ENFORCE JUDGMENT.

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

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* Reporter's note: The following amendments are of Rules 2.614, 2.622, 3.203, 3.211, 3.214, 3.301, 3.302, 3.305, 3.602, 3.616, 3.617, 3.706, 3.707, 3.708, 3.982, 5.144, 6.110, 7.107, 7.108, 7.201, 7.204, 7.205, 7.209, 7.215, 7.305, 7.306, 9.207, 9.223, and 9.224 of the Michigan Court Rules and of Rule 2.119 of the Court of Claims Local Rules.

(1) Except as provided in this rule, execution may not issue on a judgment and proceedings may not be taken for its enforcement until 21 days after a final judgment (as defined in MCR 7.202[6]) is entered in the case. If a motion for new trial, a motion 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 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.]

RULE 2.622. RECEIVERS.

(A) [Unchanged.]

(B) Selection of Receiver. If the court determines there is good cause to appoint a receiver, the court shall select the receiver in accordance with this subrule. Every receiver selected by the court must have sufficient competence, qualifications, and experience to administer the receivership estate.

(1)-(5) [Unchanged.]

(6) Except as otherwise provided by law or by subrule (B)(7), a person or entity may not serve as a receiver or in any other professional capacity representing or assisting the receiver, if such person or entity:

(a)-(g) [Unchanged.]

(h) is an "insider" as defined by MCL 566.31(hg);

(i)-(j) [Unchanged.]

(7) [Unchanged.]

(C)-(I) [Unchanged.]

RULE 3.203. SERVICE OF NOTICE AND COURT PAPERS IN DOMESTIC RELATIONS CASES.

(A)-(I) [Unchanged.]

(J) Service of Informational Pamphlet. If a child of the parties or a child born during the marriage is under the age of 18, or if a party is pregnant, or if child support or spousal support is requested, the plaintiff must serve with the complaint a copy of the friend of the court informational pamphlet required by MCL 552.505(1a)(c). The proof of service must state that service of the informational pamphlet has been made.

RULE 3.211. JUDGMENTS AND ORDERS.

(A) [Unchanged.]

(B) A judgment of divorce, separate maintenance, or annulment must include

(1) the insurance ~~and dower~~ provisions required by MCL 552.101;

(2) a determination of the rights of the parties in pension, annuity, and retirement benefits, as required by MCL 552.101(34);

(3)-(4) [Unchanged.]

(C) [Unchanged.]

(D) Uniform Support Orders

(1)-(2) [Unchanged.]

~~(3) The clerk shall charge a single judgment entry fee when a Uniform Support Order is submitted for entry along with a judgment order that incorporates it by reference.~~

(E)-(H) [Unchanged.]

RULE 3.214. ACTIONS UNDER UNIFORM ACTS.

(A) Governing Rules. Actions under the Revised Uniform Reciprocal Enforcement of Support Act (RURESA), MCL 780.151 *et seq*., the Uniform Interstate Family Support Act (UIFSA), MCL 552.2~~1~~101 *et seq*., and the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*., are governed by the rules applicable to other civil actions, except as otherwise provided by those acts and this rule.

(B) [Unchanged.]

(C) Sending Notices in UIFSA cases. The friend of the court office shall send all notices and copies of orders required to be sent by the tribunal under MCL 552.2~~1~~101 *et seq*.

(D) [Unchanged.]

RULE 3.301. EXTRAORDINARY WRITS IN GENERAL.

(A)-(F) [Unchanged.]

(G) Procedure Where Relief is Sought in Supreme Court or Court of Appeals.

(1) MCR 7.30~~6~~4 applies to original proceedings brought in the Supreme Court to obtain relief under this subchapter.

(2) [Unchanged.]

RULE 3.302. SUPERINTENDING CONTROL.

(A) [Unchanged.]

(B) Policy Concerning Use. If another adequate remedy is available to the party seeking the order, a complaint for superintending control may not be filed. See subrule (D)(2), and MCR 7.101(A)(2), and 7.306~~304~~(A).

(C)-(E) [Unchanged.]

RULE 3.305. MANDAMUS.

(A) Jurisdiction

(1) An action for mandamus against a state officer may be brought in the Court of Appeals or the Court of Claims~~circuit court~~.

(2) [Unchanged.]

(B)-(G) [Unchanged.]

RULE 3.602 ARBITRATION.

(A)-(I) [Unchanged.]

(J) Vacating Award.

(1)-(3) [Unchanged.]

(4) In vacating the award, the court may order a rehearing before a new arbitrator chosen as provided in the agreement, or, if there is no such provision, by the court. If the award is vacated on grounds stated in subrule (J)(2~~1~~)(c) or (d), the court may order a rehearing before the arbitrator who made the award. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

(5) [Unchanged.]

(K)-(N) [Unchanged.]

RULE 3.616. PROCEEDING TO DETERMINE CONTINUATION OF VOLUNTARY FOSTER CARE SERVICES.

(A)-(B) [Unchanged.]

(C) Court File. Upon the filing of a petition under subrule (E), the court shall open a file using the appropriate case classification code ~~from~~as referenced in MCR 8.117~~(A)(9)~~. The file shall be closed following the issuance of the court's determination under subrule (F).

(D)-(G) [Unchanged.]

RULE 3.617. DELAYED REGISTRATION OF ~~FOREIGN~~ BIRTH.

The entire record for delayed registration of ~~foreign~~ birth ~~pursuant to MCL 333.2830~~ is confidential. Except as otherwise ordered by the court, only the legal parent or parents and the child may gain access to the confidential file, and no information relating to a confidential record, including whether the record exists, shall be accessible to the general public.

RULE 3.706. ORDERS.

(A)-(D) [Unchanged.]

(E) Oral Notice. If oral notice of the order is made by a law enforcement officer as described in MCL 600.2950(22) or 600.2950a(22~~19~~), proof of the notification must be filed with the court by the law enforcement officer.

RULE 3.707. MODIFICATION, TERMINATION, OR EXTENSION OF ORDER.

(A) Modification or Termination.

(1) [Unchanged.]

(2) Hearing on the Motion. The court must schedule and hold a hearing on a motion to modify or terminate a personal protection order within 14 days of the filing of the motion, except that if the respondent is a person described in MCL 600.2950(2) or 600.2950a(5~~2~~), the court shall schedule the hearing on the motion within 5 days after the filing of the motion.

(3) [Unchanged.]

(B)-(D) [Unchanged.]

RULE 3.708. CONTEMPT PROCEEDINGS FOR VIOLATION OF PERSONAL PROTECTION ORDERS.

(A) In General.

(1) A personal protection order is enforceable under MCL 600.2950(23), (25), 600.2950a(23θ), (252), 764.15b, and 600.1701 *et seq*. For the purpose of this rule, "personal protection order" includes a foreign protection order enforceable in Michigan under MCL 600.2950l.

(2) [Unchanged.]

(B)-(I) [Unchanged.]

RULE 3.982. ENFORCEMENT OF MINOR PERSONAL PROTECTION ORDERS.

(A) In General. A minor personal protection order is enforceable under MCL 600.2950(22), (25), 600.2950a(2219), (252), 764.15b, and 600.1701 *et seq*. For the purpose of MCR 3.981-3.989, "minor personal protection order" includes a foreign protection order against a minor respondent enforceable in Michigan under MCL 600.29501.

(B)-(C) [Unchanged.]

RULE 5.144. ADMINISTRATIVE CLOSED FILE.

(A) Administrative Closing. The Court may administratively close a file

(1)-(2) [Unchanged.]

In a conservatorship, the court may administratively close a file only when there are insufficient assets in the estate to employ a successor or special fiduciary, or after notice and hearing upon a finding of good cause. ~~If the court administratively closes the conservatorship, the court shall provide notice to the state court administrative office of the closure.~~

(B) [Unchanged.]

RULE 6.110. THE PRELIMINARY EXAMINATION.

(A) [Unchanged.]

(B) Time of Examination; Remedy.

(1) Unless adjourned by the court, the preliminary examination must be held on the date specified by the court at the arraignment on the warrant or complaint. If the parties consent, ~~for good cause shown,~~ the court may adjourn the preliminary examination for a reasonable time. If a party objects, the court may not adjourn a preliminary examination unless it makes a finding on the record of good cause shown for the adjournment. A violation of this subrule is deemed to be harmless error unless the defendant demonstrates actual prejudice.

(2) [Unchanged.]

(C)-(I) [Unchanged.]

RULE 7.107. AUTHORITY OF TRIAL COURT OR AGENCY.

After a claim of appeal is filed or leave to appeal is granted, jurisdiction vests in the circuit court. The trial court or agency may not set aside or amend the judgment, order, or decision appealed except by circuit court order or as otherwise provided by law. In all other respects, the authority of the trial court or agency is governed by MCR 7.208(C) through (J~~I~~).

RULE 7.108. STAY OF PROCEEDINGS; BOND; REVIEW.

(A) [Unchanged.]

(B) Civil Actions.

(1) [Unchanged.]

(2) Effect of Appeal. An appeal does not stay execution unless:

(a) [Unchanged.]

(b) the trial court grants a stay with or without bond under MCR 3.604(L), MCR 7.209(E)(2~~1~~)(b), or MCL 600.2605. The stay order must conform to any condition expressly required by the statute authorizing review.

(3)-(7) [Unchanged.]

(C)-(D) [Unchanged.]

RULE 7.201. ORGANIZATION AND OPERATION OF COURT OF APPEALS.

(A) [Unchanged.]

(B) Court of Appeals Clerk; Place of Filing Papers; Fees.

(1) The court shall appoint a chief clerk who is subject to the requirements imposed on the Supreme Court clerk in MCR 7.30~~1~~9(C). The clerk's office must be located in Lansing and be operated under the court's direction. With the court's approval, the clerk may appoint assistant and deputy clerks.

(2)-(3) [Unchanged.]

(C)-(H) [Unchanged.]

RULE 7.204. FILING APPEAL OF RIGHT; APPEARANCE.

(A) Time Requirements. The time limit for an appeal of right is jurisdictional. See MCR 7.203(A). The provisions of MCR 1.108 regarding computation of time apply. For purposes of subrules (A)(1) and (A)(2), "entry" means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions.

(1) [Unchanged.]

(2) An appeal of right in a criminal case must be taken

(a)-(c) [Unchanged.]

(d) within 42 days after the entry of an order denying a motion for a new trial, for directed verdict of acquittal, or to correct an invalid sentence, if the motion was filed within the time provided in MCR 6.419(C~~B~~), 6.429(B), or 6.431(A), as the case may be.

(e) [Unchanged.]

(3) [Unchanged.]

(B)-(H) [Unchanged.]

RULE 7.205. APPLICATION FOR LEAVE TO APPEAL.

(A)-(F) [Unchanged.]

(G) Late Appeal.

(1)-(3) [Unchanged.]

(4) The limitation provided in subrule (G)(3) does not apply to an application for leave to appeal by a criminal defendant if the defendant files an application for leave to appeal within 21 days after the trial court decides a motion for a new trial, for directed verdict of acquittal, to withdraw a plea, or to correct an invalid sentence, if the motion was filed within the time provided in MCR 6.310(C), MCR 6.419(C~~B~~), MCR 6.429(B), and MCR 6.431(A), or if

[Remainder unchanged.]

(5)-(6) [Unchanged.]

(H) [Unchanged.]

RULE 7.209. BOND; STAY OF PROCEEDINGS.

(A)-(D) [Unchanged.]

(E) Stay of Proceedings by Trial Court.

(1) [Unchanged.]

(2) An appeal does not stay execution unless:

(a) Except in a domestic relations matter, the party seeking to stay a money judgment~~With respect to a money judgment, the party seeking the stay~~ files with the court a bond in compliance with MCR 3.604 ~~and~~ in an amount not less than 110% of the judgment or order being enforced, including any costs, interest, attorney fees, and sanctions assessed to the date of filing the bond, with the party in whose favor the judgment or order was entered as the obligee, by which the party promises to

(i) perform and satisfy the judgment or order stayed if it is not set aside or reversed~~;~~, and

(ii) prosecute to completion any appeal subsequently taken from the judgment or order stayed and perform and satisfy the judgment or order entered by the Court of Appeals or Supreme Court~~;~~ or

(b) ~~With respect to all other judgments, including those obtained in a domestic relations matter, the~~ The trial court grants a stay with or without bond, or with a reduced bond, as justice requires or as otherwise provided by statute (see MCL 500.3036).

~~(c) The court may order, on stipulation or otherwise, other forms of security in lieu of the bond in subsection (E)(2)(a), including but not limited to an irrevocable letter of credit.~~

(3) The court may order, on stipulation or otherwise, other forms of security in lieu of the bond in subsection (E)(2)(a), including but not limited to an irrevocable letter of credit.

(4~~3~~) When the bond is filed under~~or other security in~~ subsections~~s~~ (E)(2)(a)~~-(c) is filed~~, the judgment or order shall automatically be stayed pending entry of a final order under subsection (G).

(4)-(6) [Renumbered (5)-(7) but otherwise unchanged.]

(F)-(I) [Unchanged.]

RULE 7.215. OPINIONS, ORDERS, JUDGMENTS, AND FINAL PROCESS FOR COURT OF APPEALS.

(A)-(E) [Unchanged.]

(F) Execution and Enforcement.

(1) Routine Issuance. Unless otherwise ordered by the Court of Appeals or the Supreme Court or as otherwise provided by these rules,

(a) [Unchanged.]

(b) execution on the Court of Appeals judgment is to be obtained or enforcement proceedings had in the trial court or tribunal after the record has been returned (by the clerk under MCR 7.210[H] or by the Supreme Court clerk under MCR 7.310~~1[B]~~) with a certified copy of the court's judgment or, if a record was not transmitted to the Court of Appeals, after the time specified for return of the record had it been transmitted.

(2) [Unchanged.]

(G)-(J) [Unchanged.]

RULE 7.305. APPLICATION FOR LEAVE TO APPEAL.

(A)-(H) [Unchanged.]

(I) Stay of Proceedings. MCR 7.209 applies to appeals in the Supreme Court. When a stay bond has been filed on appeal to the Court of Appeals under MCR 7.209 or a stay has been entered or takes effect pursuant to MCR 7.209(E)(7~~4~~), it operates to stay proceedings pending disposition of the appeal in the Supreme Court unless otherwise ordered by the Supreme Court or the Court of Appeals.

RULE 7.306. ORIGINAL PROCEEDINGS.

(A)-(C) [Unchanged.]

(D) Brief by Respondent in Action Against Attorney Grievance Commission or Attorney Discipline Board. A respondent in an action against the Attorney Grievance Commission or Attorney Discipline Board may file a response brief with the clerk within 28~~1~~ days after service of the complaint, and a proof that a copy of the response brief was served on plaintiff and defendant. A response brief filed under this subsection shall conform to MCR 7.212(B) and (D).

(E)-(I) [Unchanged.]

RULE 9.207. INVESTIGATION; NOTICE.

(A)-(C) [Unchanged.]

(D) Notice to Judge.

(1)-(4) [Unchanged.]

(5) If the commission admonishes a judge pursuant to MCR 9.207(B)(4):

(a) The judge may file one signed original~~24 copies~~ of a petition for review in the Supreme Court, serve two copies on the commission, and file a proof of service with the commission within 28 days of the date of the admonishment. The petition for review, and any subsequent filings, shall be placed in a confidential file and shall not be made public unless ordered by the Court.

(b) [Unchanged.]

(c) The Supreme Court shall review the admonishment in accordance with MCR 9.225. Any opinion or order entered pursuant to a petition for review under this subrule shall be published and shall have precedential value pursuant to MCR 7.315~~7~~.

(E)-(F) [Unchanged.]

RULE 9.223. FILING AND SERVICE OF DOCUMENTS BY COMMISSION.

Within 21 days after entering an order recommending action with regard to a respondent, the commission must take the action required by subrules (A) and (B).

(A) Filings in Supreme Court. The commission must file in the Supreme Court:

(1) [Unchanged.]

(2) one~~24~~ copy~~ies~~ of the order; and

(3) [Unchanged.]

(B) [Unchanged.]

RULE 9.224. REVIEW BY SUPREME COURT.

(A) Petition by Respondent. Within 28 days after being served, a respondent may file in the Supreme Court one~~24~~ copy~~ies~~ of

(1)-(2) [Unchanged.]

The respondent must serve the commission with 3 copies of the petition and 2 copies of the appendix and file proof of that service.

(B) Brief of Commission. Within 21 days after respondent's petition is served, the commission must file

(1) one~~24~~ copy~~ies~~ of a brief supporting its finding, and

(2) [Unchanged.]

The commission may file one~~24~~ copy~~ies~~ of an appendix containing portions of the record not included in the respondent's appendix that the commission believes necessary to fairly judge the issues.

(C)-(F) [Unchanged.]

RULE 2.119.* MOTION PRACTICE.

(A) Form of Motions.

(1)-(3) [Unchanged.]

(4) All motions and responses shall include as part of the title the date of filing of the motion. (For example, DATE [mm~~dd~~/dd~~mm~~/yyyy] followed by MOTION FOR . . . or RESPONSE TO THE [mm~~dd~~/dd~~mm~~/yyyy] MOTION FOR . . .).

(5)-(6) [Unchanged.]

(B) [Unchanged.]

(C) Time for Service and Filing of Motions~~, and~~ Responses, and Reply Briefs.

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* Reporter's note: This amendment is of Rule 2.119 of the Court of Claims Local Rules.

(1)-(3) [Unchanged.]

(4) Unless a different period is set by the court for good cause, any reply brief filed pursuant to MCR 2.116(G)(1)(a)(iii) must be filed and served within 4 days after the response is filed.

(~~4~~5) If the court sets a different time for serving a motion or response its authorization must be endorsed in writing on the face of the motion or response, or made by separate order.

(~~5~~6) Unless the court sets a different time, any discovery motion must be filed at least 21 days before the discovery cut-off date.

(D)-(G) [Unchanged.]

Staff Comment: These amendments update cross-references and make other nonsubstantive revisions to clarify the rules. The amendment of MCR 6.110(B)(1) addresses an inadvertent omission from the last amendment of this rule that was intended to be shown in overstrike. Accordingly, the current rule does not match the published version. Striking the clause "for good cause shown" will provide consistency with other published versions of the rule and with the statute, MCL 766.7, which allows a magistrate to adjourn a preliminary examination with the consent of the parties without the need for good cause to be shown.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted March 28, 2018, effective May 1, 2018 (File No. 2014-36)—REPORTER.

On order of the Court, the following amendments are adopted, effective immediately. On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 6.425 of the Michigan Court Rules is adopted, effective May 1, 2018.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A)-(F) [Unchanged.]

(G) Appointment of Lawyer and Preparation of Transcript; Scope of Appellate Lawyer's Responsibilities; ~~Trial Court Responsibilities in Connection with Appeal~~.

(1) Appointment of Lawyer and Preparation of Transcript.

(a) All requests for the appointment of appellate counsel must be granted or denied on forms approved by the State Court Administrative Office and provided through the Michigan Appellate Assigned Counsel System (MAACS).~~Unless there is a postjudgment motion pending, the court must rule on a defendant's request for a lawyer within 14 days after receiving it. If there is a postjudgment motion pending, the court must rule on the request after the court's disposition of the pending motion and within 14 days after that disposition.~~

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

(c) Within 7 days after receiving a request and related information from the trial court, MAACS must

provide the court with a proposed order appointing appellate counsel or denying the appointment of appellate counsel. A proposed appointment order must name the State Appellate Defender Office (SADO) or an approved private attorney who is willing to accept an appointment for the appeal.

(~~b~~d) Within 7 days after receiving a proposed order from MAACS, the trial court must rule on the request for a lawyer. ~~In a case involving a conviction following a trial, i~~If the defendant is indigent, the court must enter an order appointing a lawyer if the request for a lawyer is filed within 42 days after entry of the judgment of sentence ~~sentencing~~ or, if applicable, within the time for filing an appeal of right. The court should liberally grant an untimely request as long as the defendant may file an application for leave to appeal. A denial of counsel must include a statement of reasons.

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

~~(c) In a case involving a conviction following a plea of guilty or nolo contendere, if the defendant is indigent, the court must enter an order appointing a lawyer if the request is filed within 42 days after sentencing.~~

(f) An appointment order must direct the court reporter to prepare and file, within the time limits specified in MCR 7.210, the full transcript of all proceedings, and provide for the payment of the reporter's fees.

(g) The trial court must serve MAACS with a copy of its order granting or denying a request for a lawyer. Unless MAACS has agreed to provide the order to any of the following, the trial court must also serve a copy of its order on the defendant, defense counsel, the prosecutor, and, if the order includes transcripts, the court reporter(s)/recorder(s). If the order is in the form of a Claim of Appeal and Appointment of Counsel, the court must also serve the Court of Appeals with a copy of the order and the judgment being appealed.

(~~d~~2) Scope of Appellate Lawyer's Responsibilities. The responsibilities of the appellate lawyer appointed to represent the defendant include representing the defendant

(~~i~~a) in available postconviction proceedings in the trial court the lawyer deems appropriate,

(~~ii~~b) in postconviction proceedings in the Court of Appeals,

(~~iii~~c) in available proceedings in the trial court the lawyer deems appropriate under MCR 7.208(B) or 7.211(C)(1), and

(~~iv~~d) as appellee in relation to any postconviction appeal taken by the prosecutor.

~~(2) Order to Prepare Transcript. The appointment order also must~~

~~(a) direct the court reporter to prepare and file, within the time limits specified in MCR 7.210,~~

~~(i) the trial or plea proceeding transcript,~~

~~(ii) the sentencing transcript, and~~

~~(iii) such transcripts of other proceedings, not previously transcribed, that the court directs or the parties request, and~~

~~(b) provide for the payment of the reporter's fees.~~

~~The court must promptly serve a copy of the order on the prosecutor, the defendant, the appointed lawyer, the court reporter, and the Michigan Appellate Assigned Counsel System. If the appointed lawyer timely requests additional transcripts, the trial court shall order such transcripts within 14 days after receiving the request.~~

~~(3) Order as Claim of Appeal; Trial Cases. In a case involving a conviction following a trial, if the defendant's request for a lawyer, timely or not, was made within the time for filing a claim of appeal, the order described in subrules (G)(1) and (2) must be entered on a form approved by the State Court Administrative Office, entitled "Claim of Appeal and Appointment of Counsel," and the court must immediately send to the Court of Appeals a copy of the order and a copy of the judgment being appealed. The court also must file in the Court of Appeals proof of having made service of the order as required in subrule (G)(2). Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204.~~

Staff Comment: The amendments of MCR 6.425(G) reflect recent changes to the appellate counsel assignment process by extending and segmenting the time frame for courts to respond to appointment requests, requiring judges to provide a statement of reason when appellate counsel is denied, encouraging courts to liberally grant untimely requests for appellate counsel in guilty plea cases, requiring the filing of all lower court transcripts as part of an order appointing counsel, and clarifying MAACS' assumption of the trial court's service obligations.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted March 28, 2018, effective May 1, 2018 (File No. 2015-26)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following addition of MCR 3.808 of the Michigan Court Rules is adopted, effective May 1, 2018.

RULE 3.808. FINALIZING ADOPTION; FINDINGS OF COURT.

Before entering a final order of adoption, the trial court shall determine that the adoptee is not the subject of any pending proceedings on rehearing or reconsideration, or on appeal from a decision to terminate parental rights. The trial court shall make the following findings on the record:

> That any appeal of the decision to terminate parental rights has reached disposition; that no appeal, application for leave to appeal, or motion for rehearing or reconsideration is pending; and that the time for all appellate proceedings in this matter has expired.

Staff Comment: The addition of MCR 3.808 is consistent with § 56 of the Michigan Adoption Code, MCL 710.56. This new rule arises out of *In re JK*, 468 Mich 202 (2003), and *In re Jackson*, 498 Mich 943 (2015), which involved cases where a final order of adoption was entered despite pending appellate proceedings involving the adoptee children. Although the Michigan Court of Appeals has adopted a policy to suppress in its register of actions and online case search tool the names of children (and parents) who are the subject of appeals from proceedings involving the termination of parental rights, this information remains open to the public. Therefore, in order to make the determination required of this new rule, a trial court may contact the clerk of the Michigan Court of Appeals, the Michigan Supreme Court, or any other court where proceedings may be pending.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted March 28, 2018, effective May 1, 2018 (File No. 2016-09)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of rules 3.804, 3.971, and 3.977 and addition of rule 3.809 of the Michigan Court Rules are adopted, effective May 1, 2018.

[Rule 3.809 is a new rule and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.804. CONSENT AND RELEASE.

(A) Contents and Execution of Consent or Release; Indian Child.

In addition to the requirements of MCL 710.29 or MCL 710.44, if a parent of an Indian child intends to voluntarily consent to adoptive placement or the termination of his or her parental rights for the express purpose of adoption pursuant to MCL 712B.13, the following requirements must be met:

(1)-(4) [Unchanged.]

(B) Hearing on Consent to Adopt.

(1)-(3) [Unchanged.]

(C) Notice of Child Support Obligation.

(1) Before executing a release, as part of the explanation of the parent's legal rights, the parent shall be informed that the obligation to support the child will continue until a court of competent jurisdiction modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated by operation of law.

(2) Before executing the consent, as part of the explanation of the parent's legal rights, the parent shall be informed that the obligation to support the child will continue until a court of competent jurisdiction modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated by operation of law.

(3) Failure to provide required notice under this subsection does not affect the obligation imposed by law or otherwise establish a remedy or cause of action on behalf of the parent.

(D~~C~~) [Relettered but otherwise unchanged.]

RULE 3.809. NOTICE FOLLOWING INVOLUNTARY TERMINATION OF PARENTAL RIGHTS.

(A) If the parental rights of a parent whose identity and whereabouts are known are involuntarily terminated, the court shall notify the parent, either orally or in a writing, that the obligation to support the child will continue until a court of competent jurisdiction modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated by operation of law.

(B) If the whereabouts of a parent are unknown, the notice required by subsection (A) may be provided in a notice of hearing provided pursuant to MCR 3.802(C).

(C) Failure to provide required notice under this subsection does not affect the obligation imposed by law or otherwise establish a remedy or cause of action on behalf of the parent.

RULE 3.971. PLEAS OF ADMISSION OR NO CONTEST.

(A) [Unchanged.]

(B) Advice of Rights and Possible Disposition. Before accepting a plea of admission or plea of no contest, the

court must advise the respondent on the record or in a writing that is made a part of the file:

(1)-(4) [Unchanged.]

(5) if parental rights are subsequently terminated, the obligation to support the child will continue until a court of competent jurisdiction modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated by operation of law. Failure to provide required notice under this subsection does not affect the obligation imposed by law or otherwise establish a remedy or cause of action on behalf of the parent.

(C) [Unchanged.]

RULE 3.977. TERMINATION OF PARENTAL RIGHTS.

(A)-(I) [Unchanged.]

(J) Respondent's Rights Following Termination.

(1) Advice. Immediately after entry of an order terminating parental rights, the court shall advise the respondent parent orally or in writing that:

(a)-(d) [Unchanged.]

(e) The respondent's obligation to support the child will continue until a court of competent jurisdiction modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated by operation of law. Failure to provide required notice under this subsection does not affect the obligation imposed by law or otherwise establish a remedy or cause of action on behalf of the parent.

(2)-(3) [Unchanged.]

(K) [Unchanged.]

Staff Comment: The amendments incorporate into both the rules concerning juvenile proceedings and adoption proceedings the requirement to notify parents that the termination of parental rights does not

automatically terminate the obligation to provide support for a child. The amendments also make clear that failure to provide the notice would not affect the parent's obligation to continue to pay child support.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted March 28, 2018, effective May 1, 2018 (File No. 2016-13)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following addition of rule 3.810 of the Michigan Court Rules is adopted, effective May 1, 2018.

RULE 3.810. TRANSCRIPTS FOR PURPOSES OF APPEAL.

In an appeal following the involuntary termination of parental rights, if the court finds that the respondent is financially unable to pay for the preparation of transcripts for appeal, the court must order transcripts prepared at public expense.

Staff comment: This new rule requires a court to provide a respondent whose rights are involuntarily terminated under the Adoption Code with transcripts for the purposes of appeal if respondent is unable to pay for their preparation, similar to the requirement in MCR 3.977(J)(3) for respondents whose rights are terminated under the Juvenile Code.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted March 28, 2018, effective May 1, 2018 (File No. 2016-23)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing

and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of MCR 2.105 of the Michigan Court Rules is adopted, effective May 1, 2018.

[Additions to the text are indicated in underlining and deleted text is shown by strike-over.]

RULE 2.105. PROCESS; MANNER OF SERVICE.

(A)-(B) [Unchanged.]

(C) Partnerships; Limited Partnerships. Service of process on a partnership or limited partnership may be made by

(1) serving a summons and a copy of the complaint on any general partner or agent for service of process; or

(2) serving a summons and a copy of the complaint on the person in charge of a partnership office or business establishment and sending a summons and a copy of the complaint by registered mail, addressed to a general partner or agent for service of process at his or her usual residence or last known address.

(D)-(K) [Unchanged.]

Staff Comment: The amendment of MCR 2.105 adds reference to service on the "agent for service of process" so that it is consistent with MCL 449.1105(a)(2).

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted March 28, 2018, effective May 1, 2018 (File No. 2017-08)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a

public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 3.977 of the Michigan Court Rules is adopted, effective May 1, 2018.

[Additions to the text are indicated in underlining and deleted text is shown by strike-over.]

RULE 3.977. TERMINATION OF PARENTAL RIGHTS.

(A)-(I) [Unchanged.]

(J) Respondent's Rights Following Termination.

(1) Advice. Immediately after entry of an order terminating parental rights, the court shall advise the respondent parent orally or in writing that:

(a) [Unchanged.]

(b) If the respondent is financially unable to provide an attorney to perfect an appeal, the court will appoint an attorney and furnish the attorney with the complete~~portions of the~~ transcript and record of all proceedings~~the attorney requires to appeal~~.

(c)-(d) [Unchanged.]

(2) [Unchanged.]

(3) Transcripts. If the court finds that the respondent is financially unable to pay for the preparation of transcripts for appeal, the court must order the complete transcripts of all proceedings prepared at public expense.

(K) [Unchanged.]

Staff Comment: The amendments of MCR 3.977(J) were submitted by the Court of Appeals, and require the production of the complete transcript in appeals from termination of parental rights proceedings when counsel is appointed by the court. The amendments codify existing practice in many courts, and the Court of Appeals believes

they promote proper consideration of appeal issues and eliminate unnecessary delays to the appellate process. Note that the proposal published for comment also contained a similar revision of MCR 6.425. That concept is included with other substantive changes as part of ADM File No. 2014-36 at MCR 6.425(G)(1)(f) and will be incorporated in the order that issues in that file.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted March 28, 2018, effective May 1, 2018 (File No. 2017-18)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration given to the comments received, the following amendment of MCR 3.903 of the Michigan Court Rules is adopted, effective May 1, 2018.

[Additions to the text are indicated in underlining and deleted text is shown by strike-over.]

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.]

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

(4)-(27) [Unchanged.]

(B)-(F) [Unchanged.]

Staff Comment: The amendment of MCR 3.903 removes the requirement that juvenile guardianship information be maintained in a nonpublic manner. This change resolves the conflict between the child protective proceeding social file (which is considered nonpublic) and the juvenile guardianship file (which is public), and makes the rule consistent with current court practices.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted March 28, 2018, effective May 1, 2018 (File No. 2017-19)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of MCR 2.410 and 2.411 and addition of MCR 3.970 of the Michigan Court Rules are adopted, effective May 1, 2018.

[Rule 3.970 is a new rule and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2.410. ALTERNATIVE DISPUTE RESOLUTION.

(A) Scope and Applicability of Rule; Definitions.

(1) [Unchanged.]

(2) For the purposes of this rule, alternative dispute resolution (ADR) means any process designed to resolve a legal dispute in the place of court adjudication, and includes settlement conferences ordered under MCR 2.401; case evaluation under MCR 2.403; mediation under MCR 2.411; domestic relations mediation under MCR 3.216; child protection mediation under

MCR 3.970; and other procedures provided by local court rule or ordered on stipulation of the parties.

(B)-(F) [Unchanged.]

RULE 2.411. MEDIATION.

(A) Scope and Applicability of Rule; Definitions.

(1) This rule applies to cases that the court refers to mediation as provided in MCR 2.410. MCR 3.216 governs mediation of domestic relations cases. MCR 3.970 governs mediation in child protective proceedings.

(2) [Unchanged.]

(B)-(G) [Unchanged.]

RULE 3.970. CHILD PROTECTION MEDIATION.

(A) Scope and Applicability of Rule; Definitions.

(1) This rule applies to the mediation of child protective proceedings.

(2) "Mediation" includes dispute resolution processes in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement. A mediator or facilitator has no authoritative decision-making power.

(B) ADR Plan. Each trial court that submits child protective proceedings to mediation processes under this rule shall either incorporate the process into its current ADR plan, or if the court does not have an approved ADR plan, adopt an ADR plan by local administrative order under MCR 2.410(B).

(C) Order for Mediation.

(1) At any stage in the proceedings, after consultation with the parties, the court may order that a case be submitted to mediation.

(2) Unless a court first conducts a hearing to determine whether mediation is appropriate, the court shall not refer a case to mediation if the parties are subject to a personal protection order or other protective order. The court may order mediation without a hearing if a protected party requests mediation.

(3) In addition to other provisions the court considers appropriate, the order shall:

(a) specify, or make provision for selection of, the mediation provider;

(b) provide time limits for initiation and completion of the mediation process.

The court shall not order a party to pay a fee for mediation services.

(4) The order may require attendance at mediation proceedings as provided in subrule (E).

(D) Objections to Mediation. A party may orally object to an order to mediate or in writing. Cases may be exempt from mediation on the basis of the following:

(1) Domestic abuse, unless attorneys for both parties will be present at the mediation session;

(2) Inability of one or both parties to negotiate for themselves at the mediation, unless attorneys for both parties will be present at the mediation session;

(3) Reason to believe that one or both parties' health or safety would be endangered by mediation;

(4) A showing that the parties have made significant efforts to resolve the issues such that mediation is likely to be unsuccessful; or

(5) For other good cause shown.

(E) Attendance at Mediation Proceedings.

(1) Attendance of Counsel. The court may direct that the attorneys representing the parties attend media-

tion proceedings. If the attorney representing a party is unable to attend, another attorney associated with the representing attorney may attend, but must be familiar with the case.

(2) Presence of Parties. The court may direct that the parties to the action and other persons:

(a) be present at the mediation proceeding or be immediately available by some other means at the time of the proceeding; and

(b) have information and authority adequate for responsible and effective participation in the proceeding for all purposes.

The court's order may specify whether the availability is to be in person or by other means.

(3) Except for legal counsel, the parties may not bring other persons to the mediation session unless permission is first obtained from the mediator, after notice to opposing counsel.

(4) Failure to appear. The failure of a party to appear in accordance with this rule may be considered a contempt of court.

(F) Selection of the Mediator.

(1) The parties may stipulate to the selection of a mediator. A mediator selected by agreement of the parties need not meet the qualifications set forth in subrule (H). The court must appoint a mediator stipulated to by the parties, provided the mediator is willing to serve within a period that would not interfere with the court's scheduling of the case. If the parties do not stipulate to a particular mediator, the court may select a Community Dispute Resolution Program (CDRP) center or other mediator who meets the requirements of subrule (H).

(2) The rule for disqualification of a mediator is the same as that provided in MCR 2.003 for the disqualification of a judge. The mediator must promptly disclose any potential basis for disqualification.

(G) Scheduling and Mediation Process.

(1) Scheduling. The order referring the case for mediation shall specify the time within which the mediation is to be completed. A copy of the order shall be sent to each party, the CDRP center or the mediator selected. Upon receipt of the court's order, the CDRP center or mediator shall promptly confer with the parties to schedule mediation in accordance with the order. The mediator may direct the parties to submit in advance, or bring to the mediation, documents or summaries providing information about the case.

(2) The mediator must make reasonable inquiry as to whether either party has a history of a coercive or violent relationship with the other party. Throughout the mediation process, the mediator must make reasonable efforts to screen for the presence of coercion or violence that would make mediation physically or emotionally unsafe for any participant or that would impede achieving a voluntary and safe resolution of issues. A reasonable inquiry includes the use of the domestic violence screening protocol for mediators provided by the State Court Administrative Office as directed by the Supreme Court.

(3) Mediation Process. The mediator shall discuss with the parties and counsel, if any, the facts and issues involved. Mediation participants may ask to meet separately with the mediator throughout the mediation process. The mediation will continue until: an agreement is reached, the mediator determines that an agreement is not likely to be reached, the end of the first mediation session, or until a time agreed to by the

parties. Additional sessions may be held as long as it appears to the mediator that the process may result in an agreement.

(4) Following their attendance at a mediation session, a party may withdraw from mediation without penalty at any time.

(5) Completion of Mediation. Within two days after the completion of the mediation process, the CDRP center or the mediator shall so advise the court, stating only: the date of completion of the process, who appeared at the mediation, whether an agreement was reached, and whether further mediation proceedings are contemplated. If an agreement was reached, the CDRP center or the mediator shall submit the agreement to the court within 14 days of the completion of mediation.

(6) Agreements reached in mediation are not binding unless the terms are incorporated in an order of the court or placed on the record and the court complies with MCR 3.971.

(7) Confidentiality. Confidentiality in the mediation process is governed by MCR 2.412. However, previously uninvestigated allegations of abuse or neglect identified during the mediation process are not confidential and may be disclosed. The mediator shall advise the parties, orally and in writing, of the rules regarding confidentiality under MCR 2.412 and MCL 722.631.

(H) Qualification of Mediators.

(1) To be eligible to serve as a mediator in child protection cases, a person must meet the following minimum qualifications:

(a) Complete a general civil or domestic relations mediation training program approved by the State

Court Administrator providing the generally accepted components of mediation skills;

(b) Have one or more of the following:

(i) Juris doctor degree, graduate degree in conflict resolution or a behavioral science, or 5 years of experience in the child protection field; or

(ii) 40 hours of mediation experience over two years, including mediation, co-mediation, observation, and role-playing in the context of mediation.

(c) Upon completion of the training required under subrule (H)(1)(a), observe two general civil or domestic relations mediation proceedings conducted by an approved mediator, and conduct one general civil or domestic relations mediation to conclusion under the supervision and observation of an approved mediator.

(d) Complete a 15-hour advanced training program on child protection mediation practice and an 8-hour training program on domestic violence screening approved by the State Court Administrator.

(2) Approved mediators are required to complete 8 hours of advanced mediation training during each 2-year period.

(3) Additional requirements may not be imposed upon mediators.

Staff Comment: The amendments of MCR 2.410 and MCR 2.411 and adoption of the new MCR 3.970 provide explicit authority for judges to order mediation in child protection proceedings.

The staff comment is not authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted April 19, 2018, effective May 1, 2018 (File No. 2016-07)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 6.310, 6.429, 6.431, 7.205, 7.211, and 7.212 of the Michigan Court Rules are adopted, effective May 1, 2018.

[Additions to the text are indicated in underlining and deleted text is shown by strike-over.]

RULE 6.310. WITHDRAWAL OR VACATION OF PLEA.

(A)-(B) [Unchanged.]

(C) Motion to Withdraw Plea After Sentence.

(1) The defendant may file a motion to withdraw the plea within 6 months after sentence or within the time provided by subrule (C)(2).

(2) If 6 months have elapsed since sentencing, the defendant may file a motion to withdraw the plea if:

(a) the defendant has filed a request for the appointment of counsel pursuant to MCR 6.425(G)(1) within the 6-month period,

(b) the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the request for counsel or substitute counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G)(2), and

(c) the motion to withdraw the plea is filed in accordance with the provisions of this subrule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing counsel or

substitute counsel, or the order denying the appointment of counsel, the 42-day period runs from the date of that order.

(3) Thereafter, the defendant may seek relief only in accordance with the procedure set forth in subchapter 6.500.

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

(D)-(E) [Unchanged.]

RULE 6.429. CORRECTION AND APPEAL OF SENTENCE.

(A) [Unchanged.]

(B) Time For Filing Motion.

(1)-(2) [Unchanged.]

(3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion to correct an invalid sentence may be filed:

(a) within 6 months of entry of the judgment of conviction and sentence., or,

(b) if 6 months have elapsed since entry of the judgment of conviction and sentence, the defendant may file a motion to correct an invalid sentence if:

(i) the defendant has filed a request for the appointment of counsel pursuant to MCR 6.425(G)(1) within the 6-month period,

(ii) The defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the request for counsel or substitute counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G)(2), and

(iii) The motion to correct invalid sentence is filed in accordance with the provisions of this subrule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing counsel or substitute counsel, or the order or denying the appointment of counsel, the 42-day period runs from the date of that order.

(4) [Unchanged.]

(C) [Unchanged.]

RULE 6.431. NEW TRIAL.

(A) Time for Making Motion.

(1)-(2) [Unchanged.]

(3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion for a new trial may be filed:

(a) within 6 months of entry of the judgment of conviction and sentence., or

(b) If 6 months have elapsed since entry of the judgment of conviction and sentence, the defendant may file a motion for new trial if:

(i) the defendant has filed a request for the appointment of counsel pursuant to MCR 6.425(G)(1) within the 6-month period,

(ii) the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the request for counsel or substitute counsel,

unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G)(2), and

(iii) the motion for a new trial is filed in accordance with the provisions of this subrule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing counsel or substitute counsel, or the order denying the appointment of counsel, the 42-day period runs from the date of that order.

(4) [Unchanged.]

(B)-(D) [Unchanged.]

RULE 7.205. APPLICATION FOR LEAVE TO APPEAL.

(A)-(F) [Unchanged.]

(G) Late Appeal.

(1)-(3) [Unchanged.]

(4) The limitation provided in subrule (G)(3) does not apply to an application for leave to appeal by a criminal defendant if the defendant files an application for leave to appeal within 21 days after the trial court decides a motion for a new trial, for directed verdict of acquittal, to withdraw a plea, or to correct an invalid sentence, if the motion was filed within the time provided in MCR 6.310(C), MCR 6.419(C), MCR 6.429(B), and MCR 6.431(A), or if

(a) [Unchanged.]

(b) the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the delayed request for counsel or for substitute counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G)(2), and

(c) the application for leave to appeal is filed in accordance with the provisions of this rule within 42

days after the filing of the transcript. If the transcript was filed before the order appointing counsel, or substitute counsel, or the order denying the appointment of counsel, the 42-day period runs from the date of that order.

A motion for rehearing or reconsideration of a motion mentioned in subrule (G)(4) does not extend the time for filing an application for leave to appeal, unless the motion for rehearing or reconsideration was itself filed within 21 days after the trial court decides the motion mentioned in subrule (G)(4), and the application for leave to appeal is filed within 21 days after the court decides the motion for rehearing or reconsideration.

A defendant who seeks to rely on one of the exceptions in subrule (G)(4) must file with the application for leave to appeal an affidavit stating the relevant docket entries, a copy of the register of actions of the lower court, tribunal, or agency, or other documentation showing that the application is filed within the time allowed.

(5)-(6) [Unchanged.]

(H) [Unchanged.]

RULE 7.211. MOTIONS IN COURT OF APPEALS.

(A)-(B) [Unchanged.]

(C) Special Motions. If the record on appeal has not been sent to the Court of Appeals, except as provided in subrule (C)(6), the party making a special motion shall request the clerk of the trial court or tribunal to send the record to the Court of Appeals. A copy of the request must be filed with the motion.

(1) Motion to Remand.

(a)-(c) [Unchanged.]

(d) If a motion to remand is granted, further proceedings in the Court of Appeals are stayed until completion of the proceedings in the trial court pursuant to the remand, unless the Court of Appeals orders otherwise. ~~Unless the Court of Appeals sets another time, the appellant's brief must be filed within 21 days after the trial court's decision or after the filing of the transcript of any hearing held, whichever is later.~~

(e) If the trial court grants the appellant relief in whole or in part,

(i) Unless the Court of Appeals orders otherwise, appellant must file the brief on appeal or notice of withdrawal of appeal within 21 days after the trial court's decision or after the filing of the transcript of any hearing held, whichever is later.

(ii) The appellee may file a cross appeal in the manner provided by MCR 7.207 within 21 days after the trial court's decision. If the appellant has withdrawn the appeal before the appellee has filed a cross appeal, the appellee may file a claim of appeal or an application for leave to appeal within the 21 day period.

(f) If the trial court denies the appellant's request for relief, appellant's brief must be filed within 21 days after the decision by the trial court, or the filing of the transcript of any trial court hearing, whichever is later.

(2)-(9) [Unchanged.]

(D)-(E) [Unchanged.]

RULE 7.212. BRIEFS.

(A) [Unchanged.]

(B) Length and Form of Briefs. Except as permitted by order of the Court of Appeals, and except as

provided in subrule (G), briefs are limited to 50 pages double-spaced, exclusive of tables, indexes, and appendixes. Quotations and footnotes may be single-spaced. At least one-inch margins must be used, and printing shall not be smaller than 12-point type. A motion for leave to file a brief in excess of the page limitations of this subrule must be filed by the due date of the brief and shall accompany the proposed briefat least 21 days before the due date of the brief. Such motions are disfavored and will be granted only for extraordinary and compelling reasons. If the motion is denied, the movant shall file a conforming brief within 21 days after the date of the order deciding the motion.

(C)-(I) [Unchanged.]

Staff Comment: The amendments, submitted by SADO, are intended to clarify practices and provide protections for criminal defendants represented by assigned appellate counsel. The amendments allow an additional 42 days to file post-judgment motions in certain circumstances, and where delay is due to the trial court, clarify in the amendment of MCR 7.205 that in certain circumstances, substitute appellate counsel may file a delayed application for leave to appeal within 42 days of appointment (even if later than six months after sentencing), add language to MCR 7.211 to guide parties and courts if relief is granted in the trial court, and change the procedure for seeking permission to file a brief longer than 50 pages in length.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted May 16, 2018, effective September 1, 2018 (File No. 2016-20)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the follow-

ing amendment of MCR 8.119 of the Michigan Court Rules is adopted, effective September 1, 2018.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 8.119. COURT RECORDS AND REPORTS; DUTIES OF CLERKS.

(A)-(H) [Unchanged.]

(I) Sealed Records.

(1)-(3) [Unchanged.]

(4) ~~For purposes of this rule, "court records" includes all documents and records of any nature that are filed with or maintained by the clerk in connection with the action. Nothing in this rule is intended to limit the court's authority to issue protective orders pursuant to MCR 2.302(C).~~ Materials that are subject to a motion to seal a record in whole or in part shall be held under seal pending the court's disposition of the motion.

(5) For purposes of this rule, "court records" includes all documents and records of any nature that are filed with or maintained by the clerk in connection with the action.

(6~~5~~) A court may not seal a court order or opinion, including an order or opinion that disposes of a motion to seal the record.

(7) [Unchanged.]

(8) Nothing in this rule is intended to limit the court's authority to issue protective orders pursuant to MCR 2.302(C) without a motion to seal or require that a protective order issued under MCR 2.302(C) be filed with the Clerk of the Supreme Court and the State Court Administrative Office. A protective order issued

under MCR 2.302(C) may authorize parties to file materials under seal in accordance with the provisions of the protective order without the necessity of filing a motion to seal under this rule.

(96) Any person may file a motion to set aside an order that disposes of a motion to seal the record, to unseal a document filed under seal pursuant to MCR 2.302(C), or an objection to entry of a proposed order. MCR 2.119 governs the proceedings on such a motion or objection. If the court denies a motion to set aside the order or enters the order after objection is filed, the moving or objecting person may file an application for leave to appeal in the same manner as a party to the action. See MCR 8.116(D).

(J)-(L) [Unchanged.]

Staff Comment: The amendment of MCR 8.119 clarifies the procedure for sealing files and better accommodates protective orders issued under MCR 2.302 by clarifying that a protective order may authorize parties to file materials without also filing a motion to seal.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted May 23, 2018, effective September 1, 2018 (File No. 2015-04)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 6.429 of the Michigan Court Rules is adopted, effective September 1, 2018.

[Additions to the text are indicated in underlining and deleted text is shown by strike-over.]

RULE 6.429. CORRECTION AND APPEAL OF SENTENCE.

(A) Authority to Modify Sentence. ~~A motion to correct an invalid sentence may be filed by either party.~~ The court may correct an invalid sentence, on its own initiative after giving the parties an opportunity to be heard, or on motion by either party. ~~b~~But the court may not modify a valid sentence after it has been imposed except as provided by law. Any correction of an invalid sentence on the court's own initiative must occur within 6 months of the entry of the judgment of conviction and sentence.

(B)-(C) [Unchanged.]

Staff Comment: This amendment provides trial courts with authority to *sua sponte* address erroneous judgments of sentence, following the Court's recent consideration of the issue in *People v Comer*, 500 Mich 278 (2017). The amendment requires any such correction initiated by the court to occur within six months after entry of the judgment of conviction and sentence.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted May 23, 2018, effective September 1, 2018 (File No. 2016-08)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 6.610 of the Michigan Court Rules is adopted, effective September 1, 2018.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.610. CRIMINAL PROCEDURE GENERALLY.

(A)-(D) [Unchanged.]

(E) Pleas of Guilty and Nolo Contendere. Before accepting a plea of guilty or nolo contendere, the court shall in all cases comply with this rule.

(1)-(3) [Unchanged.]

(4) A defendant or defendants may be informed of the trial rights listed in subrule (3)(b) as follows:

(a)-(c) [Unchanged.]

Except as provided in subrule (E)(7), if~~I~~f the court uses a writing pursuant to subrule (E)(4)(b) or (c), the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights.

(5)-(6) [Unchanged.]

(7) A plea of guilty or nolo contendere in writing is permissible without a personal appearance of the defendant and without support for a finding that defendant is guilty of the offense charged or the offense to which the defendant is pleading if

(a)-(c) [Unchanged.]

A "writing" includes digital communications, transmitted through electronic means, which are capable of being stored and printed.

(8)-(9) [Unchanged.]

(F)-(H) [Unchanged.]

Staff Comment: The amendment of MCR 6.610 eliminates an arguable conflict by exempting pleas taken under subsection (E)(7) from the requirements of subsection (E)(4), and clarifies what constitutes a "writing" by incorporating digital communications.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted May 23, 2018, effective September 1, 2018 (File Nos. 2016-19 and 2016-28)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 5.125 of the Michigan Court Rules is adopted, effective September 1, 2018.

[Additions to the text are indicated in underlining and deleted text is shown by strike-over.]

RULE 5.125. INTERESTED PERSONS DEFINED.

(A)-(B) [Unchanged.]

(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)-(21) [Unchanged.]

(22) The persons interested in an application for appointment of a guardian of an incapacitated individual by a guardian appointed in another state or in a petition for appointment of a guardian of an alleged incapacitated individual are

(a)-(d) [Unchanged.]

(e) if no spouse, adult child, or parent is living, the presumptive heirs of the individual,

(f)-(h) [Unchanged.]

(23) The persons interested in receiving a copy of the report of a guardian of a minor, or of a legally incapacitated individual, on the condition of the ward are:

(a) the ward, if 14 years of age or older;

(b) the person who has principal care and custody of the ward, ~~and~~if other than the guardian;

(c) for an adult guardianship, the spouse and adult children or, if no adult children are living, the presumptive heirs of the individual~~.~~; and

(d) for a minor guardianship, the parents of the minor or, if neither of them is living, any grandparents and the adult presumptive heirs of the minor.

(24)-(33) [Unchanged.]

(D)-(E) [Unchanged.]

Staff Comment: The amendment of MCR 5.125(C)(22) ensures that minor children of an alleged legally incapacitated person receive notice of a petition as presumptive heirs. The amendment of MCR 5.125(C)(23) was submitted by the Representative Assembly of the State Bar of Michigan, and clarifies the definition of persons interested in receiving a copy of a guardianship report for a minor, as referenced by MCL 700.5215, and expressly distinguishes between adult and minor guardianships.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted May 23, 2018, effective September 1, 2018 (File No. 2016-30)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 9.112 and 9.131 of the Michigan Court Rules are adopted, effective September 1, 2018.

[Additions to the text are indicated in underlining and deleted text is shown by strike-over.]

RULE 9.112. REQUESTS FOR INVESTIGATION.

(A)-(B) [Unchanged.]

(C) Handling by Administrator.

(1)-(2) [Unchanged.]

(3) Request for Investigation of Member or Employee of Commission or Board, or the Relative of Member or Employee of Commission or Board. Except as modified by MCR 9.131, MCR 9.104-9.130 apply to a request for investigation of an attorney who is a member of or is employed by the board or the commission, or who is a relative of a member or employee of the board or commission.

"Relative" includes spouse, child, parent, brother, sister, grandparent, grandchild, first cousin, uncle, aunt, niece, nephew, brother-in-law, sister-in-law, daughter-in-law, son-in-law, mother-in-law, and father-in-law, whether natural, adopted, step or foster. The term also includes same-sex or different-sex individuals who have a relationship of a romantic, intimate, committed, or dating nature.

(D) [Unchanged.]

RULE 9.131. INVESTIGATION OF MEMBER OR EMPLOYEE OF BOARD OR COMMISSION, OR RELATIVE OF MEMBER OR EMPLOYEE OF BOARD OR COMMISSION; INVESTIGATION OF ATTORNEY REPRESENTING RESPONDENT OR WITNESS; REPRESENTATION BY MEMBER OR EMPLOYEE OF BOARD OR COMMISSION.

(A) Investigation of Commission Member or Employee, or Relative of Member or Employee of Commission. If the request is for investigation of an attorney who is a member or employee of the commission, or a relative of a member or employee of the commission, the following provisions apply:

(1)-(6) [Unchanged.]

If the request is for investigation of the administrator, the term "administrator" in this rule means a member of the commission or some other employee of the commission designated by the chairperson.

"Relative" includes spouse, child, parent, brother, sister, grandparent, grandchild, first cousin, uncle, aunt, niece, nephew, brother-in-law, sister-in-law, daughter-in-law, son-in-law, mother-in-law, and father-in-law, whether natural, adopted, step or foster. The term also includes same-sex or different-sex individuals who have a relationship of a romantic, intimate, committed, or dating nature.

(B) Investigation of Board Member or Employee or Relative of Board Member or Employee. Before the filing of a formal complaint, the procedures regarding a request for investigation of a member or employee of the board or relative of a member or employee of the board, are the same as in other cases. Thereafter, the following provisions apply:

(1)-(4) [Unchanged.]

"Relative" includes spouse, child, parent, brother, sister, grandparent, grandchild, first cousin, uncle, aunt, niece, nephew, brother-in-law, sister-in-law, daughter-in-law, son-in-law, mother-in-law, and father-in-law, whether natural, adopted, step or foster. The term also includes same-sex or different-sex individuals who have a relationship of a romantic, intimate, committed, or dating nature.

(C)-(D) [Unchanged.]

Staff Comment: The amendments of MCR 9.112 and MCR 9.131 provide that relatives of AGC or ADB members or employees are subject to the same procedure for review of allegations of misconduct as the Board or Commission member or employee. This change comports with recent Supreme Court practice. These amendments are intended to address any perceived conflict of interest that may exist if the procedures in MCR 9.112 were to be used to review a request for investigation

of the relative of a member or employee of the Attorney Grievance Commission or Attorney Discipline Board.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted May 23, 2018, effective September 1, 2018 (File No. 2016-31)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 1.16 of the Michigan Rules of Professional Conduct is adopted, effective September 1, 2018.

[Additions to the text are indicated in underlining and deleted text is shown by strike-over.]

RULE 1.16. DECLINING OR TERMINATING REPRESENTATION.

(a) [Unchanged.]

(b) Except as stated in paragraph (c), <u>after informing the client that the lawyer cannot do so without permission from the tribunal for the pending case,</u> a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1)-(6) [Unchanged.]

(c)-(d) [Unchanged.]

Comment: [Unchanged.]

Staff Comment: The amendment of MRPC 1.16 addresses the concern raised during the Court's consideration of *People v Townsend*, Docket No. 153153, to ensure that criminal defendants are made aware of the fact that an attorney cannot withdraw without the court's permission.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted May 23, 2018, effective September 1, 2018 (File No. 2016-42)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 6.310, 6.429, and 6.431 of the Michigan Court Rules are adopted, effective September 1, 2018.

[Additions to the text are indicated in underlining and deleted text is shown by strike-over.]

RULE 6.310. WITHDRAWAL OR VACATION OF PLEA.

(A)-(B) [Unchanged.]

(C) Motion to Withdraw Plea After Sentence.

(1)-(4) [Unchanged.]

(5) If a motion to withdraw plea is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the motion as a pro se party, the motion shall be deemed presented for filing on the date of deposit of the motion in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement filed with the motion, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to cases in which a plea was accepted on or after the effective date of this amendment. This excep-

tion also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to withdraw a plea in a Michigan court.

(D)-(E) [Unchanged.]

RULE 6.429. CORRECTION AND APPEAL OF SENTENCE.

(A) [Unchanged.]

(B) Time For Filing Motion.

(1)-(4) [Unchanged.]

(5) If a motion to correct an invalid sentence is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the motion as a pro se party, the motion shall be deemed presented for filing on the date of deposit of the motion in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement filed with the motion, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to cases in which a judgment of conviction and sentence is entered on or after the effective date of this amendment. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to correct an invalid sentence in a Michigan court.

(C) [Unchanged.]

RULE 6.431. NEW TRIAL.

(A) Time for Making Motion.

(1)-(4) [Unchanged.]

(5) If a motion for new trial is received by the court after the expiration of the periods set forth above, and

if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the motion as a pro se party, the motion shall be deemed presented for filing on the date of deposit of the motion in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement filed with the motion, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to cases in which the trial court rendered its decision on or after the effective date of this amendment. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks a new trial in a Michigan court.

(B)-(D) [Unchanged.]

Staff comment: The amendments of MCR 6.310, 6.429, and 6.431 establish a "prison-mailbox" rule for post-sentencing motions to withdraw plea, motions to correct an invalid sentence, and motions for new trial, filed by *in pro per* defendants in the custody of the Department of Corrections.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted May 23, 2018, effective September 1, 2018 (File No. 2016-45)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 9.122 of the Michigan Court Rules is adopted, effective September 1, 2018.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 9.122. REVIEW BY SUPREME COURT.

(A) Kinds Available; Time for Filing.

(1) [Unchanged.]

(2) If a request for investigation has been dismissed under MCR 9.112(C)(1)(a) or 9.114(A), a party aggrieved by the dismissal may file a complaint in the Supreme Court under MCR 7.306 within 182 days after the date of the letter notifying the party of the dismissal.

(B)-(E) [Unchanged.]

Staff comment: The amendment of MCR 9.122 establishes a 182-day time period within which a grievant may file a complaint in the Supreme Court after the Attorney Grievance Commission has dismissed a request for investigation.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted May 23, 2018, effective September 1, 2018 (File No. 2016-49)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following addition of Rule 1.18 and amendment of Rule 7.3 of the Michigan Rules of Professional Conduct are adopted, effective September 1, 2018.

[Rule 1.18 is a new rule and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.18. DUTIES TO PROSPECTIVE CLIENT.

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Comments: Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from represent-

ing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(l), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

RULE 7.3. SOLICITATION~~DIRECT CONTACT WITH PROSPECTIVE CLIENTS~~.

(a) A lawyer shall not solicit professional employment from a person~~prospective client~~ with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed

generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful, nor does the term "solicit" include "sending truthful and nondeceptive letters to potential clients known to face particular legal problems" as elucidated in *Shapero v Kentucky Bar Ass'n*, 486 US 466, 468; 108 S Ct 1916; 100 L Ed 2d 475 (1988).

(b) A lawyer shall not solicit professional employment from a personprospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:

(1) the personprospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

Comments: There is a potential for abuse inherent in direct contact by a lawyer with a personprospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject athe laypersonto the private importuning of the trained advocate in a direct interpersonal encounter. A personThe prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to evaluate fully all available alternatives with reasoned judgment and appropriate self-interest in the face of athe lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

However, the United States Supreme Court has modified the traditional ban on written solicitation.

Shapero v Kentucky Bar Ass'n, 486 US 466; 108 S Ct 1916; 100 L Ed 2d 475 (1988). Paragraph (a) of this rule is therefore modified to the extent required by the Shapero decision.

The potential for abuse inherent in direct solicitation ~~of prospective clients~~ justifies its partial prohibition, particularly since lawyer advertising and the communication permitted under these rules are alternative means of communicating necessary information to those who may be in need of legal services.

Advertising and permissible communication make it possible for a person~~prospective client~~ to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting a person~~the prospective client~~ to impermissible persuasion that may overwhelm a person's~~the client's~~ judgment.

The use of general advertising and communications permitted under *Shapero* ~~to transmit information from lawyer to prospective client~~, rather than impermissible direct contact, will help to assure that the information flows cleanly as well as freely. Advertising is out in public view, thus subject to scrutiny by those who know the lawyer. The contents of advertisements and communications permitted under Rule 7.2 are permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false or misleading communications, in violation of Rule 7.1. The contents of some impermissible direct conversations ~~between a lawyer and a prospective client~~ can be disputed and are not subject to third-party scrutiny. Consequently they are much more likely to approach (and occasionally cross)

the dividing line between accurate representations and those that are false and misleading.

There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior family or professional relationship or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Consequently, the general prohibition in Rule 7.3(a) is not applicable in those situations.

This rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for its members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of, and detail concerning, the plan or arrangement that the lawyer or the lawyer's firm is willing to offer. This form of communication is not directed to a specific person~~prospective client~~ known to need legal services related to a particular matter. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become ~~prospective~~ clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under these rules.

Staff Comment: The addition of new rule MRPC 1.18 and amendment of MRPC 7.3 clarifies the ethical duties that lawyers owe to prospective clients and creates consistency in the use of the term "prospective client." This proposal was submitted to the Court by the Representative Assembly of the State Bar of Michigan.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted May 23, 2018, effective September 1, 2018 (File No. 2017-10)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, Rule 6.417 of the Michigan Court Rules is adopted, effective September 1, 2018.

RULE 6.417. MISTRIAL.

Before ordering a mistrial, the court must, on the record, give each defendant and the prosecutor an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives.

Staff Comment: This new rule, based on FR Crim P 26.3, requires a trial court to provide parties an opportunity to comment on a proposed order of mistrial, to state their consent or objection, or suggest alternatives. The rule was pursued following the Court's consideration of *People v Howard*, Docket No. 153651.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted May 30, 2018, effective September 1, 2018 (File No. 2002-37)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendments of Rules 1.109, 2.107, 2.113, 2.114, 3.206, 3.901, 3.931, 3.961, 4.302, 5.113, 5.114, 6.001, 6.101, 8.117, and 8.119 of the Michigan Court Rules are adopted, effective September 1, 2018.

[Additions to the text are indicated in underlining and deleted text is shown by strike-over.]

RULE 1.109. COURT RECORDS DEFINED; DOCUMENT DEFINED; FILING STANDARDS; SIGNATURES; ELECTRONIC FILING AND SERVICE;~~AND~~ ACCESS.

(A) Court Records Defined.

(1) Court records are defined by MCR 8.119 and this subrule. Court records are recorded information of any kind that has been created by the court or filed with the court in accordance with Michigan Court Rules. Court records may be created using any means and may be maintained in any medium authorized by these court rules provided those records comply with other provisions of law and these court rules.

(a) [Unchanged.]

(b) For purposes of this subrule:

(i)-(ii) [Unchanged.]

(iii) Data refers to any information entered in the case management system that is not ordinarily reduced to a document~~,~~ but that is still recorded information, and any data entered into or created by the statewide electronic-filing system.

(iv) [Unchanged.]

(2) [Unchanged.]

(B) Document Defined. A document means a record produced on paper or a digital image of a record originally produced on paper or originally created by an approved electronic means, the output of which is readable by sight and can be printed to 8½ x 11 inch paper without manipulation.

(C) Filing With Court Defined. Pleadings and other documents and materials filed with the court as required by these court rules must be filed with the clerk of the court in accordance with MCR 1.109(D), except that the judge to whom the case is assigned may accept

materials for filing when circumstances warrant. A judge who does so shall note the filing date on the materials and immediately transmit them to the clerk. It is the responsibility of the party who presented the materials to the judge to confirm that they have been filed with the clerk. If the clerk records the receipt of materials on a date other than the filing date, the clerk shall record the filing date in the case history.

(D~~C~~) Filing Standards.

(1) Form and Captions of Documents.

(a~~1~~) All ~~pleadings and other~~ documents prepared for filing in the courts of this state and all documents prepared by the court for placement in a case file must be legible and in the English language, comply with standards established by the State Court Administrative Office~~MCR 8.119(C),~~ and be ~~filed~~ on good quality 8½ by 11 inch paper or transmitted through an approved electronic means ~~or created electronically by the court~~ and maintained as~~in~~ a digital image. The print must be no smaller than 10 characters per inch (nonproportional) or 12-point (proportional), except with regard to forms approved by the State Court Administrative Office. Transcripts filed with the court must contain only a single transcript page per document page, not multiple transcript pages combined on a single document page.

(b) The first part of every document must contain a caption stating:

(i) the name of the court;

(ii) the names of the parties or the title of the action or proceeding, subject to (c);

(iii) the case number, including a prefix of the year filed and a two-letter suffix for the case-type code from

a list provided by the State Court Administrator pursuant to MCR 8.117, according to the principal subject matter of the proceeding;

(iv) the identification of the document;

(v) the name, business address, telephone number, and state bar number of each attorney appearing in the case; and

(vi) the name, an address, and telephone number of each party appearing without an attorney.

(c) In a civil action initiating document, the title of the action must include the names of all the parties, with the plaintiff's name placed first. In subsequent documents, it is sufficient to state the name of the first party on each side with an appropriate indication of other parties, such as "et al."

(d) In a case filed under the juvenile code, the caption must also contain a petition number, where appropriate.

(e) If an action has been assigned to a particular judge in a multi-judge court, the name of that judge must be included in the caption of a document later filed with the court.

(f) An affidavit must be verified by oath or affirmation.

(g) Pursuant to Administrative Order No. 2006-2, a filer is prohibited from filing a document that contains another person's social security number except when the number is required or allowed by statute, court rule, court order, or for purposes of collection activity when it is required for identification.

(2) Case Initiation Information. A party filing a case initiating document and a party filing any response or answer to a case initiating document shall provide specified case information in the form and manner

established by the State Court Administrative Office and as specified in other applicable rules. At a minimum, specified case information shall include the name, an address for service, an e-mail address, and a telephone number of every party, and:

(a) in a civil action, either of the following statements:

(i) There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint, or

(ii) A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in [this court]/ [_____ Court], where it was given case number _____ and was assigned to Judge _____. The action [remains]/[is no longer] pending.

(b) in proceedings governed by chapters 3.200 and 3.900, except for outgoing requests to other states and incoming registration actions filed under the Revised Uniform Reciprocal Enforcement of Support Act, MCL 780.151 *et seq*. and the Uniform Interstate Family Support Act, MCL 552.2101 *et seq*., either of the following statements, if known:

(i) There are no pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person[s] who [is/are] the subject of the complaint or petition, or

(ii) There is one or more pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person[s] who [is/are] the subject of the complaint or petition. Attached is a completed case inventory listing those cases.

(3) Verification. Except when otherwise specifically provided by rule or statute, a document need not be verified or accompanied by an affidavit. If a document is required or permitted to be verified, it may be verified by

(a) oath or affirmation of the party or of someone having knowledge of the facts stated; or

(b) except as to an affidavit, including the following signed and dated declaration:

"I declare under the penalties of perjury that this _____ has been examined by me and that its contents are true to the best of my information, knowledge, and belief." Any requirement of law that a document filed with the probate court must be sworn may be also met by this declaration.

In addition to the sanctions provided by subrule (E), a person who knowingly makes a false declaration under this subrule may be found in contempt of court.

(42) All other materials submitted for filing shall be prepared in accordance with this subrule and standards established by the ~~s~~State ~~c~~Court ~~a~~Administrative ~~o~~Office. An attachment or discovery material that is submitted for filing shall be made part of the public case file unless otherwise confidential.

(53) Except where electronic filing is implemented, ~~A~~all original documents filed on paper may be reproduced and maintained by the court as a digital image in place of the paper original in accordance with standards ~~and guidelines~~ established by the ~~s~~State ~~c~~Court ~~a~~Administrative ~~o~~Office. Any document reproduced under this subrule replaces the paper as the official record.

(64) A clerk of the court may reject nonconforming documents as prescribed by MCR 8.119.

(7) Electronic filing and electronic service of documents is governed by subrule (G) and the policies and standards of the State Court Administrative Office.

(8) Filing Documents Under Seal. Public documents may not be filed under seal except when the court has previously entered an order in the case under MCR 2.302(C). However, a document may be made nonpublic temporarily before an order is entered as follows:

(a) A filer may request that a public document be made nonpublic temporarily when filing a motion to seal a document under MCR 8.119(I). As part of the filing, the filer shall provide a proposed order granting the motion to seal and shall identify each document that is to be sealed under the order. The filer shall bear the burden of establishing good cause for sealing the document.

(b) Pending the court's order, the filer shall serve on all the parties:

(i) copies of the motion to seal and the request to make each document nonpublic temporarily,

(ii) each document to be sealed, and

(iii) the proposed order.

(c) The clerk of the court shall ensure that the documents identified in the motion are made nonpublic pending entry of the order.

(d) Before entering an order sealing a document under this rule, the court shall comply with MCR 8.119(I). On entry of the order on the motion, the clerk shall seal only those documents stated in the court's order and shall remove the nonpublic status of any of the documents that were not stated in the order.

(E~~D~~) Signatures.

(1) [Unchanged.]

(2) Requirement. Every document filed shall be signed by the person filing it or by at least one attorney of record. A party who is not represented by an attorney must sign the document. In probate proceedings the following also applies:

(a) When a person is represented by an attorney, the signature of the attorney is required on any paper filed in a form approved by the State Court Administrator only if the form includes a place for a signature.

(b) An application, petition, or other paper may be signed by the attorney for the petitioner, except that an inventory, account, acceptance of appointment, and sworn closing statement must be signed by the fiduciary or trustee. A receipt for assets must be signed by the person entitled to the assets.

(3) Failure to Sign. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party.

(4) An electronic signature is acceptable in accordance with this subrule.

(a~~2~~) An electronic signature means an electronic sound, symbol, or process, attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record. The following form is acceptable: /s/ *John L. Smith*.

~~(3) If a law or court rule requires a signature to be notarized or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law or court rule, is attached to or logically associated with the signature.~~

(b~~4~~) Retention of a signature electronically affixed to a document that will be retained by the court in

electronic format must not be dependent upon the mechanism that was used to affix that signature.

(5) Effect of Signature. The signature of a person filing a document, whether or not represented by an attorney, constitutes a certification by the signer that:

(a) he or she has read the document;

(b) 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

(c) 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.

(6) 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.

(7) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

(F~~E~~) Requests for access to public court records shall be granted in accordance with MCR 8.119(H).

(G) Electronic Filing and Service.

(1) Definitions. For purposes of this subrule:

(a) "Authorized user" means a user of the e-filing system who is registered to file, serve, and receive documents and related data through approved electronic means. A court may revoke user authorization for good cause as determined by the court, including but not limited to a security breach.

(b) "Electronic filing" or "e-filing" means the electronic transmission of data and documents to the court through the electronic-filing system.

(c) "Electronic-filing system" means a system provided by the State Court Administrative Office that permits electronic transmission of data and documents.

(d) "Electronic notification" means the electronic transmission of information from the court to authorized users through the electronic-filing system. This does not apply to service of documents. See subrule (f).

(e) "Electronic service" or "e-service" means the electronic service of information by means of the electronic-filing system under this rule. It does not include service by e-mail under MCR 2.107(C)(4).

(f) "Notice of electronic filing or service" means a notice automatically generated by the e-filing system at the time a document is filed or served.

(2) Electronic-Filing and Electronic-Service Standards. Courts shall implement electronic filing and electronic service capabilities in accordance with this rule and shall comply with the standards established by the State Court Administrative Office. Confidential and nonpublic information must be electronically filed or electronically served in compliance with these standards to ensure secure transmission of the information.

(3) Scope and Applicability.

(a) A court shall:

(i) accept electronic filing and permit electronic service of documents;

(ii) comply with the electronic-filing guidelines and plans approved by the State Court Administrative Office; and

(iii) maintain electronic documents in accordance with the standards established by the State Court Administrative Office.

(b) A court may allow documents, including but not limited to materials related to case evaluations or inventory information for decedent estates, to be transmitted to the court for purposes other than filing in a case file.

(c) Non-Electronic Materials. Courts must accommodate the filing and serving of materials that cannot be filed or served electronically.

(d) Converting Paper Documents. The clerk of the court shall convert to electronic format any document filed on paper.

(e) A court may electronically serve notices, orders, opinions, and other documents by means of the electronic-filing system.

(4) Official Court Record. The electronic version of any document filed with or generated by the court under this rule and any case initiation data transmitted in accordance with subrule (D)(2) is an official court record.

(5) Electronic-Filing Process.

(a) General Provisions.

(i) Specified case information, including e-mail addresses for achieving electronic service, shall be provided electronically by the authorized user in the form and manner established by the State Court Administrative Office pursuant to subrule (D)(2).

(ii) The authorized user has the responsibility of ensuring that a filing has been received by the electronic-filing system. If the authorized user discovers that the version of the document available for viewing through the e-filing system does not depict the document as submitted, the authorized user shall notify the clerk of the court immediately and resubmit the filing if necessary. In the event of a controversy between the clerk of the court and the authorized user, the authorized user may file a motion with the court under subrule (G)(7).

(iii) If the clerk of the court rejects a submitted document pursuant to MCR 8.119(C), the clerk shall notify the authorized user of the rejection and the reason for the rejection. A rejected document shall not become part of the official court record and the rejection shall be recorded in an electronic-filing transaction from the court to the authorized user in accordance with subrule (c).

(b) Time and Effect of Electronic Filing. A document submitted electronically is deemed filed with the court when the transmission to the electronic-filing system is completed and the required filing fees have been paid or waived. If a document is submitted with a request to waive the filing fees, the document is deemed filed on the date the document was submitted to the court. A transmission is completed when the transaction is recorded as prescribed in subrule (c). Regardless of the date a filing is accepted by the clerk of the court, the date of filing is the date submitted. Electronic filing is not restricted by the operating hours of a court and any document submitted at or before 11:59 p.m. of a business day is deemed filed on that business day. Any document submitted on a weekend or court holiday is deemed filed on the next business day.

(c) Electronic-Filing Transaction. On receipt of a submission or on rejection of a submission for nonpayment, the electronic-filing system shall record the filing transaction and send a notice of receipt of the submission and payment or rejection to the authorized user. When the filing transaction is date and time stamped, the electronic-filing system shall record the filing transaction and send a notice of electronic-filing to the authorized user. If the filing is rejected, the electronic-filing system shall record the rejection and send a notice of the rejection to the authorized user. The system shall maintain for every court a record of each submission, payment, filing, and rejection transaction in accordance with the records retention and disposal schedules and standards established by the State Court Administrative Office. A notice of electronic filing shall include the date and time of the transaction, the name of the authorized user filing the document(s), the type of document, the name of the authorized user receiving the notice, and a hyperlink to the filed or rejected document(s).

(d) Documents Under Seal. Except for documents filed pursuant to a protective order issued under MCR 2.302(C), a party seeking to file a document under seal must comply with subrule (D)(8).

(6) Electronic-Service Process.

(a) General Provisions.

(i) Service of process of case initiating documents shall be made in accordance with the rules and laws required for the particular case type.

(ii) Service of process of all other documents electronically filed shall be accomplished electronically among authorized users through the electronic-filing system unless one or more parties have been exempted from electronic filing, or a party has not filed a re-

sponse or answer or has not registered with the electronic-filing system and that party's e-mail address is unknown. In those circumstances, service shall be made on that party by any other method required by Michigan Court Rules.

(iii) Delivery of documents through the electronic-filing system in conformity with these rules is valid and effective personal service and is proof of service under Michigan Court Rules.

(iv) Except for service of process of initiating documents and as otherwise directed by the court or court rule, service may be performed simultaneously with filing.

(v) When a court rule permits service by mail, service may be accomplished electronically under this subrule.

(b) Time and Effect. A document served electronically through the electronic-filing system in conformity with all applicable requirements of this rule is considered served when the transmission to the recipient's e-mail address is completed. A transmission is completed when the transaction is recorded as prescribed in subrule (c).

(c) Electronic-Service Transaction. On transmission of a document, the electronic-filing system shall record the service transaction. The system shall maintain for every court a record of each service transaction in accordance with the state-approved records retention and disposal schedules and standards established by the State Court Administrative Office.

(7) Transmission Failures.

(a) In the event the electronic-filing system fails to transmit a document submitted for filing, the authorized user may file a motion requesting that the court

enter an order permitting the document to be deemed filed on the date it was first attempted to be sent electronically. The authorized user must prove to the court's satisfaction that:

(i) the filing was attempted at the time asserted by the authorized user;

(ii) the electronic-filing system failed to transmit the electronic document; and

(iii) the transmission failure was not caused, in whole or in part, by any action or inaction of the authorized user. A transmission failure caused by a problem with a filer's telephone line, ISP, hardware, or software shall be attributed to the filer.

(b) Scheduled system outages, such as for system maintenance, shall be posted on the MiFILE website.

(c) Notice shall be provided on the MiFILE website and/or the One Court of Justice website if the electronic-filing system becomes unavailable for an extended or indefinite period. The notice shall indicate that filers are responsible for filing documents on paper and serving paper in another manner required by Michigan Court Rules in order to meet any deadlines imposed by statute or court rule.

RULE 2.107. SERVICE AND FILING OF PLEADINGS AND OTHER DOCUMENTS~~PAPERS~~.

(A)-(C) [Unchanged.]

(D) Proof of Service. Except as otherwise provided by MCR 2.104, 2.105, or 2.106, proof of service of documents~~papers~~ required or permitted to be served may be by written acknowledgment of service, or ~~affidavit of the person making the service,~~ a written statement by the individual who served the documents~~regarding the service~~ verified under MCR 1.109(D)(3)~~2.114(B), or other proof satisfactory to the court~~. The proof of

service may be included at the end of the documentpaper as filed. Proof of service must be filed promptly and at least at or before a hearing to which the documentpaper relates.

(E)-(F) [Unchanged.]

(G) Filing With Court Defined. Pleadings and other materials filed with the court as required by these rules must be filed with the clerk of the court in accordance with standards prescribed by MCR 1.109(C), except that the judge to whom the case is assigned may accept materials for filing when circumstances warrant. A judge who does so shall note the filing date on the materials and immediately transmit them to the clerk. It is the responsibility of the party who presented the materials to confirm that they have been filed with the clerk. If the clerk records the receipt of materials on a date other than the filing date, the clerk shall record the filing date on the register of actions.

RULE 2.113. FORM, CAPTIONING, SIGNING, AND VERIFYING OF DOCUMENTSPLEADINGS AND OTHER PAPERS.

(A) Applicability. The rules on the form, captioning, signing, and verifying of pleadings apply to all motions, affidavits, and other papersdocuments are provided for by these rulesprescribed in MCR 1.109(D). However, an affidavit must be verified by oath or affirmation.

(B) Preparation. Every pleading must be legibly printed in the English language and in compliance with MCR 1.109.

(C) Captions.

(1) The first part of every pleading must contain a caption stating

(a) the name of the court;

~~(b) the names of the parties or the title of the action, subject to subrule (D);~~

~~(c) the case number, including a prefix of the year filed and a two-letter suffix for the case-type code form a list provided by the State Court Administrator pursuant to MCR 8.117 according to the principal subject matter of the proceeding;~~

~~(d) the identification of the pleading (see MCR 2.110[A]);~~

~~(e) the name, business address, telephone number, and state bar number of the pleading attorney;~~

~~(f) the name, address, and telephone number of a pleading party appearing without an attorney; and~~

~~(g) the name and state bar number of each other attorney who has appeared in the action.~~

~~(2) The caption of a complaint must also contain either (a) or (b) as a statement of the attorney for the plaintiff, or of a plaintiff appearing without an attorney.~~

~~(a) There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint.~~

~~(b) A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in [this court]/ [_____ Court], where it was given docket number _____ and was assigned to Judge _____. The action [remains]/[is no longer] pending.~~

~~(3) If an action has been assigned to a particular judge in a multi-judge court, the name of that judge must be included in the caption of a pleading later filed with the court.~~

~~(D) Names of Parties.~~

~~(1) In a complaint, the title of the action must include the names of all the parties, with the plaintiff's name placed first.~~

~~(2) In other pleadings, it is sufficient to state the name of the first party on each side with an appropriate indication of other parties, such as "et al."~~

(B~~E~~)-(D~~G~~) [Relettered but otherwise unchanged.]

~~RULE 2.114. SIGNATURES OF ATTORNEYS AND PARTIES; VERIFICATION; EFFECT; SANCTIONS.~~

~~(A) Applicability. This rule applies to all pleadings, motions, affidavits, and other papers provided for by these rules. See MCR 2.113(A). In this rule, the term "document" refers to all such papers.~~

~~(B) Verification.~~

~~(1) Except when otherwise specifically provided by rule or statute, a document need not be verified or accompanied by an affidavit.~~

~~(2) If a document is required or permitted to be verified, it may be verified by~~

~~(a) oath or affirmation of the party or of someone having knowledge of the facts stated; or~~

~~(b) except as to an affidavit, including the following signed and dated declaration: "I declare that the statements above are true to the best of my information, knowledge, and belief."~~

~~In addition to the sanctions provided by subrule (E), a person who knowingly makes a false declaration under subrule (B)(2)(b) may be found in contempt of court.~~

~~(C) Signature.~~

~~(1) Requirement. Every document of a party represented by an attorney shall be signed by at least one~~

~~attorney of record. A party who is not represented by an attorney must sign the document.~~

~~(2) Failure to Sign. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party.~~

~~(3) An electronic signature is acceptable provided it complies with MCR 1.109(D).~~

~~(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~~

~~(1) he or she has read the document;~~

~~(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.~~

~~(F) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.~~

RULE 3.206. INITIATING A CASE~~PLEADING~~.

(A) Information in Case Initiating Document~~Complaint~~.

(1) The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D).

(2~~1~~) Except for matters considered confidential by statute or court rule, in all domestic relations actions, the complaint or other case initiating document must state

(a) [Unchanged.]

(b) the residence information required by statute; and

~~(c) the complete names of all parties; and~~

(c~~d~~) the complete names ~~and dates of birth~~ of any minors involved in the action, including all minor children of the parties and all minor children born during the marriage, and for complaints for divorce, the ages of all children born of the marriage.

~~(2) In a case that involves a minor, or if child support is requested, the complaint also must state whether any Michigan court has prior continuing jurisdiction of the minor. If so, the complaint must specify the court and the file number.~~

~~(3) In a case in which the custody of a minor is to be determined, the complaint or an affidavit attached to the complaint also must state the information required by MCL 722.1209.~~

~~(4) The caption of the complaint must also contain either (a) or (b) as a statement of the attorney for the plaintiff or petitioner, or of a plaintiff or petitioner appearing without an attorney:~~

~~(a) There is no other pending or resolved action within the jurisdiction of the family division of the~~

~~circuit court involving the family or family members of the person[s] who [is/are] the subject of the complaint or petition.~~

~~(b) An action within the jurisdiction of the family division of the circuit court involving the family or family members of the person[s] who [is/are] the subject of the complaint or petition has been previously filed in [this court]/[_____Court], where it was given docket number _____ and was assigned to Judge _____. The action [remains]/[is no longer] pending.~~

(3) When any pending or resolved family division case exists that involves family members of the person(s) named in the case initiation document filed under subrule (2), the filing party must attach a completed case inventory listing those cases, if known. The case inventory must be on a form approved by the State Court Administrative Office. This does not apply to outgoing requests to other states and incoming registration actions filed under the Revised Uniform Reciprocal Enforcement of Support Act, MCL 780.151 *et seq*., and the Uniform Interstate Family Support Act, MCL 552.2101 *et seq*.

(4~~5~~)[Renumbered but otherwise unchanged.]

(5~~6~~) [Renumbered but otherwise unchanged.]

(6~~7~~) [Renumbered but otherwise unchanged.]

(B) In a case in which the custody or parenting time of a minor is to be determined or modified, the filing party shall file a Uniform Child Custody Jurisdiction Enforcement Act Affidavit on a form approved by the State Court Administrative Office, as required by MCL 722.1209(1).

(C~~B~~) [Relettered but otherwise unchanged.]

(D~~C~~) [Relettered but otherwise unchanged.]

RULE 3.901. APPLICABILITY OF RULES.

(A) Scope.

(1) The rules in this subchapter, in subchapter 1.100, ~~in MCR 5.113,~~ and in subchapter 8.100 govern practice and procedure in the family division of the circuit court in all cases filed under the Juvenile Code.

(2)-(3) [Unchanged.]

(B) [Unchanged.]

RULE 3.931. INITIATING DELINQUENCY PROCEEDINGS.

(A) Commencement of Proceeding. Any request for court action against a juvenile must be by written petition. The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D). When any pending or resolved family division case exists that involves family members of the person(s) named in the petition filed under subrule (B), the petitioner must attach to the petition a completed case inventory listing those cases, if known. The case inventory must be on a form approved by the State Court Administrative Office.

(B) Content of Petition. A petition must contain the following information:

(1) [Unchanged.]

(2) the names and addresses, if known, of

(a)-(c) [Unchanged.]

(d) the juvenile's membership or eligibility for membership in an Indian tribe, if any, and the identity of the tribe.~~, and~~

~~(e) any court with prior continuing jurisdiction~~;

(3)-(5) [Unchanged.]

(6) the court action requested; and

(7) if applicable, the notice required by MCL 257.732(8), and the juvenile's Michigan driver's license number.~~; and~~

~~(8) information required by MCR 3.206(A)(4), identifying whether a family division matter involving members of the same family is or was pending.~~

(C)-(D) [Unchanged.]

RULE 3.961. INITIATING CHILD PROTECTIVE PROCEEDINGS.

(A) Form. Absent exigent circumstances, a request for court action to protect a child must be in the form of a petition. The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D). When any pending or resolved family division case exists that involves family members of the person(s) named in the petition filed under subrule (B), the petitioner must attach to the petition a completed case inventory listing those cases, if known. The case inventory must be on a form approved by the State Court Administrative Office.

(B) Content of Petition. A petition must contain the following information, if known:

(1) [Unchanged.]

(2) The names and addresses of:

(a) [Unchanged.]

(b) the parent, guardian, legal custodian, or person who has custody of the child, if other than a mother or father, and

(c) the nearest known relative of the child, if no parent, guardian, or legal custodian can be found.~~, and~~

~~(d) any court with prior continuing jurisdiction.~~

(3)-(6) [Unchanged.]

~~(7) The information required by MCR 3.206(A)(4), identifying whether a family division matter involving members of the same family is or was pending.~~

(C) [Unchanged.]

RULE 4.302. STATEMENT OF CLAIM.

(A) Contents. The statement of the claim must be in an affidavit in substantially the form approved by the state court administrator. Affidavit forms shall be available at the clerk's office. The nature and amount of the claim must be stated in concise, nontechnical language, and the affidavit must state the date or dates when the claim arose. The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D).

(B)-(D) [Unchanged.]

RULE 5.113. ~~PAPERS;~~FORM, CAPTIONING, SIGNING, AND VERIFYING OF DOCUMENTS~~FILING~~.

(A) Form~~s~~ of Documents~~Papers~~ Generally. The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D). Documents must be substantially in the form approved by the State Court Administrative Office, if a form has been approved for the use. An application, petition, inventory, accounting, proof of claim, or proof of service must be verified in accordance with MCR 1.109(D)(3).

~~(1) An application, petition, motion, inventory, report, account, or other paper in a proceeding must~~

~~(a) comply with MCR 1.109 and be legibly typewritten or printed in ink in the English language, and~~

~~(b) include the~~

~~(i) name of the court and title of the proceeding in which it is filed;~~

~~(ii) case number, if any, including a prefix of the year filed and a two-letter suffix for the case-type code (see MCR 8.117) according to the principal subject matter of the proceeding, and if the case is filed under the~~

~~juvenile code, the petition number which also includes a prefix of the year filed and a two-letter suffix for the case-type code.~~

~~(iii) character of the paper; and~~

~~(iv) name, address, and telephone number of the attorney, if any, appearing for the person filing the paper, and~~

~~(c) be substantially in the form approved by the State Court Administrator, if a form has been approved for the use.~~

~~(2) A judge or register may reject nonconforming documents in accordance with MCR 8.119.~~

(B) [Unchanged.]

(C) Filing by Registered Mail. Where e-filing is implemented, ~~A~~a~~a~~ny document required by law to be filed in or delivered to the court by registered mail~~,~~ may be filed through the electronic-filing system~~or delivered by certified mail, return receipt requested~~.

(D) [Unchanged.]

~~RULE 5.114 SIGNING AND AUTHENTICATION OF PAPERS~~

~~(A) Signing of Papers.~~

~~(1) The provisions of MCR 2.1141.109(D) and (E) regarding the signing of papers apply in probate proceedings except as provided in this subrule.~~

~~(2) When a person is represented by an attorney, the signature of the attorney is required on any paper filed in a form approved by the State Court Administrator only if the form includes a place for a signature.~~

~~(3) An application, petition, or other paper may be signed by the attorney for the petitioner, except that an inventory, account, acceptance of appointment, and sworn closing statement must be signed by the fidu-~~

~~ciary or trustee. A receipt for assets must be signed by the person entitled to the assets.~~

~~(B) Authentication by Verification or Declaration.~~

~~(1) An application, petition, inventory, accounting, proof of claim, or proof of service must be either authenticated by verification under oath by the person making it, or, in the alternative, contain a statement immediately above the date and signature of the maker: "I declare under the penalties of perjury that this _____ has been examined by me and that its contents are true to the best of my information, knowledge, and belief." Any requirement of law that a document filed with the court must be sworn may be met by this declaration.~~

~~(2) In addition to the sanctions provided by MCR 2.114(E), a person who knowingly makes a false declaration under subrule (B)(1) is in contempt of court.~~

RULE 6.001. SCOPE; APPLICABILITY OF CIVIL RULES; SUPERSEDED RULES AND STATUTES.

(A) [Unchanged.]

(B) Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006, 6.101, 6.102(D) and (F), 6.103, 6.104(A), 6.106, 6.125, 6.202, 6.425(E)(3), 6.427, 6.435, 6.440, 6.445(A)-(G), and the rules in subchapter 6.600 govern matters of procedure in criminal cases cognizable in the district courts.

(C)-(E) [Unchanged.]

RULE 6.101. THE COMPLAINT.

(A) Definition and Form. A complaint is a written accusation that a named or described person has committed a specified criminal offense. The complaint must include the substance of the accusation against the accused and the name and statutory citation of the

offense. At the time of filing, specified case initiation information shall be provided in the form and manner approved by the State Court Administrative Office.

(B)-(C) [Unchanged.]

RULE 8.117. CASE CLASSIFICATION CODES.

Use of Case-Type Code. As required by MCR 1.109(D)(1)(b)(iii)~~2.113(C)(1)(c)~~, the person filing a case initiating document~~plaintiff~~ must assign one case-type code from a list provided by the State Court Administrator according to the principal subject matter of the action (not the nature of the proceedings), and shall provide~~include~~ this code ~~in the caption of the complaint~~with other case initiation information required by MCR 1.109(D)(2). The case code must be included in the caption of all other documents~~papers~~ ~~thereafter~~ filed in the case. ~~The current case classification codes may be found at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/cf_casetypecodes.pdf.~~

RULE 8.119. COURT RECORDS AND REPORTS; DUTIES OF CLERKS.

(A) [Unchanged.]

(B) Records Standards. ~~The clerk of the court~~Trial courts shall comply with the records standards in this rule, MCR 1.109, and as prescribed by the Michigan Supreme Court.

(C) Filing of Documents and Other Materials. The clerk of the court shall ~~endorse on the first page of every document the date on which it is filed~~process and maintain documents filed with the court as prescribed by~~. Documents and other materials filed with the court as defined in MCR 2.107(G) must comply with~~ Michigan Court Rules and the Michigan Trial Court ~~Case File~~Records Management Standards and all filed documents must be file stamped in accordance with these

standards. The clerk of the court may only reject documents that do not comply with MCR 1.109(D)(1) and (2), are not signed in accordance with MCR 1.109(E), or are not accompanied by a required filing fee or a request for fee waiver~~meet the following minimum filing requirements:~~

~~(1) standards prescribed by MCR 1.109,~~

~~(2) legibility and language as prescribed by MCR 2.113(B) and MCR 5.113,~~

~~(3) captioning prescribed by MCR 2.113(C)(1) and MCR 5.113,~~

~~(4) signature prescribed by MCR~~ 1.109(E)~~2.114(C) and MCR 5.114, and~~

~~(5) the filing fee is not paid at the time of filing~~, unless already waived or suspended by court order.

(D) Records Kept by the Clerk of the Court. The clerk of the court shall maintain the following case records in accordance with the Michigan Trial Court ~~Case File~~Records Management Standards~~, Michigan Trial Court Record Retention and Disposal Standards and Guidelines, and approved records retention and disposal schedules~~. Documents and other materials made nonpublic or confidential by court rule, statute, or order of the court pursuant to subrule (I) must be designated ~~as confidential~~accordingly and maintained to allow only authorized access. In the event of transfer or appeal of a case, every rule, statute, or order of the court under~~pursuant to~~ subrule (I) that makes a document or other materials in that case nonpublic or confidential applies uniformly to every court in Michigan, irrespective of the court in which the document or other materials were originally filed.

(1) Case History and Case Files. The clerk shall maintain records of each case consisting of case

history (known as a register of actions) and, except for civil infractions, a case file in such form and style as may be prescribed by the State Court Administrative Office. Each case shall be assigned a case number on receipt of a case~~complaint, petition, or other~~ initiating document. The case number shall comply with MCR 1.109(D)(1)(b)(iii)~~2.113(C)(1)(c) or MCR 5.113(A)(1)(b)(ii) as applicable~~. In addition to the case number, a separate petition number shall be assigned to each petition filed under the juvenile code~~Chapter XIIA of the Probate Code~~, MCL 712A.1 *et seq*., as required under MCR 1.109(D)(1)(d)~~5.113(A)(1)(b)(ii)~~. The case number (and petition number if applicable) shall be recorded in the court's automated case management system and on the case file. The records shall include the following characteristics:

(a) Case History. The clerk shall create and maintain a case history of each case, known as a register of actions, in the court's automated case management system. The automated case management system shall be capable of chronologically displaying the case history for each case and shall also be capable of searching a case by number or party name (previously known as numerical and alphabetical indices) and displaying the case number, date of filing, names of parties, and names of any attorneys of record. The case history shall contain both pre- and post-judgment information and shall, at a minimum, consist of the data elements prescribed in the Michigan Trial Court Records~~Case File~~ Management Standards. Each entry shall be brief, but shall show the nature of each item filed, each order or judgment of the court, and the returns showing execution. Each entry shall be dated with not only the date of filing, but with the date of entry and shall indicate the person recording the action.

(b) Case File. The clerk of the court shall maintain a file of each action, bearing the case number assigned to it, for all pleadings, process, written opinions and findings, orders, and judgments filed in the action, and any other materials prescribed by court rule, statute, or court order to be filed with the clerk of the court. If case file records are maintained separately from the case files, the clerk shall maintain them as prescribed by the Michigan Trial Court Records~~Case File~~ Management Standards.

(2) [Unchanged.]

(3) Abolished Records.

(a) [Unchanged.]

(b) Dockets. Case history~~A register of actions~~ replaces a docket. Wherever these rules or applicable statutes require entries on a docket, those entries shall be entered in the court's automated case management system.

(4) Official Court Record. There is only one official court record, regardless whether original or suitable-duplicate and regardless of the medium. Suitable-duplicate is defined in the Michigan Trial Court Records Management Standards. Documents electronically filed with the court or generated electronically by the court are original records and are the official court record. A paper printout of any electronically filed or generated document is a copy and is a nonrecord for purposes of records retention and disposal.

(E)-(G) [Unchanged.]

(H) Access to Records. Except as otherwise provided in subrule (F), only case records as defined in subrule (D) are public records, subject to access in accordance with these rules. The clerk shall~~may~~ not permit any

case record to be taken from the court without the order of the court. A court may provide access to the public case history information through a publicly accessible website, and business court opinions may be made available as part of an indexed list as required under MCL 600.8039; however, all other public information in its case files may be provided through electronic means only upon request. The court may provide access to any case record that is not available in paper or digital image, as defined by MCR 1.109(B), if it can reasonably accommodate the request. Any materials filed with the court pursuant to MCR 1.109(D)~~(C)(2)~~, in a medium for which the court does not have the means to readily access and reproduce those materials, may be made available for public inspection using court equipment only. The court is not required to provide the means to access or reproduce the contents of those materials if the means is not already available.

(1) Unless access to a case record or information contained in a record as defined in subrule (D) is restricted by statute, court rule, or an order entered pursuant to subrule (I), any person may inspect that record and may obtain copies as provided in subrule (J). In accordance with subrule (J), the court may collect a fee for the cost of providing copies~~this service, including the cost of providing the new record in a particular medium~~.

(2) [Unchanged.]

(I) [Unchanged.]

(J) Access and Reproduction Fees.

(1) A court may not charge ~~an access~~a fee to access public case history information or to retrieve or inspect a case document irrespective of the medium in which the case record is retained, the manner in which access

to the case record is provided (including whether a record is retained onsite or offsite), and the technology used to create, store, retrieve, reproduce, and maintain the case record.

(2) A court may charge a reproduction fee for a document pursuant to MCL 600.1988, except when~~or reproduction fee for a case record that the court is~~ required by law or court rule to provide a copy without charge to a person or other entity~~, irrespective of the medium in which the case record is retained, the manner in which access to the case record is provided, and the technology used to create, store, retrieve, reproduce, and maintain the case record~~.

(3~~2~~) The court may provide access to its public case records in any medium authorized by the records reproduction act, 1992 PA 116; MCL 24.401 to 24.403. ~~If a court maintains its public records in electronic format only,~~

~~(a) the court may not charge a fee to access those case records when access is made on-site through a public terminal or when a verbal request for public information is made on-site to the clerk.~~

~~(b) the court or a contracted entity may charge a fee, in accordance with Supreme Court order, to access those case records when the access is made off-site through a document management, imaging, or other electronic records management system.~~

(4~~3~~) Reproduction of a case document~~record~~ means the act of producing a copy of that document~~record~~ through any medium authorized by the records reproduction act, 1992 PA 116; MCL 24.401 to 24.403.

(a) A court may charge only for the actual cost of labor and supplies and the actual use of the system, including printing from a public terminal, to reproduce

a case document~~record~~ and not the cost associated with the purchase and maintenance of any system or technology used to store, retrieve, and reproduce the document~~a case record~~.

(b)-(c) [Unchanged.]

(5~~4~~) [Renumbered but otherwise unchanged.]

(K) Retention Periods and Disposal of Court Records.

For purposes of retention, the records of the trial courts include: (1) administrative and fiscal records, (2) case file and other case records, (3) court recordings, log notes, jury seating charts, and recording media, and (4) nonrecord material. The records of the trial courts shall be retained in the medium prescribed by MCR 1.109. The records of a trial court may not be disposed of except as authorized by the records retention and disposal schedule and upon order by the chief judge of that court. Before disposing of records subject to the order, the court shall first transfer to the Archives of Michigan any records specified as such in the Michigan trial courts approved records retention and disposal schedule. An order disposing of court records shall comply with the retention periods established by the State Court Administrative Office and approved by the state court administrator, Attorney General, State Administrative Board, Archives of Michigan, and Records Management Services of the Department of Management and Budget, in accordance with MCL ~~399.5~~399.811.

(L) [Unchanged.]

Staff Comment: The amendments in this order are intended to begin moving trial courts toward a statewide uniform e-Filing process. In addition, the order moves existing language into MCR 1.109 as a way to, for the first time, include most filing requirements in one single rule, instead of scattered in various rules. The order largely mirrors the

administrative orders that most e-Filing pilot projects have operated under, but contains some significant new provisions. For example, courts are required to maintain documents in an electronic document management system, and the electronic record is the official court record.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

Adopted May 30, 2018, effective September 1, 2018 (File No. 2016-27)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 7.2 of the Michigan Rules of Professional Conduct is adopted, effective September 1, 2018.

[Additions to the text are indicated in underlining and deleted text is shown by strike-over.]

RULE 7.2. ADVERTISING.

(a)-(c) [Unchanged.]

(d) Services of a lawyer or law firm that are advertised under the heading of a phone number, web address, or trade name shall identify the name, office address, and business telephone number of at least one lawyer responsible for the content of the advertisement.

Staff Comment: The amendment of MRPC Rule 7.2 requires certain lawyer advertisements to identify the lawyer or law firm responsible for the advertisement's content. This new language is a revised version of a proposal submitted by the State Bar of Michigan Representative Assembly, and is intended to identify at least one lawyer responsible for the advertisement's content as a way to provide potential clients with

important information when the services are advertised under the heading of a phone number, web address, or trade name.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted June 14, 2018, effective September 1, 2018 (File No. 2016-25)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendment of Rule 7.212 of the Michigan Court Rules is adopted, effective September 1, 2018.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.212. BRIEFS.

(A)-(B) [Unchanged.]

(C) Appellant's Brief; Contents. The appellant's brief must contain, in the following order:

(1)-(7) [Unchanged.]

(8) The relief, stating in a distinct, concluding section the order or judgment requested; ~~and~~

(9) A signature~~.~~; and

(10) A separately filed appendix, only as provided in section (J) of this rule.

(D)-(I) [Unchanged.]

(J) Appendix.

(1) In all civil cases (except those pertaining to child protection proceedings, including termination of parental rights, and non-criminal delinquency proceed-

ings under chapter XIIA of the Probate Code and adoptions under chapter X), and in all appeals from administrative agencies, except those described in section (J)(5) of this rule, the appellant shall file and serve an appendix. The appellant's appendix shall contain a table of contents and copies of the following documents if they exist:

(a) The judgment or order(s) appealed from, including any written opinion, memorandum, findings of fact and conclusions of law stated on the record, in conjunction with the judgment or order(s) appealed from;

(b) A copy of the trial court docket sheet;

(c) The relevant pages of any transcripts cited in support of the appellant's position on appeal. Where appropriate, the appellant may attach pages preceding and succeeding the page cited if helpful to provide context to the citation. If a complete trial, deposition, or administrative transcript is filed, the index to such transcript must be included. Only non-compressed (one sheet to a page) transcripts may be filed;

(d) If a jury instruction is challenged, a copy of the instruction, any portion of the transcript containing a discussion of the instruction, and any relevant request for the instruction; and

(e) Any other exhibit, pleading, or other evidence that was submitted to the trial court and that is relevant and necessary for the Court to consider in deciding the appeal. Briefs submitted in the trial court are not required to be included in the appendix unless they pertain to a contested preservation issue.

For material that is subject to an existing protective order, or for evidence that is not subject to such an order, but which contains information that is confidential or privileged, the procedures of MCR 7.211(C)(9) apply.

(2) The appellee shall file and serve an appendix with its responsive brief only if the appellant's appendix does not contain all the information set forth in section (J)(1) of this rule. The appellee's appendix shall not contain any of the documents contained in the appellant's appendix, but shall only contain additional information described in section (J)(1) that is relevant and necessary to the determination of the issues raised in the appeal.

(3) Each volume of any appendix shall contain no more than 250 pages. The table of contents shall identify each document with reasonable definiteness, and indicate the volume and page of the appendix where the document is located. The cover to the appendix shall indicate in bold type whether it is the "Appellant's Appendix" or "Appellee's Appendix."

(a) For a paper appendix, each document shall also be tabbed. A paper appendix shall be bound separate from the brief. Five copies of the paper appendix shall be filed with the court.

(b) If an appendix is to be filed electronically, it must be filed as an independent .pdf file or a series of independent .pdf files. The table of contents for electronically filed appendixes shall contain bookmarks, linking to each document in the appendix.

(4) In cases involving more than one appellant or appellee, including cases consolidated for appeal, to avoid duplication each side shall, where practicable, file a joint rather than separate appendixes.

(5) This subsection does not apply to appeals arising from the Michigan Public Service Commission (in which the record is available on the Commission's e-docket) or the Michigan Tax Tribunal (in which the record is available on the Tribunal's tax docket lookup

page). In those cases, the parties shall cite to the document number and relevant pages.

Staff Comment: The amendment of MCR 7.212 requires an appellant to file an appendix with specific documents when filing the appellant's and/or appellee's principal brief or responsive brief. The amendment is intended to identify for practitioners the key portions of the record that the Court deems necessary for thorough and efficient review of the issues on appeal.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

MICHIGAN SUPREME COURT INVESTITURE CEREMONY OF JUSTICE KURTIS T. WILDER

OCTOBER 17, 2017

CHIEF JUSTICE STEPHEN J. MARKMAN: Please be seated. Welcome to today's investiture ceremony of KURTIS T. WILDER. This is a tradition initiated by our Court back in 1857, at which time we had a retroactive investiture of JAMES WITHERELL, who was a judge of the territory of Michigan, who'd been appointed by President Thomas Jefferson in April of 1808, and we have had investitures on a fairly regular basis since that time.

We welcome this afternoon Governor Rick Snyder, of course without whom none of this would have been possible. We welcome today's speakers, members of the Michigan Judiciary, members of the bar, members of the public, members of the Hall of Justice community, the Michigan wing of the Civil Air Patrol Guard, the Interlochen Chamber Singers, and, of course, we welcome the family members and friends of KURT WILDER, including those who may be watching on closed-circuit TV in Ohio. You can all be very proud of Kurt. And Kurt, I'm told by the way that Lucy is disappointed that you haven't invited her;[1] you can explain that further, perhaps, later.

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[1] Reporter's note: Lucy is a dog belonging to Michigan Court of Appeals Judge AMY RONAYNE KRAUSE and Kurt E. Krause.

What is important to understand about KURT WILDER, this Court's 112th Justice, is that although he is our junior justice, he is at the same time our senior judge. By the time he was appointed to this Court earlier this year, by Governor Snyder, KURT WILDER had already served for more than a quarter of a century on the bench of Michigan. Equally impressively, he had substantial service as both a trial and appellate court judge, at one time serving as president of the Michigan Judges Association. There is little in the judicial realm that KURT WILDER has not seen and considered and decided. In short, KURT WILDER has already experienced one of the most remarkable careers of any jurist of this state. And the appointment that we celebrate today only adds to that luster.

While Kurt's tenure will soon come to an end as this Court's junior justice, it will continue for many years, we hope, as one of the richest and most varied tenures of any person ever to serve in our judiciary. Perhaps even more to the point, however, in his first several months on this Court, Judge WILDER has regularly drawn upon that history and personal experience, and demonstrated clearly the wisdom of this Governor's appointment. He was appointed at a most difficult time for any new justice, in midterm, with the Court's consideration of large numbers of cases and controversies and administrative matters already well and deeply in progress. But Judge WILDER did not miss a beat in contributing thoughtfully and insightfully to Court deliberations, drawing from the deep well of his service on the trial court in Washtenaw County for many years and from his perspectives in having decided thousands of appeals on the Michigan Court of Appeals.

Each and every day during his first weeks on this Court, KURT WILDER was confronted with difficult ethi-

cal and practical questions concerning his participation in ongoing cases; he was required to catch up with his colleagues in resolving complex and nuanced cases in which the rest of the Court had had weeks or months to prepare. And he was obligated to define decision-making principles and premises that he would bring to bear on this new Court, in which every decision to hear or not to hear a case is made through the exercise of judgment of the individual justices.

Justice WILDER has done all this in exemplary fashion, showing himself quickly to be an outstanding fit for this Court in terms of work ethic and preparation, in terms of conscientious attention to detail, in terms of open-mindedness and fair-mindedness, in terms of adherence to principle, and in terms of clarity and insight in his writings and expressions of thought. Kurt has also somehow found the time to become the Court's liaison to the Judicial Tenure Commission, the principal disciplinary agency of our branch of government. And he has increasingly become our authority on issues of courthouse and courtroom security. It is very difficult to imagine any other new justice coming in midterm, as he has, who could have acclimated himself as quickly and as seamlessly as has Justice WILDER.

His legacy on this Court, I am confident, will be felt in many ways in the future. But today, his legacy is that, among other things, he has introduced "Hallelujah" to this courtroom. I will be honest with you that this is not typically how we have opened up our sessions over the years. [Laughter.] Any sounds that have emitted from this courtroom have been considerably less melodic over time. [Laughter.] It is now my honor to introduce to serve as today's master of ceremonies, one of the most distinguished members of our bar, Dick Rassel, chairman of the very venerable law

firm of Butzel Long, one of whose alumnus is being recognized here today. Dick.

MR. RICHARD RASSEL: Thank you, Justice MARKMAN. Good afternoon and welcome, everybody. Before we post the colors, I would like to acknowledge the very, very large number of dignitaries that we have with us today—elected officials and judges—so I am going to read off this list. Please hold your acknowledgments until I have completed this list; it is quite lengthy and it is obviously a reflection of their belief in you, Justice.

From the Supreme Court, obviously, we have the justices of the Supreme Court: Justice MARKMAN, Justice ZAHRA, Justice LARSEN, Justice MCCORMACK, Justice VIVIANO, and Justice BERNSTEIN.

Federal Judges: Honorable David McKeague, Honorable Victoria Roberts.

Michigan Court of Appeals: Honorable JANE BECKERING, Honorable MARK BOONSTRA, Honorable THOMAS CAMERON, Honorable AMY RONAYNE KRAUSE, Honorable JANE MARKEY, Honorable PATRICK METER, Honorable CHRISTOPHER MURRAY, Honorable PETER O'CONNELL, Honorable BROCK SWARTZLE.

From the district courts: Honorable Janice Cunningham, Honorable Michael Gerou, Honorable Eugene Hunt, Honorable Julie Phillips.

From the probate court: The Honorable Linda Hallmark, Honorable Darlene O'Brien, Honorable Kathleen Ryan.

From our circuit courts: The Honorable Martha D. Anderson, Honorable Laura Baird, Honorable Margaret Bakker, Honorable Mariam Saad Bazzi, Honorable Annette Berry, Honorable Nancy Blount, Honorable Kathleen Brickley, Honorable Archie Brown, Honorable Melissa Cox, Honorable Paul Cusick,

Honorable Thomas Evans, Honorable Edward Ewell, Honorable Patricia Fresard, Honorable John Gillis, Honorable Stephen Gorsalitz, Honorable Adel Harb, Honorable Michael Hathaway, Honorable Timothy Hicks, Honorable Hala Jarbou, Honorable Shalina Kumar, Honorable Charles LaSata, Honorable Pam Lightvoet, Honorable Qiana Lillard, Honorable George Mertz, Honorable Lita Popke, Honorable Paul Stutesman, Honorable Joseph Toia, Honorable Jon Van Allsburg, Honorable Michael Warren, Honorable Christopher Yates.

Retired judges among us: The Honorable Alfred Butzbaugh, Honorable Barry Howard, Honorable Jerry Rosen and Honorable Justice ROBERT YOUNG.

Lastly, elected officials: Senator Margaret O'Brien, Senator Tonya Schuitmaker, Representative Joseph Bellino, Jr., Representative Abdullah Hammoud, Representative Brandt Iden, Representative Larry Inman, Representative Klint Kesto, Representative Tom Leonard, Representative Eric Leutheuser, Representative Jeff Noble, Representative Lana Theis. Please join me in [indiscernible]. [Applause.]

UNIDENTIFIED INDIVIDUAL: Will the Color Guard please post the colors. [Colors posted.]

MEMBER OF THE COLOR GUARD: Colors turned.

MEMBER OF THE COLOR GUARD: Ladies and gentlemen, please join me in the Pledge of Allegiance.

THOSE IN ATTENDANCE: 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.

MEMBER OF THE COLOR GUARD: Thank you.

MR. RASSEL: Our Pledge was led today and the Color Guards were from Saline's Michigan Civil Air Patrol.

Thank you very much. At this time, we will have the invocation. Reverend Emily Campbell from Justice KURTIS WILDER's church in Plymouth, Michigan. Welcome.

REV. EMILY CAMPBELL: Let us now ask God's blessing upon this ceremony and upon God's calling on Kurt's life. Let us pray. Gracious God, you have given us the gift of life and the determination to use our lives in the service of your people. We thank you for Kurt, for his willing heart, for his wise mind, for his deep and meaningful faith. We pray your blessing on his tenure as a justice of the Michigan Supreme Court. May your Holy Spirit help him every single day to act justly, to love mercy, so that he might forever walk humbly with you. We pray your blessing this day on all who seek to serve your people in need. This we pray, in the name of Jesus Christ. Amen.

THOSE IN ATTENDANCE: Amen.

MR. RASSEL: As Justice MARKMAN indicated, Justice WILDER has brought "Hallelujah" to the Michigan Supreme Court. Please join me in welcoming "Hallelujah." [Interlochen choir sings *Hallelujah*.] [Applause.]

MR. RASSEL: That is not something you see in the Court every day. I'm doubly humbled to be here today. First of all, rarely if ever in my lifetime, have I ever addressed an audience as distinguished as this one. There is just a lot of brain power in this room, and I'm truly humbled to be here. Second, I was really very, very humbled to be asked by Justice WILDER to participate in this ceremony. I met him many years ago when he was a young lawyer, and I was a striving kind of middle-aged partner. And all I can tell you is, he managed to keep me out of a lot of legal mud puddles over the years. And for that I am deeply grateful and still grateful.

Justice WILDER asked me to do two things today—very simple: first, to make very brief introductions of all of our speakers. And I apologize in advance to all of our distinguished speakers. There are many things that could be said about you today that won't be said. You'll be introduced and everybody pretty much knows who you are, anyways, but I apologize that I'm not going to do justice to you. Second, he asked me to keep the program going and to end this sometime before midnight, or sunset, or much earlier than that. I will endeavor to do just that—partially out of fear, because sanctions were kind of hinted at if I didn't succeed, so I intend to do that. So, I intend to fulfill both of those requests. Let me move right then to our principal speaker today, the Honorable Rick Snyder, our 48th Governor; he needs no introduction and you are getting the first of the very short introductions, Governor Snyder.

GOVERNOR SNYDER: Well, thank you, Dick, for that concise introduction. That's much appreciated. Chief Justice MARKMAN, justices of the Court, it's an honor to be here. It's not often I have the opportunity to come enjoy the hospitality of the judicial branch. It's great to be with you. I'm proud of your outstanding record. And that was one of the key issues with looking at who to put on the Court, was how to keep up with the standard you've set. You've set a good benchmark showing the rest of the country how good justice is done. And I want to compliment you and thank you for your outstanding service. So, thank you.

It's great to see so many other judges here; it's wonderful. It's also great to see my colleagues from the legislative branch. Speaker Leonard and your team, it's wonderful to have you here. I think we have a new benchmark that we need to strive for. Those of you that

don't know, from the judicial branch, quite often during late nights, during lame duck, other things, there's a group of legislators that go out and sing in the Capitol rotunda. And they're actually—I thought they were outstanding, but we have a new bar here. So, you might want to see if they want to brush up a little bit, Tom, before they get into the holiday season for singing, because that was wonderful.

It's great to be here. I would like to share a few comments about Justice WILDER. First of all, there are two key attributes I would say I was looking for in terms of who I thought would be a great member of this Court. The first one was part of our normal appointments process. We go through a rigorous process. Beth Clement and our team does a wonderful job of going through opinions looking for analytical skills, logical skills, rule-of-law skills, looking for one of the brightest minds you can find to join this fine group; to say, you have to have those fundamental skills to be on this Court, to keep up with the standards that this Court has set. And I'm proud to say, Kurt, you did an outstanding job. You've got a fabulous track record that you should be proud of. And as we sat down—I sat down personally with the justice and we discussed a number of these issues. And I'm proud of how you handled that, the responses you gave me, and your conviction, and thought process on how to go through that. So that was half of it.

The other part, though, is—and quite often people can view the law as a cold thing. But we're talking real people's lives. So the other one is—is about humanity and compassion, and how that fits into the equation. And this was outside of the normal review process. The nice part of this particular situation is, I'd had a personal relationship with Kurt that went back quite a few years now, probably approaching close to 20 years.

We first met by being on the board of a community group. And that group was to be an advocate for African-American and Latino musicians. About how to encourage more music education for them, about how to create new opportunities, about how to change the environment for those fine young people to have careers. And that's something where I got an appreciation for this man's heart. You can see it in the music by having these fine people sing here today. But it was about caring for people at the deepest level, with compassion, with caring, with concern. And that needs to be part of the law, too. And so the amazing part is, it was great to find an individual that combined both those attributes—the analytical skills, the logic needed and the heart and the compassion to say justice is not heartless; it's about recognizing how we can do well together.

And I appreciated that service and I look forward to you having a very bright career on this Court. You're joining an outstanding group of people. They should be proud, and I want to see this tradition continue. So thank you for giving me an opportunity to congratulate you and wish you the best. I know you're going to continue your music; you're already showing you're bringing new attributes to the Court already. You've set a higher bar now for the legislative—and I won't even talk about where the executive branch is; we're at the bottom of this pyramid of music. So thank you for the opportunity to join you today. And again, I want to wish the best to the justice and all the Court for outstanding work. Thank you so much.

MR. RASSEL: Our next speaker comes to us from [whispering] Ohio. [Laughter.] Welcome. Harvey Kugelman is a distinguished attorney from Cleveland, Ohio. And he happened to have been a high school classmate, as I understand it, of Justice WILDER's; now,

I personally would not have the nerve to ask a high school classmate of mine to have a mic at a session like this. But he has great faith in you, and we hope we can share some thoughts that are sharable from Mr. WILDER's childhood. Harvey Kugelman.

MR. HARVEY KUGELMAN: What a great day. Justices, all the justices here, and judges, and distinguished guests. I guess I'm here on deep background. I've known Kurt a long time, a very long time. So long that I think when we met, I had a lot of hair, he was skinny as a rail. We go back to high school maybe when we were 15 years old or so. We were classmates, we played sports together, we hung out together, we had road trips together. We had countless nights and endless discussions about everything that you could imagine—what we wanted to do, what we wanted to be like, about really everything.

I don't really have any scandalous Kurt stories to share, sorry to disappoint everyone, but maybe that's why he's here today. I know we're probably—neither of us are reckless in vehicles anymore; he once pinned me between two cars with his vehicle, but I still walk. I once knocked out his rear taillights, actually a car belonging to his formidable mother. And we both lived to tell about it, which was not a given.

I want to just reach out and say something about Sarah and Nate Wilder who aren't—weren't able to be here today. The apple certainly doesn't fall far from the tree. Sarah Wilder is one of the most formidable people I have ever met in my life. She's a force of nature. Nate Wilder is an extremely good man. And when I look at Kurt, I see both of them in him. I see Sarah's formidable nature, and I see Nate's calmness. Kurt is always calm. Actually, I saw him angry once. I know he was angry because he told me, "I'm angry." [Laughter.]

I would think that the traits that make him such a good person are perfect for serving on this great bench. He is obviously smart. He's rational. As I said, he's calm, and he really is an exceptional listener. One of the things I've learned—not just talking to him, but just by being around him—is that I'm an interrupter. When I want to get to the point, I tend to interrupt people to just get to the point. Kurt will always let everybody say the last thing that's on their mind before responding. And every time I'm around him, after a while I just think, well, I should do that. Because it's an exceptional trait, and I think it's served him well his entire life. And I'm sure it's served him well on the bench.

My perspective of more than 40 years of watching Kurt is that he's really a natural and will be a natural at this. No one is more at ease, and I think he is comfortable observing all the necessary judicial canons. He is thoughtful, and he is kind, and he is deliberate. And that is not something that I think he had to develop all that hard. That is who he is; that's his natural state of being. Michigan has a good man I'm proud to call my friend. And I think all of you will be very proud to call him Supreme Court Justice WILDER. Thank you.

MR. RASSEL: Our next speaker is truly a legend of the Michigan Bar, and he's the man that I hope to be if I ever grow up. Charlie Rutherford was called to the bar more than 60 years ago. He is the President of the Michigan Historical—Supreme Court Historical Society and a living legal legend. Charlie.

MR. CHARLES RUTHERFORD: May it please the Court, Mr. Chief Justice, Associate Justices, Justice WILDER's friends and family. Thank you for this opportunity to be part of today's special event. As indicated, I'm Charles Rutherford, President of the Michigan Supreme Court

Historical Society. This Society was created by then Chief Justice DOROTHY COMSTOCK RILEY on April the 19th, 1988. Our mission then, as now, is to protect, preserve, display documents, records, and memorabilia relating to the Michigan Supreme Court and other courts of Michigan. Most notably, this includes the historic collection of justices' portraits that you see throughout this building. Once a justice leaves the bench, their portrait is painted and then dedicated back to the Court in a special session. The rest of our mission is to promote the study of the history of Michigan courts and to increase public awareness of Michigan's legal heritage.

One of the ways we do this is through the publication of a newsletter, four times a year. The Society is a membership-driven, nonprofit organization. We host an annual luncheon every year at the Detroit Athletic Club for our members, featuring a presentation about a legal history—history topic. Our annual luncheon will be held on a very special date: April the 19th, 2018, which is exactly 30 years to the date the Society was incorporated as a nonprofit 501(c)(3). On behalf of the board of directors of the Michigan Society, I invite you to consider joining the Society as a dues-paying member today and help us to continue our good work. For further information about joining, visit our website at www.michcourthistory.org. Thank you very much.

MR. RASSEL: Our next speaker is another member, a very distinguished member, of the Michigan Bar. Elizabeth Hardy is a named partner in the law firm of Kienbaum Opperwall Hardy and Pelton. She is a member, a very distinguished member, of the American College of Trial Lawyers. She is also a former governor, two-time governor of Wayne State University and very active beyond the bar in many, many affairs. Elizabeth.

MS. ELIZABETH HARDY: Governor Snyder, Justice WILDER, members of the judiciary and distinguished guests. I first met Judge, now Justice WILDER in his early tenure in the Michigan Court of Appeals. Since that time, I've unfortunately had only a few opportunities to appear in front of him while he was on the Court of Appeals. But in those contacts and in crossing paths with him over the years at numerous professional events, I have come to know Justice WILDER as a thoughtful, fair-minded, engaged judge, who listens patiently and with respect to the arguments of advocates who appear before him. Those impressions were reinforced recently when Justice WILDER was nominated by Governor Snyder to the Michigan Supreme Court and appeared before the State Bar Judicial Qualifications Committee as part of the nomination process.

Prior to being interviewed by the JQC, a background investigation was conducted so that those on the screening committee who did not have experience with Justice WILDER would know what practitioners around the state thought of his qualifications and reputation as a judge. As part of that process, a wide cross-section of practitioners in the state were interviewed and their comments were shared with the committee. While I must speak in generalities to avoid revealing the otherwise confidential work of the JQC, there was, not surprisingly, an overwhelming consensus among those interviewed about how Justice WILDER was viewed in his judicial role.

The descriptions repeatedly used by practitioners in connection with Justice WILDER were thoughtful, open-minded, exceedingly patient, respectful of advocates and their clients, and willing to let practitioners present their clients' case and oral argument, even when he wasn't hearing anything that would make a difference

in the outcome, and despite the propensity of certain advocates to be long-winded and redundant.

While many judges lose their patience in such scenarios, without exceptions, practitioners commented that Justice WILDER would demonstrate patience and respect for the process. He recognizes how important it is for the advocates and their clients in our judicial system to be heard, separate and apart from the outcome of the case.

Participation in professional bar activities and community service was another contribution of Justice WILDER that practitioners recognized during the nomination process. Appellate judges are not often well known by the professional bar or the public due to the nature of their position, unless they make a special effort to circulate in public forums. Justice WILDER received high marks from the bar and the public in this regard. He gives freely of his time to civic and philanthropic endeavors and is frequently in attendance and circulating at receptions sponsored by different legal organizations. And he is not simply present; he is approachable, friendly, and generous with his time.

The transition to the Michigan Supreme Court will undoubtedly impinge upon the time that Justice WILDER has available for staying in contact with the bar and the community. But hopefully that will be temporary and not permanent. On behalf of the bar and the public, I would like to congratulate and thank Justice WILDER for his contributions as a member of the judiciary, our profession, and convey the hope and the desire that he continues to be an engaged, thoughtful, approachable member of the judiciary as you have been for the past several decades. Thank you.

MR. RASSEL: Thank you, Elizabeth. Our next speaker really needs no introduction, especially if you're from

southeastern Michigan, because he's been on the—present on the public scene in our region for—it seems like decades. How that is possible for a man with very few grey hairs on his head, I have no idea. Our next speaker is the Honorable Wayne County Sheriff, the Honorable Benny Napoleon.

MR. BENNY NAPOLEON: If it pleases the Court, for the record, Benny Napoleon appearing on behalf of my good friend, Justice WILDER. Richard, I have to deliver some bad news for you, though, because I'm going to upset your time now. Because when the justice called me and told me that I was going to speak this afternoon, he said that I could talk as long as I want to. [Laughter.] So I prepared this 40-minute speech, and he really said I could talk as long as I want to, as long as I'm done in a couple minutes, so I am. I really won't be long.

My relationship is kind of different with the justice. You—I think the Governor kind of summed up all of the positives of the appointment and why he was placed on the Court, and I echo all of that. And those are things that I was going to say. But I'm going to say something different now, Justice. I probably know Justice WILDER in a different way. When I was told that, by my good friend Mario Murrow, when he was campaigning for his last election, Mario calls me up and says, Benny, need you to do me a favor. And I said, and what is that? He says, I need you to take Justice WILDER around Wayne County and help him campaign. I'm like, Justice WILDER, from the Court of Appeals, from Washtenaw County? And he said, that same Justice WILDER. And we had an opportunity to spend long, long days and nights together. And I have come to know him to have a very bright and agile mind. This man is very smart.

He has a beautiful temp—a beautiful spirit, a beautiful temperament. He is very concerned about average, everyday people. And so it was easy for me to spend that time with him, take him to some places where, as you said, folks just don't know the judges on our courts maybe the way they should. But with him, he took—he went into some places, quite honestly, I thought he was gonna look at me and say, uh, Benny, are you sure you want to take me in here?

But the guy is courageous, and that's what—one of the things I admire about him most. He was never reluctant, hesitant, or with the least bit of problem going into any venue speaking to people from all walks of life. And he was very comfortable every place we went, explaining to people what the Court does, what his philosophies were, and very careful—*extremely* careful—not to talk outside the bounds of judicial ethics. But he is a very compassionate and caring person. And one thing that I do know for sure, only God knows what is on a person's heart and mind. But I can tell you that I am confident when Judge WILDER goes to sleep at night, he sleeps really good knowing that he has done the people's work and the Lord's work. God bless you, Justice.

MR. RASSEL: Our last speaker before taking the oath is the Honorable BRIAN ZAHRA.

JUSTICE BRIAN ZAHRA: Thank you, Richard. Governor Snyder, Sheriff Napoleon, members of the federal and state bench, members of our state Legislature, friends and family of Justice WILDER. It's my pleasure and honor to speak here today.

Kurt, thank you so much for including me in this celebration. My remarks are very consistent with those offered by the many distinguished speakers we've already heard from, and this is for good reason.

KURT WILDER is one of those people you can't say enough good things about. No matter how one encounters Kurt, you're simply left with a good impression. Simply stated, Kurt is a very good man.

Governor Snyder, you showed our state how it can function with relentless, positive action. Kurt has lived his life with relentless, positive action for as long as I have known him. And I have known him for a very long time. We have a special bond. A long time ago, we both served as young, probably too young Circuit Court judges—too, not t-w-o but t-o-o. I won't tell you how long ago that was, but it was back in the day when your cell phone wasn't smart and few of us had e-mail addresses. I was in Wayne County and Kurt was in Washtenaw. We both learned a great deal in the trial court trenches.

More than 18 years ago, Kurt and I were invested on the Court of Appeals together, with Judge Jeffrey Collins. And this was at the Second Ebenezer Baptist Church in Detroit. Kurt and I served together on the Court of Appeals for over 12 years, and my law clerks tell me that we served together and decided over 300 cases on panels together. I have observed or worked with Kurt on a number of different projects, personal and professional, and some even political. As a result, I have much to admire about Kurt.

As I thought about how to organize my remarks, I came up with a list of reasons why I admire Kurt, reasons that left me confident that he will be an outstanding justice of our Michigan Supreme Court. I wanted to do a David Letterman-style Top Ten Reasons I Admire Kurt list, but Kurt quickly vetoed that, claiming it would—he was concerned it would take too much time. Those of you in this room who were at our Court of Appeals investiture 19 years ago know that we

really don't care how long something is going take at an investiture. The Reverend Edgar Vann told us afterwards that our investiture was longer than his Sunday service.

I think Kurt was really concerned about my dark sense of humor. In any event, I made a list of five reasons why I admire Kurt and here they are:

First, I admire Kurt because of his deep devotion and love for his family. While I rarely see his children, Alycia and Klif, I feel like I know them. Kurt's heart is bursting with pride for his children. He shares in their joy and he feels their pain and wants to ease it when they are in times of pain and suffering. Not only is he a dedicated father, he is also an exemplary and dedicated son to his parents, Nathaniel and Dr. Sarah Wilder. It is no small task to be fully dedicated to both your children and your parents, but Kurt does it with seeming ease. I admire KURT WILDER greatly for his devotion to his family.

Second, I admire Kurt because he is a man of deep faith, who lives that faith each and every day. Kurt is the kind of person who always has time for others, to lend a hand, to listen, to provide a shoulder to lean on. Kurt never turns down a friend, never. Moreover, Kurt is not ashamed to pray for you, or to suggest that one might find peace in heart and mind through prayer. In a day where religious freedom is under attack, it takes great courage and conviction to live one's faith. I admire Kurt greatly for his devotion to his faith.

Third, I admire Kurt because he's so even-tempered. No matter what the challenge, he never lets his emotions get the best of him. When you've been a judge for 25 years, this is quite a remarkable accomplishment. I often wondered what his secret was. And I recently learned from Connie, his longtime administrative as-

sistant, that Kurt lives his life by the self-implementation of what youth hockey coaches and other youth coaches know as the 24-hour rule. I've been a youth hockey coach for 12 years, and every year I start off with a parent meeting. And I say to the parents, I'm sure you're going to see many things this season that you'll find frustrating or upsetting; please don't present them at the rink after the practice or the game. Please wait 24 hours and if you're still upset about it after that time, we can calmly talk about your concerns. Kurt implements this rule as part of his life—it's part of his way of life. Instead of responding with anger and frustration—and there are plenty of times when you are a judge or a justice of the Michigan Supreme Court where you are frustrated or even angry—Kurt takes that 24-hour period to let cooler heads prevail. He never gives up his principles; instead, his principles are clearly set forth because of his self-restraint. I admire Kurt greatly for his even-tempered disposition.

Fourth, I admire Kurt because when the workday is done, you won't find him at the bar. And to quote Jerry Seinfeld, "not that there's anything wrong with that." [Laughter.] Indeed, at the end of many of our long conference days, I find myself with some of my colleagues—I won't mention who—and we're sipping on a glass of wine solving the world's problems, if we can't solve the problems of our Court. What I mean by this is that when Kurt's day is done, it is not done. Kurt injects himself into his community. He gives of his time and talents to such marvelous organizations as the Detroit Symphony Orchestra, Interlochen Center for the Arts, and Detroit Children's Hospital Foundation. Kurt, I admire you greatly for your ability to perform your professional and personal duties in life so well, yet still find time to give back to your community.

Last and certainly not least, I admire Kurt because he's honest, straightforward, and plays by the rules. Needless to say, playing by the rules is a big deal for a judge or a justice. Kurt understands that obtaining equal justice under law, the foundation of our judicial system, can only be achieved when the rule of law is applied equally to all litigants who come to court. Kurt will never put his thumb on the scale of justice to achieve a result that is not dictated by the law. He will follow the law, even when he does not like the law.

In this regard, I'm not sure whether this admirable quality about Kurt is the product of his many years of experience on the trial and appellate court, or from his experience as a high school football official. As you might imagine, being an official is much like being a judge or a justice; you need to know the rules and you have to have the courage and conviction to apply those rules appropriately, even when the masses are yelling for a different result. You simply can't change the rules in the middle of the game. Regardless of where Kurt honed his skills, I am confident in saying, Kurt knows when to throw a flag, but he also knows when to pick it up. In fact, picking up a flag takes a lot of courage, and Kurt will not hesitate in doing what's right in upholding our Constitutions and the rule of law in our state.

Governor, when Justice YOUNG announced his retirement, I must admit I was very concerned. Justice YOUNG contributed so much jurisprudentially and administratively to make Michigan a better place to live, raise a family, and do business. The departure of Justice YOUNG left a huge void on our Court, and making this appointment could not have been easy. But Governor, I thank you for appointing KURT WILDER the 112th justice of the Michigan Supreme Court. I was thrilled to hear the news that my dear friend and

rock-solid former colleague would be joining our bench. And today I am honored to formally welcome him to the Michigan Supreme Court. Justice WILDER, congratulations and welcome.

MR. RASSEL: Mr. Chief Justice, having heard the consistent remarks about the man that we all really love, I believe the time has come for the oath of office.

CHIEF JUSTICE MARKMAN: What a wonderful ceremony this has been for this Court, and what a wonderful testament to our newest justice. By your accomplishments and character, Justice WILDER, you've earned the right today to take this oath. It's what binds you for as long as you serve on this Court, to abide by the requirements of the law, requirements of the Michigan Constitution, and the requirements of the United States Constitution. And there's no stronger bond, as you know, between people than an oath where it invokes the Almighty. In the end, of course, it is not the oath that makes us believe in the man or the woman, but the man or the woman that makes us believe in the oath. And I and your new colleagues firmly believe that you are the kind of man who makes us believe in this oath today, and that is what makes this moment a significant one. Please raise your right hand and repeat after me:

CHIEF JUSTICE MARKMAN: "I, KURTIS T. WILDER—"

JUSTICE WILDER: I, KURTIS T. WILDER—

CHIEF JUSTICE MARKMAN: "do solemnly swear—"

JUSTICE WILDER: do solemnly swear—

CHIEF JUSTICE MARKMAN: "that I will support the Constitution of the United States—"

JUSTICE WILDER: that I will support the Constitution of the United States—

CHIEF JUSTICE MARKMAN: "and the Constitution of the state of Michigan—"

JUSTICE WILDER: and the Constitution of the state of Michigan—

CHIEF JUSTICE MARKMAN: "and that I will faithfully discharge the duties—"

JUSTICE WILDER: and that I will faithfully discharge the duties—

CHIEF JUSTICE MARKMAN: "of the office of Justice of the Michigan Supreme Court—"

JUSTICE WILDER: of the office of Justice of the Michigan Supreme Court—

CHIEF JUSTICE MARKMAN: "according to the best of my ability—"

JUSTICE WILDER: according to the best of my ability—

CHIEF JUSTICE MARKMAN: "so help me, God."

JUSTICE WILDER: so help me, God.

CHIEF JUSTICE MARKMAN: Congratulations. [Applause.]

JUSTICE WILDER: [Justice WILDER dons robe]. Thank you. It's official now.

MR. RASSEL: Honorable members of the bench and all the rest of us, I give you the Honorable Justice KURTIS WILDER.

JUSTICE WILDER: May it please the Court, Mr. Chief Justice and justices of the Supreme Court. In my 33 years as a licensed attorney, I've never had the opportunity to say those words, and since it is my distinct hope that I'm not afforded the opportunity to say them from the other side of the bench anytime soon, I thought I would just see what they sound like. [Laughter.]

In all seriousness, thank you to Chief Justice MARKMAN for presiding over this ceremony and admin-

istering the oath of office. And thank you as well to my esteemed colleagues for how warmly that you've welcomed me as your new colleague, for your commitment to serve the citizens of this state with the utmost integrity, and for your intellect and your work ethic. Whatever the quality of my abilities as I join this Court, I know that I can only improve by following the example each of you sets every day.

Former Chief Justice YOUNG called to say that he was unable to be here, but I did want to thank him for his years of dedication and service to this august body and for his varied contributions to the administration of justice and of the fabric of the law in this state. And I also wanted to personally thank him for retiring, so I that I could have this seat. [Laughter.]

Governor Snyder, I want to thank you for the trust that you've placed in me and the high honor you have bestowed on me by appointing me to serve in this role. And I commit to do everything in my power and control to create the opportunity for someone now or 20 years from now to see my appointment to this Court as one of your outstanding decisions as Governor; so thank you very much.

And Reverend Campbell, you offer the most thoughtful prayers, and you and the entire First Pres family, many of whom are here today, have been a source of spiritual nourishment and also an example of Christian love. So thank you for being here today.

As you heard, unfortunately, my parents, Nathaniel Wilder and Dr. Sarah Wilder, are not able to join us in person. But they are here very much in spirit and as well in my heart; I believe they are watching—at least I hope they are—the live feed from Cleveland. There was some difficulty getting that to work earlier, so I hope that was resolved. And I also have family in other

parts of Ohio, Oklahoma, Florida, New Jersey, and Australia who could not be here today. I'm very grateful for the support of my family and for God's grace. And as I said at the time of my appointment, the fact that I've achieved anything at all, let alone the opportunity to serve on the Michigan Supreme Court, is, as I believe, a tribute to my parents.

My parents graduated from Tuskegee Institute before it was a university and traveled north to settle in Ohio. My father was a soil conservationist, before his retirement, with the United States Department of Agriculture for more than 30 years. He never took a sick day, and he was one of the first African-American soil conservationists hired by the state of Ohio or within the state of Ohio by the federal government. My mother was a dietitian/nutritionist and educator for almost 50 years. And she was the first African-American president of the Ohio Dietetics Association. As the 112th justice of this Court, but also its fifth African-American justice, I understand the legacy of service that my parents have left for me to follow. Mom and Dad, I hope you're watching; I love you and may God continue to bless you.

As you saw, my children, Alycia and Klif, have been here today to participate with the ceremony, and I want to express my love and thanks to them and ask them to stand to be recognized.

I want to thank all of you who are here in the courtroom to—for being here today, to share in this special day. Thank you to the judges, the Speaker and other legislators, and other elected officials who took the time to come here to celebrate. And thank you to so many I've worked with over the years, who've helped to mold me as a lawyer and a judge; in particular, Tony Smith and U.S. Court of Appeals

Judge David McKeague at Foster Swift, Dick Rassel and Bob Vercruysse at Butzel Long, my colleagues at the Washtenaw County Circuit Court, and my colleagues on the Michigan Court of Appeals.

Dick, I want to thank you for serving as the master of ceremonies. I have such high regard for you and consider it a high honor to have you here today.

Thank you, Harvey, for coming up from Cleveland to be a part of this day, from the band and orchestra department to the softball fields, to our respective journeys to the practice of law, we've never lost that bond that we had almost from the very time we met, and I appreciate everything that you've been to me.

Thank you, Charlie, for your kind and thoughtful words on behalf of the Michigan Supreme Court Historical Society.

Liz, you are an advocate's advocate and the consummate and formidable professional. And I'm grateful for your words and support here today.

Sheriff, you've been an exemplary sheriff and an exemplary friend. Thank you for your wonderful comments.

Brian, Justice ZAHRA, you have been a great colleague and a jurist on the Wayne Circuit bench, at the Court of Appeals, and now here, at the Supreme Court. Maybe you were too young for the circuit court, but I wasn't. [Laughter.] You've paid me a huge compliment today with your remarks, and I'll do my best to continue to live up to them.

And Steve, Chief Justice, it's an honor to serve on this Court with you as Chief Justice. You've always been a wonderful example of how to serve with dedication and commitment to the rule of law.

Let me also please recognize my judicial assistant of 24 years, Connie Fuller. I don't know if she's—where she is. Is Connie in the—please stand and be recognized. I commend her for putting up with me for all these years, to my great benefit. I want to recognize my current law clerks, Tamara York Cook, Charlynn Turner, Adam Pavlik, and Hal Stanton. And if they're in here, would you please stand? And any of my former law clerks and interns who were able to be here today, please stand to be recognized. These were all the people that have kept me on the straight and narrow all these years, so I'm very grateful to all of them.

Since I have a 25-year record of service as a judge, I'm not going to dwell today on my judicial philosophy, but I do want to say a few things, because over those 25 years I've tried to maintain the same philosophy. I believe that my job is to say what the law is, not what it ought to be; to give a reasonable interpretation to the constitutional provisions and statutes that are before us as a Court, upholding the rule of law. I respect the separation of powers that our framers so ably designed. And yet I understand that the powers granted to the judiciary must be wisely, carefully, thoughtfully, and compassionately exercised toward the end of equal justice under law.

I have always believed that a decision of any court must not only be fair, but it also must appear to be fair. That does not mean fairness in the eye of the judge or in the eye of the court. But fairness is the law governing the conflict that issue demands. This requires that particular care be given to explain the basis of any decision so that, to the extent possible, even a losing party can understand the logic of the decision against him or her. I pledge to approach my work here at the Supreme Court, deciding the cases and controversies

before us, with diligence, integrity, and seriousness as our work here deserves and demands.

And I will accord respect to my talented colleagues, listening carefully to their beliefs about how we should decide particular issues, and firmly but respectfully advocating for my view of the law if we disagree. I will do my best to treat all parties and their attorneys with dignity and respect. And, in our important administrative work, I pledge to listen and learn about the challenges of making our One Court of Justice a reality of justice for the judges, staff, and citizens who work and appear in our lower courts every day, so that I can exercise wise judgment in my administrative role on this Court.

Thank you to the Michigan Wing Civil Air Patrol Honor Guard for coming up to post the colors for us today and leading us in the Pledge of Allegiance. Thank you to the Detroit Symphony Civic Orchestra alumni who are going to be providing background music for the reception, which follows in the rotunda. I've served on the board of the Detroit Symphony Orchestra for nearly eight years, all of that time on its education committee. And I've been proud of the accomplishments of the Civic Youth Ensemble Players, many of whom, like my daughter, Alycia, continue to play professionally.

Finally, I want to give special thanks to the Interlochen Arts Academy Chamber Singers and their director, John Bragle. I've served nearly 10 years as a trustee at Interlochen. And, in addition to her time with the Detroit Symphony Civic Orchestra, my daughter Alycia is also an Interlochen Camp and Academy alum. So Interlochen, with all of its amazing student talent, some of which you have witnessed here today, its amazing faculty and staff, and its amazing

legacy in Michigan history holds a very special place in my heart. I tried to get my son to go to Interlochen, too, but he's too independent. I am informed that Interlochen is making history here today by being the first to provide music during an investiture ceremony here at the Supreme Court. So thank you for being here today.

Now let me conclude by inviting you to enjoy the refreshments in the rotunda after the Court has been closed. I'll do my best to thank each of you personally for being here today. And thank you for this great honor that you've bestowed upon me by your presence here. It is a true joy, an honor and blessing, to serve as a justice on this Court. Thank you.

MR. RASSEL: Once more, the Interlochen choir, and this I'm sure will be moving. [Interlochen choir sings *America the Beautiful*.] [Applause.] Ladies and gentlemen, that arrangement was prepared especially by Director Bragle for this investiture. It was extraordinarily moving. Thank you all for being here today. Please join Justice WILDER for light refreshments in the lobby.

CHIEF JUSTICE MARKMAN: The only thing I can say in response to that is, aren't there two or three more verses to the song? [Laughter.] Well, thanks to everyone in this room. This has been a wonderful occasion, a wonderful day for this Court, and a wonderful day, I believe, for all the people of our great state. Thank you for being here. We stand adjourned.

MICHIGAN SUPREME COURT INVESTITURE CEREMONY OF JUSTICE ELIZABETH T. CLEMENT

MARCH 28, 2018

COURT CRIER: All rise. Hear ye, hear ye, the Chief Justice and the Justices of the Supreme Court of Michigan. All persons having business before this Honorable Court are admonished to draw nigh and give their attention, for the Court is now sitting. God bless the United States, the state of Michigan, and this Honorable Court.

CHIEF JUSTICE STEPHEN J. MARKMAN: Good morning. [Indiscernible.] We don't usually hold a session this late in the afternoon unless for one reason or another, there's food and refreshment waiting in the rotunda upon adjournment. And that is exactly the case this afternoon, and you are all welcome to join us, so please do so when we're done with this ceremony. I would like to welcome everyone, bench, bar, and public, to this afternoon's special session of the Michigan Supreme Court, convened for the purpose of recognizing ELIZABETH CLEMENT's investiture. Justice CLEMENT, of course, is the newest member of this Court and has been serving with distinction since last November 17th, when she was officially sworn into office in this same courtroom.

Supreme Court investitures periodically highlight and celebrate the renewal of this Court, which, on a seven-person court, effectively occurs with the appoint-

ment or election of each new justice. To a greater or lesser extent, the ascension of each new justice transforms this Court and elevates a new voice with his or her individual perspectives on the administration of our state's justice system, the proper exercise of the judicial power, and the prerequisites of the equal rule of law. The investiture, of course, is also an opportunity for new justices to introduce themselves to the people of this state and to the bench and bar, through the words of their friends and family and colleagues, as well as through their own expressions.

The investiture is, finally, an opportunity for this institution to periodically reconnect itself with its heritage—in this case, a 180-year-old constitutional heritage. And we on the Court are always appreciative of the work, as we are today, of the Michigan Supreme Court Historical Society in periodically reminding us of that heritage through its efforts on investitures and other celebratory occasions of this Court. As with her 112 predecessors, Justice CLEMENT will renew and rejuvenate and transform the Court. And she has already successfully embarked upon this process by her many actions and decisions and statements.

I will note only at this time that it is difficult to recall a new justice who has better embodied in a single public servant what is perhaps the most enduring principle of both our state and national Constitutions—the separation of powers. She has served in the legislative branch as legal counsel to the Senate majority leader, she has served in the executive branch as legal counsel to the Governor, and she now serves in the judicial branch as justice of Michigan's highest court.

And in this regard, I would especially like to recognize and welcome the presence in our courtroom of

Governor Rick Snyder, who has played a not-insignificant role in bringing into being today's investiture. I'd also like to recognize the Lieutenant Governor of our state who is somewhere in this room as well. Lieutenant Governor Brian Calley, thank you, also, for being here. Let me now recognize for the purpose of serving as the master of ceremonies for this afternoon's program, the Chief Judge of our Court of Appeals, the Honorable MICHAEL TALBOT.

CHIEF JUDGE MICHAEL J. TALBOT: Good afternoon.

THOSE IN ATTENDANCE: Good afternoon.

CHIEF JUDGE TALBOT: Even a trial judge will tell you if you do that in the morning, you're picking that jury. And it means it's going to be a very long day. [Laughter.] Good afternoon.

THOSE IN ATTENDANCE: Good afternoon.

CHIEF JUDGE TALBOT: Now we got it. We're already behind time so, what the heck, we might as well just pitch this thing out. [Laughter.]

CHIEF JUDGE TALBOT: You should see this schedule. This thing is down to a one-minute timeline—3:11 to 3:12, 3:13 to 3:14 [indiscernible]. So, that's fine. That's the way—that's okay. The first thing on the program is, you'll see noted, is the Pledge of Allegiance with the Clement family; we've got Clare, Leo, and Camille. Would you like to come up? Did they tell you where they want you to stand and where you will lead us in the Pledge? Great. Come on up. Would everybody stand?

CLARE, LEO, AND CAMILLE CLEMENT: [The Clement children lead those in attendance in reciting the Pledge of Allegiance.] 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.

CHIEF JUDGE TALBOT: Thank you. Would you be seated? I want you to just get a picture here in your mind of a task: ministering in a parish where Mark Dantonio is a member of your parish, Tom Izzo is a member of your parish, Suzy Merchant is a member of your parish, and for a nice long afternoon of listening to a confession, BETH CLEMENT. [Laughter.] I'm going to give you good news here, Father, the job she's got now, the confessions probably will be a little longer than where she used to work. [Laughter.] Father Mark, would you join us please for an invocation? Father, would you like everybody to stand?

FATHER MARK INGLOT: It's an honor to be here this morn—or, this afternoon. I guess it is afternoon. Beth also now has to wear a robe for her job, too. [Laughter.] We have something more in common. Let us pray.

Almighty and eternal God, you have revealed your glory to all nations. God of power and might, wisdom and justice, through you authority is rightly administered, laws are enacted, and justice decreed. Assist with your spirit of counsel and fortitude Justice ELIZABETH CLEMENT, that her tenure on the Michigan Supreme Court may be conducted in righteousness and be eminently useful to your people and the Court with whom she presides. May she encourage due respect for virtue and faith. May she promote justice and mercy. Let the light of your divine wisdom direct her deliberations and the deliberations of the Court, especially Judge CLEMENT, and shine forth in all the proceedings of this Court. Guide her and the members of the Court, and help them serve the people of Michigan in uphold-

ing the blessings of liberty, equality, truth, and justice. Bring success to her work, and reward her for the good she does.

We pray for the Governor of our state, for the members of the Legislature, for all judges and elected officials, and all others who are entrusted to guard our welfare. May they be enabled by your powerful protection to discharge their duties with honesty and ability. Blessed are you, our God. We pray in your eternal name. Amen.

THOSE IN ATTENDANCE: Amen.

CHIEF JUDGE TALBOT: Thank you, Father. We didn't do this, and it kind of speaks for itself, because it—just in case they're not true they've got name tags in front of them. But I want to go along and introduce the justices, and we'll work through the other judges who are present here today. You have heard from the Chief Justice, Justice MARKMAN. Justice ZAHRA is to his right. Justice MCCORMACK to his left and that is exactly correct. [Laughter.]

JUSTICE BRIDGET M. MCCORMACK: When do we get a chance to talk back? [Laughter.]

CHIEF JUDGE TALBOT: Justice VIVIANO, Justice BERNSTEIN and what—the man who was the youngest and the newest justice, but not anymore, Justice WILDER.

Present also here today—and I—down at this end, great. Thank you. Judge McKeague from the Sixth Circuit and Judge Paul Maloney—we're delighted to have you here.

From the Michigan Supreme Court, retired Justices: Justice CORRIGAN, who we're going to hear from in just a moment, and Justice THOMAS BRENNAN, the founder of Cooley Law School. Justice BRENNAN. [Applause.]

Let me go through the judges of the Court of Appeals, my colleagues, my brothers and sisters: Judge CHRIS MURRAY, Judge PETER O'CONNELL—down at this end, wonderful. Thank you very much. Judge ELIZABETH GLEICHER, Judge MICHAEL RIORDAN, Judge MICHAEL GADOLA, Judge SWARTZLE—they're—good—thank you—Judge CAMERON and Judge TUKEL, our newest judge. Thank you.

The Circuit Judges: Judge Alexander—very good—Judge Bazzi, Judge Cunningham, Judge Cusick, Judge Fisher—back—there we go. Thank you, Judge. Judge Lillard, Judge Maurer, Judge Lita Masini Popke, Judge Schafer, Judge Martha Snow, Judge Stutesman, Judge Trice, Judge Viviano, Judge Yokich, Judge Michael Warren.

From the Probate Courts: Judge Doreen Allen and Judge Harrison-Suratt. When I get a hyphen, I'm always afraid that it's been typed up in the opposite—good.

From the District Courts: Judge Alderson, Judge Donald Allen, Judge Buchanan, Judge Chupa, Judge DeLuca, Judge Erhart, Judge David, Judge Haenicke, Judge Hoffman, and Judge Tom Brennan, Jr. These are the judges who are with us today, and we thank you all for being here.

CHIEF JUSTICE MARKMAN: Judge Talbot?

CHIEF JUDGE TALBOT: Did I miss somebody?

CHIEF JUSTICE MARKMAN: Bob.

CHIEF JUDGE TALBOT: Huh?

CHIEF JUSTICE MARKMAN: BOB YOUNG.

JUSTICE MCCORMACK: BOB YOUNG, remember that guy?

CHIEF JUDGE TALBOT: Is he here?

JUSTICE BRIAN K. ZAHRA: He is here.

JUSTICE ROBERT P. YOUNG (from the gallery): Surprise. [Laughter.]

CHIEF JUDGE TALBOT: Okay. I will tell you that I don't have—I told you about the timelines, the schedule here. I don't have a band that would start up to tell you to stop talking. So what we're going to do is, we'll have Bob—I was going to have BOB YOUNG do it, but I can't afford his hourly rate. [Laughter.] Okay, so—balance that scale off a little bit.

If you'll allow me indulgence for just a second—I think anyone who has ever studied government, civics, fully understands and appreciates that one of the most important and enduring contributions that a Governor can make to the state is in the judicial appointments that he or she makes. Those appointments and the decisions those people make stay a long time after the Governor's work is done. We thank you, Governor, for the appointments you've made and we particularly thank you for the appointment of Beth, today. I think we're all going to be very proud of the years ahead. Would you please give us your remarks? [Applause.]

GOVERNOR SNYDER: Well, thank you, Chief Judge. And before I make other comments, I do want to congratulate you and thank you for your 40 years of service. It's an incredible legacy. The only thing I can say in addition to that, in addition to thanking you, is to say I believe you worked it out to be 40 years to the day how long you were going to be on the bench. And I think that clearly reflects someone that's a nerd [laughter] although I won't call you that. I will leave that for your own confession.

Mr. Chief Justice, thank you. It's great to be with you again and the fellow justices. It's wonderful to be in front of the Court again. This is a great occasion. I'm

very proud to be here; watching Justice CLEMENT join you is a special honor for me. I'm proud to appoint her. If you stop and look at it, she had fabulous service in the legislative branch before joining our branch.

What I would say, though, is to give you a little background and perspective. Back in 2010 when we were putting the administration together, it was really important, given the state of Michigan, that we build the best team we possibly could. And so we went for people with many different backgrounds. And one criteria I sort of had is to say I wanted to blend two different groups in particular. I wanted to find a number of "been there, done that" kind of people—people that were doing this not because they needed to, because they needed a job, but because they wanted to help. They had years and years of experience. The next thing I wanted to do was find people that were going to be the next generation of leadership in the state of Michigan, people that were going to have great, long careers. And the idea was is we could learn from one another. Now, you don't have to guess what group I'm in by my hair color. I'm one of the old dogs.

But as a practical matter, when we looked towards the future, Beth was someone we identified as someone that had tremendous potential, not knowing what that ultimately may be, but to say here is an opportunity to have someone have, hopefully, great career experience to contribute to the state making a wonderful comeback and be well poised in position for decades to come to be a leader. Beth met all those criteria. And she provided tremendous service in the executive branch for nearly seven years.

What I would say is the only deficiency she had is she couldn't hold a job. [Laughter.] She changed job titles several times, starting as my deputy legal

counsel—and I'm glad to see another legal counsel also do well in terms of the Court—but also to see that continue in terms of being deputy chief of staff and then my legal counsel. What a tremendous opportunity for me to learn from someone. So as I said, we were bimodal in some degree, but it wasn't about the next generation just learning from us old folk; we also learned from the next generation. And so I looked to Beth for great counsel; she provided it with great leadership.

So it's a relatively easy call to say who would be a great justice. So I'm very proud of you, Beth, for the opportunity to join the Court. And I'm very proud of this Court, in particular. I believe we have the best Supreme Court in the United States, and I'm very proud of all our justices for their wonderful service. We're providing a great benchmark about what the rule of law is, what justice really is. And we all have a role to play.

So, it's with great honor that I'm here today, to share in this wonderful experience, to watch you, again, formally put your robe on and join this bench of outstanding people. But I'm proud to be associated with all of you, and we should be proud of the accomplishments our state has collectively made as one big team, one big family. And let's keep moving forward. So thank you so much. [Applause.]

CHIEF JUDGE TALBOT: Thank you very much, Governor. The next individual doesn't need much of an introduction, but I will tell you—probation officer and U.S. Attorney, Wayne County Prosecutor if I remember correctly, Court of Appeals, Chief Judge of the Court of Appeals, Michigan Supreme Court, Chief Justice of the Michigan Supreme Court, four years of service to the state of Michigan in the executive branch with the

Governor, and now in the private practice of law. So, Justice CORRIGAN, would you join us, please? [Applause.]

JUSTICE MAURA CORRIGAN: May it please the Court, Chief Justice MARKMAN and justices, Justice CLEMENT and members of the Clement family, Governor Snyder, Mrs. Snyder, and friends. I am so delighted that Justice CLEMENT asked me to speak this afternoon as she is sworn in as the 113th justice of the Michigan Supreme Court.

Both of us proudly served in the Snyder administration. She, with all the different hats that she wore for the Governor over seven years, and myself having stepped down from this Court to serve as Director of Human Services—still what I think of, Governor, as the most challenging job I ever had. So we share our history in the Snyder administration together. But also—and I love this about Beth—that when she was fresh from Michigan State University, she worked on my campaign for this Court 20 years ago. And that was her very first political campaign. So, I thank her for helping me way back then to become the 101st justice of the Court. And I plan to repay the favor this fall.

I also want to join Chief Judge TALBOT in recognizing Tom, Chief Justice TOM BRENNAN, for his service throughout our state. And as a point of Michigan history, he was the 66th justice of the Court, the youngest man ever elected at age 36, and the youngest Chief Justice at age 38. This was 51 years ago. A round of applause, please. [Applause.]

So, who is this stellar young woman who is joining the Supreme Court today? What of her heart and her mind? First of all, I want to say I think her priorities are straight, because she is the wife, the devoted wife of Tom, and the mother of these three beautiful and

intelligent children, Clare, Leo, and Camille. And I'm proud of you for that, and I share that priority with you.

In her professional life the Governor outlined for you already, she worked in the Legislature for two stellar senators, Mike Rogers and Mike Bishop, and then served in the Snyder administration with all of the roles the Governor told you about. But what do people say about BETH CLEMENT? First of all, her colleagues describe her as wildly intelligent and possessed of an otherworldly work ethic. And yet, she's very unassuming. I know about being unassuming; never underestimate someone who is unassuming. What we know about Justice CLEMENT is that she quickly gets to the heart of an issue, and she communicates very effectively with those she leads so that everyone pulls in the same direction. She is calm and relaxed in the face of emergencies and prioritizes problems to get them solved.

Indeed, this is not a young woman who runs for cover. Instead, she runs toward problems. It's as if Governor George Romney's words to "be bold" are ingrained in BETH CLEMENT's DNA. And all of these gifts that she possesses are tied up with a perfectly wicked sense of humor. What I know about BETH CLEMENT's heart and mind is that she has the intellect, the integrity, and the courage to become an outstanding justice of the Michigan Supreme Court.

When I was preparing for today, I went back to read the words of President Ronald Reagan when he spoke at the investiture of then Chief Justice Rehnquist and Justice Antonin Scalia. His words were beautiful on that day, and I want to paraphrase him. Reagan said that he was not looking for a conservative justice or a liberal justice—he abjured those labels. Instead, he

said he was looking for judges who could protect government by the people. That's the mission—the mission that our Chief Justice just spoke about in separating powers in our Constitution. I believe that Justice CLEMENT can be counted on, and that Governor Snyder properly puts his trust and confidence in her, with this appointment.

So, today formally begins BETH CLEMENT's most significant undertaking yet. And that is to protect government by the people, to defend our Constitutions and to defend our freedoms. Our heartfelt prayers and hopes go with you, Justice CLEMENT, and with this Honorable Court. May God bless you, God bless the great state of Michigan, God bless these United States, and this Honorable Court. Thank you very much. [Applause.]

JUSTICE MCCORMACK: —where do you want me?

CHIEF JUDGE TALBOT: It's up to you.

JUSTICE MCCORMACK: Where do you want—I'll go wherever you want.

CHIEF JUDGE TALBOT: I think right up there.

JUSTICE MCCORMACK: Okay. How's she going to hug me?

CHIEF JUDGE TALBOT: We're trying to figure out—I'm not sure which is easiest for the Justice. The judges and the justices will tell you that there was—you try for collegiality and sometimes that's possible, but there are times when that's—that's not all that easy. There was a time when this Court, the Supreme Court, struggled in terms of collegiality. Justice MCCORMACK brought back the spirit of collegiality. She healed in many ways, along with the other justices of this Court. And it's a privilege to be able to introduce her here today. Justice MCCORMACK. [Applause.]

JUSTICE MCCORMACK: Thank you. Colleagues, Clements, friends of Beth, and especially Beth. I am honored to have the opportunity to address you all about my newest colleague, and my friend, Justice ELIZABETH CLEMENT, and the meaningful role she has already assumed on this Court.

As I know you all know, the Michigan Supreme Court's work is fundamentally collegial; that is, we make all of our decisions collectively. And as with other small collective bodies (like juries or corporate boards or scientific review panels), the goal is that our work product is greater than the sum of the individual contributions of its members.

Given this, every time a member changes, the entire body changes. It has to readjust and settle into its new order. And each new member brings her individual experiences, her talents, her work habits to our group dynamic, and the chemistry we had before she arrived is different. Add one more proton to platinum, and you have gold. Take one away from mercury, same.

Some of what Beth would bring to our body we could predict. For example, we knew she was very smart and that she was incredibly hardworking and that she was experienced at making difficult legal judgments about complicated questions and that she brought to us a legal background that none of the rest of us had. She worked as a lawyer in both other branches of government. Collective decision-making is richer and stronger when individuals bring diverse experiences to the table.

I am not sure we fully appreciated the deep and broad experience Beth showed up with on some of the administrative issues with which our Court was already involved, most especially, perhaps, treatment courts, but see also indigent defense and many other

topics. Beth's experience and expertise with our treatment courts is deeper and broader than any of the rest of us have, having worked on their development and implementation both in the legislative and executive branches dating back many years. So it is not surprising that she jumped into her role as the liaison to these courts with both feet, attending graduations across the state and playing an important role for us as we work to make sure our courts are truly serving the public. And that's just one example.

But it's some of Beth's qualities that are not revealed on a CV and are less tangible, but which are impossible to miss now that she's in my life in this everyday way, which I want to highlight.

To her core, Beth believes in collaboration. Her idea of working with colleagues is not politely interacting while pursuing her own goals. Rather, she wants to know what we think and to give us her own reactions and ideas. I understand now that this was the same approach she brings to all of her workplaces. In fact, I understand that at her last workplace, Beth aggressively institutionalized collaboration by leading her colleagues in an effort to get to know one another, not just professionally, but also personally, at a regular meeting known as Tea Time. Beth, I eagerly await "Supreme Court Tea Time." [Laughter.] And I have some ideas for Supreme Court Tea Time which we can discuss when we are off the record. #NotJustTea. [Laughter.]

Beth is authentic, almost disarmingly so. She is genuinely interested in knowing the people who work with her, for her, and around her. She invites us to be ourselves, and she makes it perfectly comfortable for that to happen, because she is herself with us. She exudes kindness, warmth, empathy. She's also

hilarious—we are having fun—and she's fully engaged in the world in which people who rely on our Court live. She knows more *Game of Thrones* trivia than any other justice in any state, I promise you. But her authenticity makes her easy to approach for help, to collaborate with, and to reason with.

Beth's "mom skills" are off the charts. And by "mom skills" I don't mean that she is a great mother, although she certainly is that. But that—I mean that she has found a way to be very successful in every professional setting she has landed in, by all accounts, with no shortcuts, but rather with hard work and long hours, which is of course what separates the great from the very good, and all the while fiercely loving and supporting each of her four children and her husband.

Clare, Camille, Leo, and Jordan, it is a joy to hear your mom talk about each of you and to see her face light up when she does. Sometimes you, too, Tom. The ability to meet the needs of four unique and active kids, each with their own talents and idiosyncrasies, while also succeeding in the professional environment is not just a testament to her organization and her multitasking skills, it is a bit of a superpower. And it is one we are now the lucky beneficiaries of.

But the single quality that has been an absolute pleasure to bear witness to is Beth's curiosity. Beth is an insa—she has an insatiable appetite for learning anything new. In fact, she approaches each new issue with excitement—glee, even. She runs toward hard questions that require hard work. And we have a lot of hard questions that reach our Court. In my very first case call, we had a full grant with, I don't know, 15 or 17 questions—that's how I remember it—about the

Drain Act. There's a Drain Act, yeah. I was terrified. I have a feeling she would be thrilled. That's what she's like.

Here is one little data point in support of this argument I make: Sometimes I listen to oral arguments while—from other courts—while I'm in my car on long drives. Okay, sometimes even short drives, sometimes on the treadmill. It's fun. It actually is. And I recently listened to one that was super interesting. It involved a Sixth Amendment question where a pro se criminal defendant was himself a lawyer. It was a fascinating argument from the Sixth Circuit. And I happened to be talking to Beth right after I listened to it, and I couldn't help but tell her about it. It was 24 hours later when I heard from her that she listened to it, too. And she had reactions and ideas about what she heard. It was pretty exciting for me, I have to say. I don't think she can help herself. She is constitutionally curious. And what better quality for a judge?

Hamilton said in Federalist 78 that the judicial branch would be the weakest of the three, because it had "no influence over either the sword or the purse . . . . It may truly be said to have neither force nor will, but merely judgment[.]" And our own rules and norms underscore this. We are committed to a conscientious application of the principles and texts that bind us. Judicial restraint is the foundation of all that we do. We only answer questions asked of us. We are governed in answering those questions by precedent and the text of the statutes and the Constitution, whether we like the outcome or not. And that means that our judgment, the only contribution we make in this constitutional democracy, is the whole ballgame—which brings me back to where I started.

The thing about a collegial body like this one is that when it's working well, when each member is contributing and complementing one another, there is no question that our whole is greater than the sum of our parts. Our collective judgment is better than any judgment one of us could arrive at solo.

And now to our whole comes this new part, Justice ELIZABETH CLEMENT, with her unique experience, her fierce intellect and curiosity, her authenticity and her energy, her humor and her empathy, to improve upon our sum considerably. One more proton, and a whole new element.

Welcome to the Court, Beth. I am so happy you are here. [Applause.]

CHIEF JUDGE TALBOT: The most intriguing speaker is the one that's listed next. I've just—I'm kind of anxious myself to hear what he has to say. [Laughter.] So is Beth. [Laughter.] A great lawyer in his own right, been with the Attorney General's Office, serves as our lawyer now. He's the lawyer, General Counsel, for the Supreme Court, Supreme Court Administrator's Office, and the Court of Appeals. Tom Clement. [Applause.]

MR. CLEMENT: Thank you, Chief Judge TALBOT, Chief Justice MARKMAN, Justices, Governor Snyder, Mrs. Snyder, Lieutenant Governor Calley, Justice CORRIGAN, Father Mark, members of the Judiciary, members of the Legislature, distinguished guests, family and friends, Beth.

I find myself in a bit of a unique position today. I am both General Counsel to this Court and the husband of its newest member. I am grateful for the opportunity to serve in both of those roles. As you can imagine, many of my friends and colleagues, many of whom are sitting here today, upon learning of Beth's appointment to the bench, thought they would take the opportunity to

demonstrate to me what a great sense of humor they have. [Laughter.] So, with a great deal of patience, I have listened to many of you hit me with such witty barbs as, "Now Beth can tell you what to do at work and at home." "Do you have to call her your Honor at home as well?" And my personal favorite, "I bet I can guess who your favorite justice is."

Now, just so we can clear the air and address these important inquiries once and for all, the answers are as follows. She does not tell me what to do at work or at home, she merely makes suggestions. I do not call her your Honor at home because, in addition to that being a bit strange, that would put me at an obvious disadvantage when we disagree on something. And as to the question of who my favorite justice is, I can tell you without any fear of retribution that my favorite justice will always be whichever justice I'm meeting with at that time. [Laughter.]

As most in this room can and have attested—can attest—Beth is a phenomenal lawyer, now a jurist. She has, among other skills, a penchant for careful listening and exceptional writing, coupled with keen ability to analyze issues from all perspectives. I could go on, but you have already heard about Beth's legal acumen from our previous speakers whose words carry far greater weight than my own admittedly biased opinion. I'd like to tell you about the Beth that amazes me a little bit more every day simply by the way she chooses to embrace each day.

Mother Teresa once said that not all of us can do great things, but we can do small things with great love. While I am incredibly proud of Beth, I am not quite ready to call her Mother Teresa. But I do think this statement captures her outlook on life. Since I have known her—she has, since I have known her—

been more focused on the effort being made than the result that it may yield. She takes comfort in the belief that if she takes what is in front of her and addresses it to the best of her ability, good things will happen. She finds happiness not just in the result—not just in the result—but in the work that it took to get there.

In no aspect of her life does Beth do small things with great love more than with her family and her friends. While there are many examples to share on this point, two of Beth's longest character traits came to my mind while I was preparing these remarks. She loves unconditionally, and she can be depended on. Whether the circumstance of the moment is joyful, sorrowful, or anywhere in between, Beth is going to be there to do the small things to make the moment a little bit better. And I think that no matter who you are, if you have someone that you depend on and who you know you love—who you know loves you without condition—life gets a little easier.

I have not directly asked Beth if she considered being a Supreme Court justice and only the 11th woman, to be one of those great things. Knowing Beth's humility, I suspect that her answer would be that it is not for her to decide and any time contemplating the question is simply not time doing her job. As for me, I love Beth for the small things. Thank you. [Applause.]

CHIEF JUDGE TALBOT: Mr. Chief Justice, would you please administer the oath?

CHIEF JUSTICE MARKMAN: I knew I had to spend more quality time meeting with our counsel, and I will do that in the future. [Laughter.]

Justice CLEMENT has previously taken her oath of judicial office, but today's oath will be permanently memorialized in the official reports of this Court. By her accomplishments, she has earned the right to take

this oath; it is what binds her as long as she serves on this body to abide by the requirements of the law, the requirements of the Michigan Constitution, and the requirements of the United States Constitution.

And there is no stronger bond between people than an oath. And for that reason, an oath is the foundation of our criminal justice system, and it is required by our Constitution for every public officeholder. In the end, of course, it is not the oath that makes us believe the man or the woman, but the man or the woman who makes us believe in the oath. And we firmly believe that BETH CLEMENT is the kind of woman who will make us believe in the oath today. And that is what makes this moment a significant one.

Would you please raise your right hand, Beth, and repeat after me? "I, ELIZABETH CLEMENT—"

JUSTICE CLEMENT: I, ELIZABETH CLEMENT—

CHIEF JUSTICE MARKMAN: "do solemnly swear—"

JUSTICE CLEMENT: do solemnly swear—

CHIEF JUSTICE MARKMAN: "that I will support the Constitution of the United States—"

JUSTICE CLEMENT: that I will support the Constitution of the United States—

CHIEF JUSTICE MARKMAN: "and the Constitution of the state of Michigan—"

JUSTICE CLEMENT: and the Constitution of the State of Michigan—

CHIEF JUSTICE MARKMAN: "and that I will faithfully discharge the duties—"

JUSTICE CLEMENT: and that I will faithfully discharge the duties—

CHIEF JUSTICE MARKMAN: "of the Office of Justice of the Michigan Supreme Court—"

JUSTICE CLEMENT: of the Office of Justice of the Michigan Supreme Court—

CHIEF JUSTICE MARKMAN: "according to the best of my ability—"

JUSTICE CLEMENT: according to the best of my ability—

CHIEF JUSTICE MARKMAN: "so help me, God."

JUSTICE CLEMENT: so help me, God.

CHIEF JUSTICE MARKMAN: Congratulations. [Applause. Justice CLEMENT dons robe.]

JUSTICE CLEMENT: It's so quiet in here. Well, that was overwhelming, it really was—all the speakers and everyone that is here to celebrate with me, today. So, I first want to say thank you to—for that—because I'm speechless. I really am. I knew that this would, that this would be somewhat overwhelming, but I really didn't think that I would feel this way.

So, first for my thank yous. Chief Justice MARKMAN, my fellow justices of the Supreme Court, thank you for this opportunity to celebrate today with so many family and friends. I am so grateful to have all of you here today for my investiture. In the four months I have been on the bench, each one of you have been so kind and welcoming.

Thank you to the Michigan Supreme Court Historical Society for hosting this event. And thank you to all of my new judicial colleagues who have made time in their busy schedules to be here to celebrate today.

Governor, I am so honored that you are here today to speak at my investiture and celebrate with me. Working for you was the best job I have ever had until you appointed me to this bench. [Laughter.] Your trust in me, and the tremendous honor of being a part of your

judicial legacy in this state, means more to me than I could ever adequately express. Thank you.

GOVERNOR SNYDER: Thank you.

JUSTICE CLEMENT: Father Mark, our Pastor at St. Thomas Aquinas Parish, where my father went to school, I went to school, and my children go to school, in addition to all of the people that you mentioned that are members there, thank you for your love, guidance, and prayers for our family throughout this amazing experience, but more importantly, being there for Tom, me, and our children when we needed faith and prayers the most. Thank you for being here today, sharing this with us, and for the beautiful invocation.

Justice CORRIGAN, a dear friend and mentor to me. As you said, yours was the first campaign I ever worked on and definitely the most memorable jingle—I still remember it, unfortunately. [Laughter.] I think there's people in—that are here that do as well. I had this conversation recently with someone. Want me to do it? No. [Laughter.] Your passion for the welfare of children in our state is the thing that has always drawn me to you. And I hope to pick up your mantle on behalf of the Michigan Supreme Court.

Justice MCCORMACK, thank you for speaking today, and thank you for your friendship you have extended to me since before I was your colleague. I was very worried that I would not have as much fun in this job as I had in my previous jobs. You have successfully erased that fear. [Laughter.] Having the opportunity to serve with you, as the other female justice on this Court, has been great, and I know it will get even better with time—like the other thing you were mentioning. [Laughter.]

JUSTICE MCCORMACK: Yeah.

JUSTICE CLEMENT: Chief Judge MIKE TALBOT, thank you for agreeing to emcee today. I knew we had a similar perspective on these occasions. Keep it moving, and make sure there's some humor. You did not disappoint. I am so honored to have this be one of your last official events before you retire after 40 years on the bench. Congratulations.

My law clerks, Adam Pavlik, Jesse Kirchner, Heidi Williams, and Elizabeth Kingston. I am very lucky to have such smart, hardworking clerks that help me prepare and do their best to make me look good. They have made the last four months as smooth as possible, and I know it required a lot of hard work on their part, so thank you very much.

Judge JOAN LARSEN was not able to make it today, so I will pass along my thank you to Judge McKeague. Thank you for taking senior status so Judge LARSEN [laughter], so Judge LARSEN could be appointed to your seat, and I could have hers. I don't know that you had it all planned out like that, but I'm going to give you all the credit for it.

To my judicial assistant, Andrea Hutchinson, thank you for this wonderful day. None of this would have been possible without you. Anyone that knows me and really knows me, understands what I mean. All of the details, logistics, the invites, the flowers, the food, my clothes, are all things that I have absolutely zero natural ability or talent for. Thankfully, Andrea loves all of it and took on this project with complete enthusiasm. I would also like to thank Lynn Seaks; Deborah Allen, Judge Shapiro's judicial assistant; and Carrie Sampson; our Court Crier's Office; and the court security who were a tremendous help to Andrea.

To my parents and family, thank you for being here to be part of this amazing day. I'm the person I am

because of your love and support over the years. Thank you for always believing in me and telling me that I can accomplish anything I set my mind to. You were right; you know, I don't say that very often, so—

Most important of all my thank yous today, to Tom and our children. To my husband, Tom, thank you for the life we have together. Thank you for fighting with me when you think I am wrong and supporting me in everything that I have worked hard for. You have always had faith in me and been my champion. You are my best friend, and I am thankful to have you by my side through this journey. I love you.

My wonderful children, Jordan, Clare, Leo, and Camille—we are so blessed to have the four of you. You keep me laughing, and you keep me grounded. I love that none of this seems to faze any of you. [Laughter.] You still expect the same from me and from dad, and I hope you always do. Although your dad and I have always had very busy careers, and we love what we do, you are what is most important to us. You are why we enjoy life so much and what makes all of this worth it.

To some of the mentors I have had through my legal career: Court of Appeals Judge MIKE GADOLA, I despised your red pen. I did—but will never forget the excitement I had the day I got a lengthy memo returned with not one red mark. I remember saying something to you about it, and you asked for it back to take another look. [Laughter.] I did not give it back. Thank you for making me a better writer, for trusting me to do my job well, and for all the laughs we had.

Joe Garcia, or Uncle Joe to me and my siblings: You have always been my cheerleader, sponsored me into the Bar, and continued to support me throughout my legal career.

Dennis Muchmore, thank you for pushing me outside of my comfort zone and telling me that I am more than just a quiet attorney that likes to research and write.

I also want to acknowledge John Pirich. Hi, John, happy birthday. Thank you for sharing this day with me, and congratulations on your retirement. You will be missed.

The past four months on the bench have been an interesting transition from my prior life. I really had no appreciation for just how different it would be. I was used to jumping from issue to issue, being on the phone from early in the morning until late at night and on the weekends during all of my children's sporting events, stepping out during Mass, hundreds of e-mails a day. It was really nice after—almost immediately after I started—my phone stopped ringing like three days after. I got a lot of congratulations, and then the phone stopped. It was really nice for a few days, and it was also kind of lonely.

About three weeks after I started, on a Friday morning right before 10:00 a.m., my cell phone rang. My former colleague, Andy Doctoroff, was calling, and I'm pretty sure that I answered it on the very first ring. When he heard my voice, he said, "Beth? Beth Clement?" I said, "Hey, Andy. What's goin' on?" His reply was "Sorry, I misdialed. I meant to call Beth Emmet." [Laughter.] I said, "Well, I've got time to talk." "No, we've got a 10:00 meeting and I need to talk to her beforehand." [Laughter.] Thanks, Andy.

I can tell you how many times I have said—I cannot tell you how many times I have said—"I want a job where all I do is read all the time." Well, I got my wish. It is a lot of reading. A lot more reading than I could have ever imagined, and I love it. It has only been four

months, but I know that I will love this job for the many years I have before me. Not a day passes where I do not feel tremendous gratitude for the blessings in my life: my husband, children, family, and friends, the opportunity to be a member of the bar, and now as a justice of the Michigan Supreme Court.

My promise to my colleagues, the bench and bar, and to the people of the state of Michigan: I will be fair, impartial, independent, thoughtful, and hardworking. I will listen to my colleagues' views and analysis of the law and use my best judgment to reach the right decisions. I have learned through tough lessons throughout my life that it is more important to get to the right answer than to be right. Thank you all for your love and support, and thank you for being here today. [Applause.]

CHIEF JUDGE TALBOT: Mr. Chief Justice, back to you.

CHIEF JUSTICE MARKMAN: Thank you very much, Chief Judge TALBOT. And now that Beth has rejoined us in your customary place, so the Court does feel whole again. I am quite certain that no matter how long BETH CLEMENT serves on this Court, no matter how long and distinguished and dedicated her public service on behalf of all the people of this state, she will always remember vividly all that has taken place today in this courtroom—her family, friends, colleagues, bench and bar, all gathered together in recognition and celebration. Thank you again, all, for participating and for being here. We now stand adjourned, and we'll look forward to meeting you in the rotunda. Thank you. [Applause.]

SUPREME COURT CASES

PEOPLE v LEWIS

Docket No. 154396. Argued on application for leave to appeal April 13, 2017. Decided July 31, 2017.

Gary P. Lewis was convicted after a jury trial in the Wayne Circuit Court of four counts of third-degree arson, MCL 750.74, and one count of second-degree arson, MCL 750.73(1). The court, Lawrence S. Talon, J., sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 17 to 30 years of imprisonment for each of his convictions. Lewis appealed his convictions as of right in the Court of Appeals, claiming that he was deprived of counsel at his preliminary examination and that this deprivation of counsel at a critical stage of the criminal proceedings against him amounted to a structural error requiring automatic reversal. In an unpublished per curiam opinion issued July 21, 2016, the Court of Appeals, TALBOT, C.J., and MURRAY, J. (SERVITTO, J., concurring), concluding that automatic reversal was required under binding Michigan cases interpreting *United States v Cronic*, 466 US 648 (1984), vacated Lewis's convictions and remanded the case for a new trial. The Court of Appeals noted, however, that it did not believe reversal was required under a correct interpretation of federal law including *Coleman v Alabama*, 399 US 1 (1970), and that it would have applied a harmless-error test to determine whether reversal was required. The Supreme Court ordered and heard oral argument on whether to grant Lewis's application for leave to appeal or take other action. 500 Mich 918 (2016).

In a unanimous opinion by Justice LARSEN, in lieu of granting leave to appeal, the Supreme Court *held*:

The deprivation of defense counsel at a preliminary examination is subject to harmless-error review.

1. Under the Sixth Amendment of the United States Constitution, a defendant has a right to counsel during critical stages of a criminal prosecution. In this case, the prosecutor conceded that the preliminary examination is a critical stage. With regard to the proper remedy when the right to counsel at a preliminary examination is denied, *Coleman* held that a remand was necessary to determine whether that denial was harmless error, while *Cronic* stated that a trial is unfair if the accused is denied counsel

at a critical stage of the trial, requiring automatic reversal. However, that statement in *Cronic*, a case involving an allegation of ineffective assistance of counsel, was dictum, whereas the holding in *Coleman* that the deprivation of counsel at a preliminary examination is subject to harmless-error review was not. Accordingly, the holding in *Coleman* was binding.

2. In evaluating whether the deprivation of counsel at a preliminary examination was harmless, a court may not simply presume, without more, that the deprivation must have caused the defendant harm, nor may it presume that the error was harmless because of the subsequent conviction, even if no evidence from the preliminary examination was used at trial and the defendant waived no rights or defenses because of the absence of counsel. Given that the parties did not address either the substantive criteria or the procedural framework that should attend this review, the case was remanded to the Court of Appeals to consider those questions in the first instance.

Court of Appeals judgment reversed; Part II of the Court of Appeals opinion vacated; case remanded to the Court of Appeals for further proceedings.

Justice MCCORMACK, joined by Justice BERNSTEIN, concurring, signed the majority opinion in full and agreed that *Coleman* was controlling and binding in this case, but wrote separately to question whether harmless-error review under *Coleman* for cases in which counsel was denied at a preliminary examination was sustainable given the speculative nature of the inquiry, the evolution of and reasoning behind the United States Supreme Court's structural-error doctrine, and the unresolved tension between *Coleman* and *Cronic*.

1. CONSTITUTIONAL LAW — RIGHT TO COUNSEL — CRITICAL STAGE — PRELIMINARY EXAMINATION — HARMLESS ERROR.

The deprivation of defense counsel at a preliminary examination is subject to harmless-error review.

2. CONSTITUTIONAL LAW — RIGHT TO COUNSEL — CRITICAL STAGE — PRELIMINARY EXAMINATION — HARMLESS ERROR — REVIEW.

In evaluating whether the deprivation of counsel at a preliminary examination was harmless error, a court may not presume, without more, that the error caused the defendant harm, nor may it presume that the error was harmless because of the subsequent conviction, even if no evidence from the preliminary examination was used at trial and the defendant waived no rights or defenses because of the absence of counsel.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Amy M. Somers*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Chari K. Grove*, *Douglas W. Baker*, and *Jason R. Eggert*) for defendant.

LARSEN, J. This case confronts us with two precedents of the Supreme Court of the United States that initially seem to conflict. In one, the Supreme Court remarked that denial of counsel at a critical stage of a criminal proceeding is a structural error requiring automatic reversal. See *United States v Cronic*, 466 US 648, 659; 104 S Ct 2039; 80 L Ed 2d 657 (1984). In the other, the Court remanded for harmless-error analysis in a case in which it held that a defendant was denied counsel at a critical stage—his preliminary examination. See *Coleman v Alabama*, 399 US 1, 11; 90 S Ct 1999; 26 L Ed 2d 387 (1970).[1] An error cannot be both structural and subject to harmless-error review. See *Neder v United States*, 527 US 1, 8; 119 S Ct 1827; 144 L Ed 2d 35 (1999).

The defendant in this case was deprived of the right to counsel at his preliminary examination. Believing itself bound by precedent, the Court of Appeals resolved the conflict by holding, in effect, that *Cronic* controlled and granting defendant an automatic new

[1] Justice Brennan authored the plurality opinion in *Coleman*. Three other justices joined Justice Brennan's opinion in full, and one additional justice joined Part III of the opinion, which held that harmless error was the appropriate standard of review for a denial of counsel at a preliminary hearing. *Coleman*, 399 US at 10 n 4. Accordingly, Part III of Justice Brennan's opinion will be cited as the opinion of the Court throughout this opinion.

trial. But *Cronic*'s discussion of the general remedy for complete denials of counsel was dictum; while *Coleman* held that the denial of counsel at a preliminary hearing—the very error at issue here—is subject to harmless-error review. When the Supreme Court's holdings and its dicta conflict, we are bound to follow its holdings. Accordingly, we reverse the judgment of the Court of Appeals, vacate Part II of its opinion, and remand the case to the Court of Appeals for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Before his preliminary examination, defendant, Gary Lewis, had been appointed two lawyers. He was not pleased with either; indeed, the examining court noted that he had filed grievances against each of his previous attorneys. Defendant's most recently appointed attorney was present in the courtroom when defendant appeared for his preliminary examination. At the start of the hearing, the judge asked defendant to state his name for the record. Defendant replied that he was "not talking"; that he didn't have an attorney; that he was being disrespected; that his rights were being violated; and that he was "through with it." The trial judge stated that he understood defendant to have "elected that he would prefer not to have a lawyer represent him" at the preliminary examination. Defendant explicitly disagreed: "I never said that." The court proceeded anyway, with defendant acting pro se, and appointed defendant's former attorney as standby counsel. Despite many warnings, defendant repeatedly disrupted the preliminary examination and was ultimately removed from the courtroom. At that point, the judge relieved standby counsel of his duties, and the

prosecution continued with the preliminary examination unopposed. Defendant was bound over for trial.

Defendant was represented by counsel at trial and was convicted by jury of one count of second-degree arson and four counts of third-degree arson. He challenged his convictions in the Court of Appeals, arguing that the deprivation of counsel at his preliminary examination was a structural error requiring automatic reversal. Believing itself bound by precedent, the Court of Appeals agreed, overturned the convictions, and remanded for a new trial. *People v Lewis*, unpublished per curiam opinion of the Court of Appeals, issued July 21, 2016 (Docket No. 325782). The prosecution filed an application for leave to appeal in this Court, and we ordered oral argument on the application. *People v Lewis*, 500 Mich 897 (2016).

II. ANALYSIS

The prosecution concedes that defendant lacked counsel at his preliminary examination[2] and that the preliminary examination is a critical stage for the purposes of the Sixth Amendment right to counsel. US Const, Am VI. The prosecution's concession is unremarkable. In *Coleman v Alabama*, the Supreme Court

[2] The prosecution also concedes that the examining court did not comply with the procedures set forth in MCR 6.005 or *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976), citing *Faretta v California*, 422 US 806; 95 S Ct 2525; 45 L Ed 2d 562 (1975), for establishing an unequivocal waiver of the right to counsel. The prosecution does, however, raise two preliminary arguments related to defendant's ability to bring his denial-of-counsel claim. First, the prosecution argues that defendant did not preserve his claim because he did not raise in the circuit court his lack of counsel at the preliminary examination. The prosecution also argues that defendant's behavior in refusing to cooperate with his attorneys could be construed as a waiver of his right to counsel. We do not entertain these arguments, however, because they were not presented to the Court of Appeals.

of the United States held that Alabama's preliminary-hearing procedure was a critical stage. *Coleman*, 399 US at 9-10 (opinion by Brennan, J.); *id*. at 12 (Black, J., concurring). Although there are variations in each state's preliminary-examination procedures, this Court has repeatedly commented that defendants have a constitutional right to counsel at preliminary examinations in Michigan. See, e.g., *People v Carter*, 412 Mich 214, 217; 313 NW2d 896 (1981); *People v Mitchell*, 454 Mich 145, 161 n 15; 560 NW2d 600 (1997). This case asks us to consider the remedy when that right to counsel is denied.

Two cases compete for our attention. The prosecution directs us to *Coleman*. In that case, the defendant was denied counsel at his preliminary hearing. The Supreme Court held that the hearing was a critical stage because of the "inability of the indigent accused on his own to realize the[] advantages of a lawyer's assistance" at such a proceeding.[3] *Coleman*, 399 US at 9-10 (opinion by Brennan, J.); *id*. at 12 (Black, J., concurring) (agreeing that "the preliminary hearing is a 'critical stage' "). A majority of the Court determined that the proper remedy was to remand the case to the Alabama courts to consider "whether the denial of counsel at the preliminary hearing was harmless error." *Id*. at 11, citing *Chapman v California*, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967).

Defendant points to *United States v Cronic*. There, the Court remarked that some "circumstances . . . are so likely to prejudice the accused that the cost of

[3] These advantages, as articulated by the plurality in *Coleman*, include "expos[ing] fatal weaknesses in the State's case," cross-examining witnesses to generate potential impeachment evidence for use at trial, gaining discovery of the prosecution's case, and making arguments related to bail and psychiatric examinations. *Coleman*, 399 US at 9 (opinion by Brennan, J.).

litigating their effect in a particular case is unjustified." *Cronic*, 466 US at 658. The Court began with the "most obvious" of these circumstances—"complete denial of counsel"—and commented that "a trial is unfair if the accused is denied counsel at a critical stage of his trial." *Id*. at 659.

Coleman's review for harmless error is obviously incompatible with the automatic reversal suggested by *Cronic*. Defendant asks us to hold, therefore, that *Cronic* silently abrogated *Coleman* and to automatically reverse his conviction. We decline to do so.

It is an elementary proposition that "state courts are bound by United States Supreme Court decisions construing federal law," including the Constitution. *People v Gillam*, 479 Mich 253, 261; 734 NW2d 585 (2007). But when two statements conflict, we must prefer a holding of the Supreme Court to its dictum. See *Agostini v Felton*, 521 US 203, 237; 117 S Ct 1997; 138 L Ed 2d 391 (1997).

Cronic was a case about the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution. The defendant was on trial in a mail-fraud case involving $9.4 million in transferred checks. *Cronic*, 466 US at 649. His retained counsel had withdrawn shortly before the scheduled trial, and a young lawyer with a real-estate practice—and no criminal-trial experience—had been appointed to represent the defendant. *Id*. The Government's investigation had taken more than four years, but defense counsel was given only 25 days to prepare for trial. *Id*. The defendant challenged his conviction on the ground that, under the circumstances, he had been deprived of the effective assistance of counsel. The United States Court of Appeals for the Tenth Circuit agreed. *United States v Cronic*,

675 F2d 1126 (CA 10, 1982). Even though the defendant could not point to any specific errors in his counsel's performance, or prejudice flowing therefrom, the federal appellate court held that "no such showing is necessary 'when circumstances hamper a given lawyer's preparation of a defendant's case.' " *Cronic*, 466 US at 651. The Supreme Court reversed, holding that the defendant could "make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel." *Id*. at 666.

Along the way, the Court's opinion in *Cronic* contrasted claims of ineffective assistance with other errors "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id*. at 658. It deemed "[m]ost obvious" among them "the complete denial of counsel . . . at a critical stage of his trial." *Id*. at 659. But the question in *Cronic* was not whether the defendant had been denied counsel completely, much less whether he had been completely denied counsel at a preliminary hearing. It was, instead, whether his counsel had provided effective assistance at trial. And so the Court's statements about the complete denial of counsel were dicta.[4]

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[4] The same rationale applies to the Court of Appeals' reliance on *People v Arnold*, 477 Mich 852; 720 NW2d 740 (2006), and to our statement in *People v Russell*, 471 Mich 182, 194 n 29; 684 NW2d 745 (2004), that "[t]he complete denial of counsel at a critical stage of a criminal proceeding is a structural error that renders the result unreliable, thus requiring automatic reversal." *Arnold* was a sentencing case, and *Russell* addressed the denial of counsel at trial. As such, they are not binding in this case, which involves a preliminary examination. Nothing in those cases purported to rest on unique aspects of the Michigan, as opposed to the federal, Constitution. Accordingly, neither *Arnold* nor *Russell* could have held that the complete denial of counsel at *any* critical stage of a criminal proceeding is structural error requiring automatic reversal, when the Supreme Court of the United States has held otherwise.

The *Coleman* decision, by contrast, is directly on point. Although it is short on explanation for its remedy, the Court plainly held that the deprivation of counsel at a preliminary examination is subject to harmless-error review under the federal Constitution. See *Coleman*, 399 US at 11. Accordingly, we apply that decision, rather than the dictum in *Cronic*.[5]

We note that our resolution is consistent with that of other courts which have examined the tension between *Coleman* and *Cronic*. See, e.g., *Takacs v Engle*, 768 F2d 122, 124 (CA 6, 1985) (holding that "*Coleman's* harmless error analysis remains good law" despite the defendant's argument that it had been overruled by *Cronic* and *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984)); *State v Brown*, 279 Conn 493, 507 n 5; 903 A2d 169 (2006) ("We note that, since *Coleman*, the United States Supreme Court has indicated in dicta that denial of counsel at a critical stage renders a trial unfair, without regard to actual prejudice. . . . At no point, however, has the [C]ourt overruled explicitly *Coleman* or repudiated its conclusion that the case should be remanded for harmless error analysis, despite the denial of counsel at the preliminary hearing."). And our resolution is also consistent with the Supreme Court's admonition that other courts should not conclude that the Court's "more recent cases have, by implication, overruled an earlier precedent" but should instead leave to the Supreme Court "the prerogative of overruling its own decisions."[6] *Agostini*, 521 US

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[5] Because *Cronic*'s dictum could not have overruled *Coleman*'s holding, we need not address the prosecution's argument that *Satterwhite v Texas*, 486 US 249; 108 S Ct 1792; 100 L Ed 2d 284 (1988), implicitly overruled *Cronic*.

[6] We have recently emphasized that a similar rule governs our own lower courts. See *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016).

at 237. Defendant has not argued that the state Constitution, Const 1963, art 1, § 20, provides him with any greater protection than the federal Constitution, US Const, Am VI.[7] Defendant's claim of error is, therefore, subject to harmless-error review.

While we have easily concluded that harmless-error review applies, we admit to being uncertain about just how a court is to evaluate the effect of this error on a verdict. *Coleman* does not tell us; there, the Supreme Court simply remanded to the Supreme Court of Alabama to review the effect of the error under *Chapman* without further discussion. We do, however, have some guideposts. At each extreme, we know what is not permitted. At one end, a court may not simply presume, without more, that the deprivation of counsel at a preliminary examination must have caused the defendant harm. Although consistent with the presumption accorded to the complete denial of counsel at some other stages of a criminal proceeding, see, e.g, *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963) (at trial); *Penson v Ohio*, 488 US 75; 109 S Ct 346; 102 L Ed 2d 300 (1988) (on first appeal as of right), such an approach would be treating the error as structural—a result foreclosed by *Coleman*. Neither, however, may we presume the opposite. Although it finds support by analogy in the Supreme Court's post-verdict evaluation of most grand-jury errors, see *United States v Mechanik*, 475 US 66, 73; 106 S Ct 938;

[7] Defendant has argued that a ruling that this error is subject to harmless-error review would set a "dangerous precedent" encouraging trial courts to subject defendants to preliminary examinations without counsel. We emphasize that the courts of our State remain under an obligation to protect a defendant's right to counsel at the preliminary-hearing stage. Should they fail, trial counsel should bring the error to the circuit court's attention before trial so that it may be promptly remedied.

89 L Ed 2d 50 (1986), *Coleman* does not permit us to presume that a defendant, who was ultimately convicted at an otherwise fair trial, suffered no harm from the absence of counsel at his preliminary examination. And that is true even if no evidence from the preliminary examination was used at trial, and even if defendant waived no rights or defenses because of the absence of counsel at the preliminary examination. All of these things were true, and brought to the Court's attention,[8] in Mr. Coleman's case, and yet the Supreme Court remanded his case for a determination, under *Chapman*, whether the deprivation of counsel at his preliminary examination was harmless. See *Coleman*, 399 US at 10 (remanding for harmless-error determination even though the "prohibition against use by the State at trial of anything that occurred at the preliminary hearing was scrupulously observed" and no rights or defenses were lost).[9]

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[8] The lead opinion itself acknowledged the first two points. See *Coleman*, 399 US at 10 ("The trial transcript indicates that the prohibition against use by the State at trial of anything that occurred at the preliminary hearing was scrupulously observed."); *id*. at 8 (opinion by Brennan, J.) (" 'At the preliminary hearing . . . the accused is not required to advance any defenses, and failure to do so does not preclude him from availing himself of every defense he may have upon the trial of the case.' ") (citation omitted; ellipsis in original). And the Court was obviously aware that defendant had been convicted at trial. See *id*. at 18 (White, J., concurring) ("The possibility that counsel would have detected preclusive flaws in the State's probable-cause showing is for all practical purposes mooted by the trial where the State produced evidence satisfying the jury of the petitioners' guilt beyond a reasonable doubt."); *id*. at 28 (Stewart, J., dissenting) ("Since the petitioners have now been found by a jury in a constitutional trial to be guilty beyond a reasonable doubt, the prevailing opinion understandably boggles at these logical consequences of the reasoning therein.").

[9] The Court of Appeals, believing itself bound by precedent, held that defendant was automatically entitled to a new trial because he was denied counsel at a critical stage of the proceeding. *Lewis*, unpub op at 3. The opinion proceeded, however, to set forth the panel's view that,

And so, with the two perhaps most intuitive options for assessing harm off the table, courts are left to give meaning to the Supreme Court's command to determine whether defendant was "otherwise prejudiced by the absence of counsel at the preliminary hearing." *Coleman*, 399 US at 11. The parties have not addressed in this litigation either the substantive criteria or the procedural framework that should attend such review. Accordingly, we remand to the Court of Appeals to consider those questions in the first instance.

III. CONCLUSION

In accordance with *Coleman*, we hold that the deprivation of counsel at a preliminary examination is subject to harmless-error review. We, therefore, reverse the judgment of the Court of Appeals, vacate Part II of its opinion, and remand to that Court for further proceedings consistent with this opinion. If the Court of Appeals concludes that the error was harmless, it must also address the sentencing issue raised in defendant's brief in that Court.[10]

MARKMAN, C.J., and ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, and WILDER, JJ., concurred with LARSEN, J.

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under a proper interpretation of the law, the denial of counsel in this case should be evaluated for harmlessness. *Id*. at 3-5. It then conducted that evaluation and concluded, in dictum, that the error was harmless because "defense counsel conceded that no evidence from the preliminary exam was used at trial," defendant "did not waive any rights or defenses by not participating in the preliminary exam," and defendant was tried and convicted, with counsel, at trial. *Id*. at 5. For the reasons stated above, these findings, by themselves, were insufficient to compel the conclusion that the denial of counsel was harmless.

[10] Defendant has filed an application for leave to appeal as cross-appellant. That application is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

MCCORMACK, J. (*concurring*). I agree with the majority that we are bound to follow *Coleman v Alabama*, 399 US 1; 90 S Ct 1999; 26 L Ed 2d 387 (1970), because it is directly on point and has never been overruled. I write separately to call attention to the difficulties inherent in performing a harmless-error review in cases such as this and, relatedly, to the possibility that the United States Supreme Court should reexamine *Coleman* in light of *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

It is difficult for me to imagine what a harmless-error review will look like when, as in this case, a defendant was denied counsel at the preliminary examination. As the majority recognizes, *Coleman* excluded the most intuitive bases for finding prejudicial harm because it made plain that the question of harmless error does not depend on whether evidence from the preliminary hearing was presented at trial, and *Coleman* remanded for a harmless-error determination even though the defendants waived no rights or defenses because of the absence of counsel. *Coleman*, 399 US at 8, 10-11. Further, *Coleman* remanded for harmless-error review with little guidance; the court was to determine whether the defendants were "otherwise prejudiced" by the deprivation of counsel at the preliminary hearing. *Id*. at 11.

There are, of course, many ways that the absence of counsel at a preliminary hearing might be harmful to a defendant apart from counsel's role in negating a showing of probable cause. Indeed, the *Coleman* Court identified many of these: counsel uses a preliminary hearing to expose weaknesses in the prosecution's case through cross-examination, lays the grounds for later impeachment at trial, effectively discovers the prosecution's case, and makes arguments related to bail or

psychiatric examinations.[1] *Id*. at 9. I can think of others, too: the preliminary examination is often a critical client-counseling moment when plea deals can be negotiated, and additional formal and informal communications between defense counsel, the prosecutor, and the court give the defendant important information about the evidence against him or her. But I find it extremely problematic for a court to conduct a harmless-error review with reference to these factors. It will require courts to speculate whether counsel would have discovered a significant weakness in the prosecution's case through cross-examination, or how effectively counsel might have been able to lay the grounds for later impeachment of a witness at trial, and what other information might have been revealed in the examination of witnesses or discussions among counsel. It will require courts to speculate about the opportunities for negotiating a plea deal and counsel's advice about whether to accept a particular offer. And the speculation won't end there: next, courts will have to speculate about what result this hypothetical representation at the preliminary examination might have had at a subsequent trial.[2] In short, I am concerned

[1] Other jurisdictions have referred to these four factors in their determination of harmless error. See, e.g., *State v Canaday*, 117 Ariz 572, 575-576; 574 P2d 60 (1977) (examining harmless error based on the purposes of a preliminary hearing delineated in *Coleman*); *State v Brown*, 279 Conn 493, 510; 903 A2d 169 (2006) (stating that deprivation of counsel at a probable-cause hearing is susceptible to harmless-error analysis through examination of the functions of a preliminary hearing listed in *Coleman*).

[2] In determining what counsel might have accomplished had he or she been present at this hearing, is the reviewing court to assume that the preliminary-examination counsel would have been about as effective as trial counsel? Or more effective because counsel might have an incentive to work especially diligently at a preliminary exam because that work could pay off with a better and earlier resolution of the case? Or perhaps the reviewing court should assume counsel was simply minimally constitutionally competent?

that harmless-error review in cases such as this invites a potentially problematic level of speculation into judicial review.

All of this gives me reason to question whether *Coleman*'s holding remains viable in light of the evolution of the Supreme Court's structural-error doctrine. I agree with the majority that *Cronic*'s comment suggesting that courts should presume prejudice and automatically reverse upon complete denial of counsel at a critical stage was dictum. The issue addressed in *Cronic* was whether the defendant received effective assistance of counsel, not whether the defendant was denied counsel at a critical stage. But several subsequent cases have cited *Cronic* for the proposition that courts should presume prejudice if a defendant suffers complete denial of counsel at a critical stage. See, e.g., *Roe v Flores-Ortega*, 528 US 470, 483; 120 S Ct 1029; 145 L Ed 2d 985 (2000); *Mickens v Taylor*, 535 US 162, 166; 122 S Ct 1237; 152 L Ed 2d 291 (2002); *Woods v Donald*, 575 US ___, ___; 135 S Ct 1372, 1375-1376; 191 L Ed 2d 464 (2015). Indeed, in *Woods*, 575 US at ___; 135 S Ct at 1375-1376, the Supreme Court reiterated the *Cronic* dictum as a holding that the complete denial of counsel at a critical stage allows a presumption of unconstitutional prejudice. And the preliminary examination is a critical stage in criminal proceedings. *Coleman*, 399 US at 9. Thus, it seems *Cronic*'s reasoning would apply with equal force to a preliminary examination, but for *Coleman*'s holding to the contrary.

Further, the reasoning that animates the Court's structural-error jurisprudence seems to apply with full force in the context of a preliminary examination. The common strand I see in the Court's rationale for declaring an error structural and presuming prejudice requiring reversal is that the particular error makes

assessing its effect exceptionally difficult. *United States v Marcus*, 560 US 258, 263; 130 S Ct 2159; 176 L Ed 2d 1012 (2010). Structural errors are characterized by "consequences that are necessarily unquantifiable and indeterminate . . . ." *Sullivan v Louisiana*, 508 US 275, 282; 113 S Ct 2078, 124 L Ed 2d 182 (1993). As explained above, that rationale seems on the nose here. Harmless-error review is impractical because of the difficulty in determining what might have gone differently if the defendant had the benefit of counsel at the preliminary examination. It is impossible to know with certainty what questions counsel might have posed and what answers witnesses might have provided, what other benefits the defendant might have derived from having counsel available, and how all of those considerations would have affected the subsequent trial. In my view, harmless-error analysis in cases in which counsel was denied at the preliminary examination risks becoming a "speculative inquiry into what might have occurred in an alternate universe." *United States v Gonzalez-Lopez*, 548 US 140, 150; 126 S Ct 2557; 165 L Ed 2d 409 (2006).

The development of the Supreme Court's structural-error doctrine, the reasoning that explains it, and the unresolved tension between *Cronic* and *Coleman*[3] make me question whether the *Coleman* harmless-error review remains a sustainable rule when a defendant is denied counsel at a preliminary examination. Nevertheless, *Coleman* is directly on point and has never been overruled, while the rule of *Cronic* has

[3] Compare *Ditch v Grace*, 479 F3d 249, 255-256 (CA 3, 2001) (reconciling *Coleman* and *Cronic* by reading *Cronic* in a limited fashion), with *French v Jones*, 332 F3d 430, 438 (CA 6, 2003) (stating that caselaw after *Cronic* has reiterated that harmless-error analysis does not apply to the absence of counsel at a critical stage, which requires automatic reversal).

never been applied to denial of counsel at a preliminary examination. Therefore, I agree with the majority that *Coleman* is controlling, and we are bound to follow its holding.

BERNSTEIN, J., concurred with MCCORMACK, J.

In re RASMER ESTATE

In re GORNEY ESTATE

In re FRENCH ESTATE

In re KETCHUM ESTATE

Docket Nos. 153356, 153370, 153371, 153372, and 153373. Argued January 12, 2017 (Calendar No. 2). Decided July 31, 2017.

The Department of Health and Human Services (DHHS) brought separate actions in the Bay County Probate Court, the Huron County Probate Court, the Calhoun County Probate Court, and the Clinton County Probate Court, seeking to recover under the Michigan Medicaid estate-recovery program (MMERP), MCL 400.112g *et seq*., an amount equivalent to the Medicaid benefits paid on behalf of the decedents. The Bay County Probate Court, Dawn A. Klida, J.; the Calhoun County Probate Court, Michael L. Jaconette, J.; and the Clinton County Probate Court, Lisa Sullivan, J., granted summary disposition in favor, respectively, of Richard Rasmer, personal representative of the estate of Olive Rasmer, Daniel Gene French, personal representative of the estate of William French, and the estate of Wilma Ketchum. Regarding the estate of Irene Gorney, the Huron County Probate Court, David L. Clabuesch, J., dismissed plaintiff's claim and entered a judgment in favor of the estate after a bench trial. DHHS appealed in each case, and the Court of Appeals consolidated the cases. The Court of Appeals, GLEICHER, J., and CAVANAGH, J. (JANSEN, P.J., concurring in part and dissenting in part), affirmed in part, reversed in part, and remanded the cases to the respective probate courts, concluding that DHHS could pursue its claims for the amounts paid by Medicaid on behalf of the decedents from MMERP's implementation date, July 1, 2011, but not for the amounts paid from the program's effective date, July 1, 2010, to the July 1, 2011 implementation date. *In re Gorney Estate*, 314 Mich App 281 (2016). Relying on *In re Keyes Estate*, 310 Mich App 266 (2015), the Court of Appeals rejected the estates' due-process challenge premised on a lack of notice of estate recovery at the time each decedent enrolled in Medicaid. Finally, the Court of Appeals addressed the Ketchum estate's

alternative argument that DHHS's estate-recovery effort violated MCL 400.112g(4), which precludes DHHS from seeking Medicaid recovery if the costs of recovery exceed the amount of recovery available or if the recovery is not in the best economic interest of the state; the Court of Appeals held that it could discern no basis for granting relief but that the estate could raise the issue again on remand. The Supreme Court granted the Rasmer estate's and DHHS's applications for leave to appeal. *In re Rasmer Estate*, 499 Mich 975 (2016).

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

DHHS did not violate the statutory or constitutional rights of the decedents or their estates by seeking estate recovery under 2007 PA 74 (the MMERP Act). In each case, DHHS was permitted to pursue estate recovery for Medicaid benefits paid on behalf of the decedents after MMERP's July 1, 2010 implementation date.

1. In 1993, Congress required states to implement Medicaid estate-recovery programs; in 2007, the Michigan Legislature responded by passing the MMERP Act, which empowered DHHS to establish and operate MMERP. MCL 400.112g(5) of the act required federal approval of the program before MMERP could be implemented, and MCL 400.112k made it clear that MMERP applied to all persons who began receiving Medicaid long-term care services after September 30, 2007, the date the MMERP Act was enacted and became effective. But MCL 400.112h(a) limits DHHS's estate recovery to property and other assets included within an individual's estate subject to probate administration. The federal Centers for Medicare and Medicaid Services (CMS) approved Michigan's program in May 2011, and DHHS implemented the plan on July 1, 2011. Each decedent began receiving Medicaid benefits after passage of the MMERP Act, but the initial Medicaid applications filed by the decedents, or by their personal representatives, did not contain any information about estate recovery. After MMERP's implementation, the decedents' personal representatives submitted, as part of the annual Medicaid redetermination process, form DHS-4574, which contained an acknowledgment provision advising Medicaid applicants that DHHS could seek recovery from the decedents' estates for services paid by Medicaid. Following each decedent's death, plaintiff sought to recover an amount equivalent to the Medicaid benefits paid on each decedent's behalf for long-term care services since July 1, 2010, the date CMS deemed the effective date of MMERP.

2. MCL 400.112g(3)(e) provides that when an individual enrolls in Medicaid for long-term care services, DHHS must provide the individual written materials explaining the process for a

waiver from estate recovery due to hardship. In addition, MCL 400.112g(7) requires DHHS to provide written information to individuals seeking Medicaid eligibility for long-term care services describing MMERP and including a statement that some or all of their estates may be recovered. In *Keyes*, 310 Mich App 266, the Court of Appeals held that MCL 400.112g(3)(e) does not require DHHS to provide notice regarding estate recovery when an individual enrolls in Medicaid because that provision is part of the larger MCL 400.112g(3), which requires DHHS to seek approval from the federal government regarding certain listed items, and the estate had not asserted that DHHS had failed to seek federal approval of the timing provision. *Keyes* accordingly concluded that MCL 400.112g(3)(e) did not require DHHS to provide written materials or timely notice of MMERP. *Keyes* also concluded that MCL 400.112g(7) did not require DHHS to provide written information about MMERP at enrollment in Medicaid because the provision refers to "eligibility" rather "enrollment." *Keyes* erred by severing "eligibility" from "enrollment"; in certain cases MCL 400.112g(7) may require DHHS to provide written information not only when a beneficiary seeks a redetermination of eligibility after enrollment but, contrary to *Keyes*, also just before enrollment, when eligibility initially is sought. But DHHS was not required to notify the decedents or their personal representatives of MMERP at the time they initially applied for Medicaid long-term care services because, under MCL 400.112g(5), MMERP could not be implemented until the program was approved by the federal government. With regard to the Rasmer estate's appeal, DHHS had no duty under MCL 400.112g(7) to provide written information to Ms. Rasmer or her personal representative about MMERP until the program was approved and implemented. Further, the written acknowledgment provided by DHHS to Ms. Rasmer in 2013, which informed her of the possibility of estate recovery, complied with the MCL 400.112g(7) requirement to provide written information to individuals seeking Medicaid eligibility for long-term care services describing MMERP and including a statement that some or all of their estates may be recovered.

3. The Court of Appeals erred by concluding that DHHS implemented MMERP before it had federal approval because DHHS did not implement MMERP until after federal approval of the program. The Court of Appeals further erred by analyzing the implementation question as a due-process issue when its conclusion rested on its view that DHHS had failed to comply with the MCL 400.112g(5) restriction. Under federal law, the effective date of changes to a Medicaid state plan may predate approval.

Accordingly, the MMERP-related state-plan amendments were lawfully given effect as of the July 1, 2010 effective date, even though that effective date occurred before the July 1, 2011 implementation date. In this case, DHHS complied with both the federal effective date (July 1, 2010) and the state implementation date (July 1, 2011) when it sought to recover the amount disbursed by Medicaid on behalf of Ms. Rasmer from the July 1, 2010 effective date; DHHS did not violate the MMERP Act when it pursued estate recovery in each of these cases.

4. The Fourteenth Amendment of the United States Constitution and Article 1, § 17 of Michigan's 1963 Constitution provide that the state shall not deprive a person of life, liberty, or property without due process of law. When a person faces deprivation of a protected property interest, due process generally requires notice and an opportunity to be heard. But it is presumed that citizens know of changes in the law affecting property rights as long as the Legislature has enacted and published the law and afforded citizens a reasonable opportunity to become familiar with its terms; under *Mullane v Central Hanover Bank & Trust Co*, 339 US 306 (1950), the due-process requirements of notice and an opportunity to be heard apply to an adjudication to be accorded finality. Participants in a benefits program, like other persons, have no due-process right to individualized notice of a legislative change. Moreover, MCL 400.112k, which provides that the recovery program applies exclusively to medical assistance recipients who began receiving Medicaid long-term care services after September 30, 2007, and MCL 400.112h(a), which provides that the recovery program is limited to property subject to probate, provided constitutionally adequate notice to beneficiaries that their estates could be encumbered by MMERP.

5. According to the Rasmer estate, Ms. Rasmer was deprived of the right to plan during her lifetime for the disposition of her property after death because she lacked notice that her estate would be encumbered by DHHS's creditor claim. Even if that interest is protected, the estate did not demonstrate any harm to Ms. Rasmer's asserted right to engage in lawful planning to avoid probate administration, so her due-process argument failed.

6. Legislation is retroactive when it applies to events antedating its enactment. The MMERP Act was prospective, not retroactive, legislation because MCL 400.112k specifically provides that the act applies only to events that postdate its September 2007 enactment.

7. The Court of Appeals erred by addressing the Ketchum estate's argument that DHHS was barred from seeking estate

recovery by MCL 400.112g(4), which prohibits DHHS from seeking estate recovery if the costs of recovery exceed the amount of recovery available or if the recovery is not in the best economic interest of the state. Although the Ketchum estate asserted MCL 400.112g(4) as a defense to DHHS's creditor claim, the Clinton County Probate Court disposed of the claim on other grounds. Accordingly, the Court of Appeals unnecessarily addressed the issue rather than leaving it for the probate court to address on remand.

In Docket Nos. 153356, 153370, 153371, 153372, and 153373, Court of Appeals judgment affirmed insofar as it held that DHHS did not violate the statutory or constitutional rights of the decedents or their estates by seeking estate recovery from the MMERP implementation date, July 1, 2011, forward. Court of Appeals judgment reversed insofar as it held that DHHS violated the constitutional rights of the decedents or their estates by seeking estate recovery from the July 1, 2010 MMERP effective date to the July 1, 2011 implementation date. Cases remanded to the respective probate courts.

In Docket No. 153372, Court of Appeals discussion regarding MCL 400.112g(4) vacated.

1. STATUTES — MEDICAID ESTATE-RECOVERY PROGRAM — PROVISION OF WRITTEN INFORMATION — TIMING.

2007 PA 74 empowered the Department of Health and Human Services (DHHS) to establish and operate the Michigan Medicaid estate-recovery program (MMERP), which allows DHHS to recover from a decedent's estate an amount equivalent to the Medicaid benefits paid on the decedent's behalf for long-term care services; under MCL 400.112g(5), MMERP could not be implemented until the program was approved by the federal government; although MCL 400.112g(7) requires DHHS to provide written information to individuals seeking Medicaid eligibility for long-term care services describing MMERP and including a statement that some or all of their estate may be recovered, DHHS had no duty to provide that information before MMERP was approved by the federal government in May 2011.

2. STATUTES — MEDICAID ESTATE-RECOVERY PROGRAM — ESTATE RECOVERY — EFFECTIVE DATE.

2007 PA 74 empowered the Department of Health and Human Services (DHHS) to establish and operate the Michigan Medicaid estate-recovery program (MMERP), which allows DHHS to recover from a decedent's estate an amount equivalent to the

Medicaid benefits paid on the decedent's behalf for long-term care services; the effective date of changes to a Medicaid state plan may predate approval; the MMERP-related state-plan amendments were effective as of the plan's July 1, 2010 effective date, even though the effective date occurred before the federal government's approval of the program; DHHS may seek estate recovery from a decedent for those Medicaid benefits paid from the MMERP effective date, July 1, 2010.

3. STATUTES — MEDICAID ESTATE-RECOVERY PROGRAM — ESTATE RECOVERY — SUFFICIENCY OF STATUTORY NOTICE.

2007 PA 74 empowered the Department of Health and Human Services (DHHS) to establish and operate the Michigan Medicaid estate-recovery program (MMERP), which allows DHHS to recover from a decedent's estate an amount equivalent to the Medicaid benefits paid on the decedent's behalf for long-term care services; under MCL 400.112g(7), DHHS must provide written information to individuals seeking Medicaid eligibility for long-term care services describing MMERP and including a statement that some or all of their estate may be recovered; form DHS-4574, provided by DHHS to individuals seeking Medicaid eligibility for long-term care services, sufficiently notifies the individuals that their property could be subject to estate recovery such that estate recovery does not violate MCL 400.112g(7).

4. STATUTES — MEDICAID ESTATE-RECOVERY PROGRAM — DUE PROCESS — NOTICE REQUIRED.

2007 PA 74 empowered the Department of Health and Human Services (DHHS) to establish and operate the Michigan Medicaid estate-recovery program (MMERP), which allows DHHS to recover from a decedent's estate an amount equivalent to the Medicaid benefits paid on the decedent's behalf for long-term care services; an individual is not entitled to specific and individualized notice of the effect DHHS's estate recovery could have on the individual's estate; taken together, the enactment and publication of MCL 400.112k, which provides that the recovery program applies exclusively to medical assistance recipients who began receiving Medicaid long-term care services after September 30, 2007, and MCL 400.112h(a), which provides that the recovery program is limited to property subject to probate, provided constitutionally adequate notice to beneficiaries that their estates could be encumbered by MMERP (US Const, Am XIV; Const 1963, art 1, § 17).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Geraldine A. Brown* and *Brian K. McLaughlin*, Assistant Attorneys General, for the Department of Health and Human Services.

Gary P. Supanich PLLC (by *Gary P. Supanich*), *Dill Law PLLC* (by *Colin M. Dill*), and *James Thomas* for Richard Rasmer and the estate of Olive Rasmer.

Gary P. Supanich PLLC (by *Gary P. Supanich*) and *Cubitt & Cubitt* (by *E. Duane Cubitt*) for the estate of Irene Gorney.

Gary P. Supanich PLLC (by *Gary P. Supanich*) and *Kreis, Enderle, Hudgins & Borsos, PC* (by *James D. Lance*), for the estate of William B. French.

Gary P. Supanich PLLC (by *Gary P. Supanich*) and *Charlotte F. Shoup, PLC* (by *Charlotte F. Shoup*), for the estate of Wilma Ketchum.

LARSEN, J. At issue in these companion cases is whether the Michigan Department of Health and Human Services (DHHS) may recover from beneficiaries' estates an amount equivalent to certain Medicaid benefits paid to, or on behalf of, those beneficiaries during their lifetimes. Pursuant to the Michigan Medicaid estate-recovery program (MMERP), DHHS asserted creditor claims in the amount of those benefits against the estates of four deceased beneficiaries: Ms. Olive Rasmer, Ms. Irene Gorney, Mr. William B. French, and Ms. Wilma Ketchum. In each case, the estate prevailed in the probate court and DHHS appealed. The Court of Appeals consolidated the appeals and reversed in part, concluding that DHHS could pursue its claims for amounts paid after MMERP's

July 1, 2011 implementation date, but not for amounts paid between that date and the program's effective date, July 1, 2010. One estate applied to this Court for leave to appeal, asserting that due process barred DHHS from recovering any amount paid before 2013, when the agency had directly notified the estate's decedent of MMERP. DHHS applied for leave to appeal in all four cases, arguing that the Court of Appeals had erred in concluding that the agency was not entitled to recover the amounts paid between July 1, 2010, and July 1, 2011. We granted leave in both applications. Having considered the parties' written and oral arguments, we conclude that DHHS is not barred from pursuing estate recovery for amounts paid after July 1, 2010. We, therefore, affirm in part, reverse in part, and remand the cases to the probate courts for further proceedings.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In 1965, Congress created the Medicaid insurance program,[1] which provides "federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Schweiker v Gray Panthers*, 453 US 34, 36; 101 S Ct 2633; 69 L Ed 2d 460 (1981) (quotation marks omitted). States that choose to participate in Medicaid "must comply with [federal] requirements." *Id*. at 37. In 1993, Congress required states to enact and carry out estate-recovery programs that would seek to recover the costs of certain Medicaid benefits from the beneficiaries' estates. See 42 USC 1396p(b)(1).[2] In 2007, the Michigan

[1] See Social Security Amendments of 1965, PL 89-97, tit XIX, 79 Stat 343 (codified as amended at 42 USC 1396 *et seq*.).

[2] See Omnibus Budget Reconciliation Act of 1993, PL 103-66, § 13612, 107 Stat 627.

Legislature responded by enacting MMERP's enabling legislation, MCL 400.112g to MCL 400.112k, as enacted by 2007 PA 74 (the MMERP Act). The MMERP Act required DHHS[3] to seek the federal government's approval of certain aspects of MMERP, see MCL 400.112g(3); only after getting that approval could DHHS "implement" the program, MCL 400.112g(5). DHHS sought federal approval in September 2010. The federal Centers for Medicare and Medicaid Services (CMS) granted approval in May 2011 and, in accordance with federal regulations, gave the amendments an "effective date" of July 1, 2010.[4]

DHHS began estate-recovery efforts on July 1, 2011, explaining in a June 1, 2011 bulletin that federal law required it to "implement" MMERP.[5] The bulletin

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[3] MCL 400.112g(1) charges the state Department of Community Health (DCH) with administering MMERP. In 2015, Governor Snyder created DHHS by executive order and transferred to it the "authority, powers, duties, functions, [and] responsibilities . . . of [DCH]." See Executive Order No. 2015-4. This opinion describes some agency conduct predating the executive order and thus undertaken by DCH; for the sake of simplicity we ascribe that conduct to DHHS in this opinion.

[4] See Letter from CMS to DCH, May 23, 2011, available at <http://www.michigan.gov/documents/mdch/SPA_10_018_Approved_355355_7.pdf> (accessed June 21, 2017) [https://perma.cc/UW9J-GA7E]. We observe that, under federal regulations, a plan amendment's effective date is governed by one of two standards. First, if a plan amendment expands benefits or "changes the State's payment method and standards," the effective date may be no "earlier than the first day of the quarter in which" the amendment is submitted for federal approval. 42 CFR 430.20(a)(1) and (b)(2). Second, "[f]or other plan amendments, the effective date may be a date requested by the State if CMS approves it." 42 CFR 430.20(b)(3). The July 1, 2010 effective date satisfies either standard: July 1, 2010, is the "first day of the quarter" containing September 2010, and it was the "proposed effective date" in the approval request.

[5] See Medical Services Administration, Bulletin No. MSA 11-20, June 1, 2011, available at <https://www.michigan.gov/documents/mdch/MSA_11-20_354432_7.pdf> (accessed June 21, 2017) [https://perma.cc/7Q6A-HSWA].

explained that, in accordance with MMERP, DHHS would "attempt to recover the expenses paid on behalf of a Medicaid beneficiary from their estate." It further detailed which estates and property would be subject to recovery:

> Medicaid beneficiaries who receive nursing facility care, MI Choice home and community based waiver services, home health, home help, and hospital or prescription drug services on or after July 1, 2010, and after they have reached the age of 55 years, will be subject to recovery upon their death or the death of a spouse.
>
> Funds will be recovered from the beneficiary's estate which is defined as including all property and assets which are subject to probate, with several exceptions. The state will attempt to recover the estate when the beneficiary dies, if they were single, or when the surviving spouse dies, if they had a qualifying spouse.

The five appeals here stem from DHHS's implementing MMERP by seeking to recover from four estates. The agency's efforts were rejected in the probate courts. On appeal, the Court of Appeals reversed the probate courts in part and affirmed in part, holding that DHHS could recover from the estates but only for Medicaid benefits paid after MMERP's implementation date, July 1, 2011. *In re Gorney Estate*, 314 Mich App 281, 300; 886 NW2d 894 (2016). Although DHHS has appealed in this Court in all four cases, the estate of Ms. Olive Rasmer is the only estate to have appealed in this Court.

Ms. Rasmer applied for Medicaid benefits in October 2008 and began receiving them in 2009. As with all applicants for Medicaid benefits, Ms. Rasmer was required to submit an eligibility determination form, DHS-4574, both when she applied and periodically thereafter to redetermine benefits eligibility. When she applied in 2008, form DHS-4574 said nothing about

estate recovery or MMERP. In September 2013, when her patient representative sought a redetermination of Ms. Rasmer's eligibility, the form contained the following acknowledgment about MMERP:

> 12. Estate Recovery. I understand that upon my death, [DHHS] has the legal right to seek recovery from my estate for services paid by Medicaid. [DHHS] will not make a claim against the estate while there is a legal surviving spouse or a legal surviving child who is under the age of 21, blind, or disabled living in the home. An estate consists of real and personal property. Estate Recovery only applies to certain Medicaid recipients who received Medicaid services after the implementation date of the program. [DHHS] may agree not to pursue recovery if an undue hardship exists. For further information regarding Estate Recovery, call 1-877-791-0435.

Ms. Rasmer began receiving benefits in 2009 and received them until she died, on March 16, 2014. DHHS sought to recover from her estate an amount equal to the benefits paid by Medicaid on her behalf from July 1, 2010, until her death, but Ms. Rasmer's estate rejected the claim. DHHS then sued the estate in the Bay County Probate Court, asserting a right to collect the amount of medical benefits paid on Ms. Rasmer's behalf. The estate asserted, as an affirmative defense, that it was not subject to MMERP because Ms. Rasmer had not been notified of the program when she initially applied for benefits in 2008 and because recovery would violate due process.

Both parties moved for summary disposition under MCR 2.116(C)(10). The probate court granted the estate's motion and denied DHHS's motion, reasoning that DHHS could not recover from the estate because, in its view, the agency had not given Ms. Rasmer notice of the program in accordance with MCL 400.112*g*. The probate court also denied DHHS's motion for reconsid-

eration. DHHS appealed, arguing that Ms. Rasmer had received all the notice and process to which she was entitled.

As in Ms. Rasmer's case, in each of the other three cases, the decedent "began receiving medicaid long-term care services after [September 30, 2007]," MCL 400.112k, when the Legislature enacted the MMERP Act. After DHHS implemented MMERP in July 2011, the decedent's patient representative signed a statement acknowledging an understanding of DHHS's "legal right to seek recovery from [the decedent's] estate for services paid by Medicaid." After the decedent's death, DHHS sought recovery from the decedent's estate for amounts disbursed after the July 1, 2010 effective date of the plan. The estate rejected the claim, and DHHS sued in probate court. After DHHS's claim was dismissed, DHHS appealed, arguing that the estate had received sufficient notice to satisfy both the governing statute, MCL 400.112g(7), and due process.

On DHHS's motion, the Court of Appeals consolidated the four cases for oral argument, and, in a split decision, affirmed in part, reversed in part, and remanded to the four probate courts for further proceedings. See *Gorney*, 314 Mich App at 300. The panel majority determined that it was bound by *In re Keyes Estate*, 310 Mich App 266; 871 NW2d 388 (2015), which had concluded that the acknowledgment signed by the patient representative met the requirement of MCL 400.112g(7) to "provide written information" and that the probate proceedings complied with due process. *Gorney*, 314 Mich App at 294-295. But *Keyes* had not addressed whether DHHS could "recover costs expended between July 1, 2010 and plan implementation [i.e., July 1, 2011]," and the Court of Appeals determined that DHHS could not do so without "violat[ing]

the decedents' rights to due process." *Id*. at 300. It further determined that the Ketchum estate could argue on remand that DHHS, by pursuing estate recovery, had violated MCL 400.112g(4), which provides that DHHS "shall not seek Medicaid estate recovery if the costs of recovery exceed the amount of recovery available or if the recovery is not in the best economic interest of the state."[6] See *id*. at 293-294.

DHHS applied for leave to appeal in all four cases in this Court. Ms. Rasmer's estate also applied. This Court granted leave in both applications. See *In re Rasmer Estate*, 499 Mich 975 (2016). For the reasons that follow, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

II. STANDARD OF REVIEW

A trial court's grant of summary disposition is reviewed de novo. See *Bernardoni v Saginaw*, 499 Mich 470, 472; 886 NW2d 109 (2016). We also review de novo questions of constitutional and statutory interpretation. See *Associated Builders & Contractors v Lansing*, 499 Mich 177, 183; 880 NW2d 765 (2016); *Rock v Crocker*, 499 Mich 247, 260; 884 NW2d 227 (2016).

III. ANALYSIS

A. STATUTORY COMPLIANCE

Ms. Rasmer's estate argues that two provisions of the MMERP Act, MCL 400.112g(3)(e) and (7), required DHHS to give Ms. Rasmer certain "written materials" and "written information" when she first applied for Medicaid benefits in 2008 and that DHHS's failure to

[6] The Ketchum estate was the only party to raise this issue.

have done so precludes it from recovering against her estate. The estate also argues that when DHHS gave her written information about MMERP in 2013, that information was not detailed enough to comply with the statute. For the reasons explained below, we conclude that DHHS was not required by statute to notify Ms. Rasmer of MMERP in 2008 and that the written information provided to her in 2013 complied with the statute.

1. DHHS'S DUTY TO GIVE WRITTEN INFORMATION AT ENROLLMENT

The Rasmer estate asserts that MCL 400.112g(3)(e) and (7), read together, bar DHHS from recovering from a beneficiary's estate unless DHHS had provided the beneficiary with certain written information when he or she first enrolled in Medicaid. MCL 400.112g(3)(e) is part of a subsection, MCL 400.112g(3), requiring DHHS to "seek [federal] approval" of several items. The estate relies on subsection (3)(e), which concerns exemptions for hardship.[7] It states in relevant part:

> [DHHS] shall seek appropriate changes to the Michigan medicaid state plan and shall apply for any necessary waivers and approvals from the federal centers for medicare and medicaid services to implement the Michigan medicaid estate recovery program. [DHHS] shall seek approval from the federal centers for medicare and medicaid regarding all of the following:
>
> * * *
>
> (e) Under what circumstances the estates of medical assistance recipients will be exempt from the Michigan medicaid estate recovery program because of a hardship. At the time an individual enrolls in medicaid for long-term

[7] The Rasmer estate does not argue that it was entitled to a hardship waiver.

> care services, [DHHS] shall provide to the individual *written materials* explaining the process for applying for a waiver from estate recovery due to hardship. [DHHS] shall develop a definition of hardship according to section 1917(b)(3) of title XIX that includes, but is not limited to, [certain enumerated factors.] [Emphasis added.]

The estate also relies on subsection (7), which requires DHHS to provide "written information" to certain individuals:

> [DHHS] shall provide *written information* to individuals seeking medicaid eligibility for long-term care services describing the provisions of the Michigan medicaid estate recovery program, including, but not limited to, a statement that some or all of their estate may be recovered. [Emphasis added.]

The estate argues that Ms. Rasmer should have been provided the "written information" described in subsection (7) when she applied for Medicaid benefits in 2008. Its argument takes two forms that lead to the same place. It first argues as follows: Subsection (3)(e) requires DHHS, "[a]t the time an individual enrolls in medicaid," to provide to that individual "written materials explaining the process for applying for a waiver from estate recovery due to hardship." But because an explanation of a hardship waiver is incomplete without a full explanation of MMERP's provisions, subsection (3)(e) presupposes that DHHS already has complied with subsection (7). In other words, subsection (7) implicitly requires that "written information . . . describing the provisions of [MMERP]" be provided "[a]t the time an individual enrolls in medicaid." Alternatively, the estate argues, since one must seek eligibility before initially enrolling in Medicaid, DHHS must comply with subsection (7) when someone first applies to the program. Either way, the estate concludes, DHHS violated subsection (7) be-

cause Ms. Rasmer received no written information about MMERP when she originally applied for Medicaid benefits in 2008.

The Court of Appeals rejected similar arguments in *Keyes*. *Keyes* reasoned "that the timing provision of MCL 400.112g(3)(e) does not apply" because that provision "is part of the larger Subsection (3), which requires [DHHS] to seek approval from the federal government regarding the [listed] items," and the estate had asserted no failure by DHHS to seek federal approval about the timing provision. *Keyes*, 310 Mich App at 272. *Keyes* thus concluded that subsection (3)(e) had no bearing on DHHS's duty to provide written materials or timely notice. See *id*. at 272-273. The Court went on to analyze subsection (7), concluding that because the provision refers to *eligibility* rather than *enrollment*, it did not require DHHS to provide written information at enrollment. See *id*.[8]

[8] We are not sure that we agree with *Keyes*'s interpretation of MCL 400.112g(3)(e). As explained above, *Keyes* observed that the provision requiring DHHS to provide "written materials" at enrollment was embedded in one of a list of items for which DHHS had to seek federal approval. If context and placement in the statute are given great weight, this provision might be read, consistent with *Keyes*, to impose on DHHS only a duty to seek federal approval of various items. DHHS certainly was bound under subsection (3)(e) to seek federal approval of the "circumstances [under which] the estates of medical assistance recipients will be exempt from [MMERP] because of a hardship." Subsection (3)(e) might also be read, awkwardly, to have required DHHS to seek federal approval of both its "definition of hardship" and its plan to provide "written materials explaining the process for applying for a [hardship] waiver" "[a]t the time an individual enrolls in medicaid." But if these two commands were not embedded in this list of items for federal approval, we would read them to impose duties on DHHS, namely, to "provide . . . written materials" and to "develop a definition of hardship." We need not work through this confounding puzzle of text and context, however, because we conclude that the proper interpretation of subsection (7) does not depend on subsection (3)(e).

We agree with the estate that the Court of Appeals erred in *Keyes* when it divorced "eligibility" from "enrollment." Yet we cannot conclude that DHHS had a duty to give Ms. Rasmer "written information . . . describing the provisions of" MMERP when she applied for Medicaid benefits in 2008. Subsection (7) states that DHHS "shall provide written information to individuals seeking medicaid eligibility for long-term care services describing the provisions of [MMERP] . . . ." Unlike subsection (3)(e), which requires the provision of written materials "[*a*]*t the time* an individual enrolls," subsection (7) imposes a duty whenever "individuals seek[] medicaid eligibility for long-term care services . . . ." Under federal law, DHHS determines eligibility when someone first applies for Medicaid benefits and must also periodically redetermine eligibility. See 42 CFR 435.907, 435.911, and 435.916. And so, in certain cases, DHHS may be required to provide written information not only when a beneficiary seeks a redetermination of eligibility after enrollment, but also, contrary to *Keyes*, just before enrollment, when eligibility initially is sought.

Ms. Rasmer applied for Medicaid benefits in 2008, which we assume made her an individual "seeking medicaid eligibility." According to the estate's theory, her 2008 application triggered DHHS's duty to "provide written information . . . describing the provisions of [MMERP] . . . ." MCL 400.112g(7). But under MCL 400.112g(5), DHHS could "not implement [MMERP] until approval by the federal government [was] obtained." Although the MMERP Act clearly required DHHS to "establish an estate recovery program" whose activities would include, among other things, "[a]ctions necessary to collect amounts subject to estate recovery," MCL 400.112g(2), without federal approval, MMERP itself did not exist in final form. So it is

neither surprising nor unlawful that DHHS provided no information "describing the provisions of" MMERP in 2008. MMERP was not approved by the federal government until 2011; only then did DHHS know what "the provisions of" the program would actually be, and only then could DHHS have complied with the statute by "provid[ing] written information" about those provisions. MCL 400.112g(7).

The estate concedes that to accept its reading would be to ask DHHS to do the impossible.[9] That suggests to us that the estate's reading is wrong. The estate maintains instead that the MMERP Act intended the impossibility of performance to bar DHHS from ever recovering against the estates of decedents who had enrolled in Medicaid before MMERP was federally approved in May 2011. In other words, the estate argues, the Legislature intended to "grandfather" into the old Medicaid regime all persons who began receiving Medicaid before MMERP's approval or implementation in 2011. The statutory scheme reflects no such intent. By its terms, the Act expressly grandfathers into the old Medicaid regime only one group of Medicaid recipients: those "who began receiving medicaid long-term care services" before the Act's September 30, 2007 effective date. MCL 400.112k. In light of that explicit grandfathering provision, we have a hard time

[9] The estate writes in its leave application: "DHHS could not, at any time before approval of its [estate-plan amendments] on July 1, 2011, advise Ms. Rasmer, or any applicant or person receiving Medicaid for that matter, of what estate recovery would entail." The estate continued in its brief: "Because no estate recovery program was in effect at the time Olive Rasmer applied for enrollment in Medicaid, the DHHS' predecessor, the Department of Community Health, could not have complied with MCL 400.112g by providing the statutorily-required written information to her describing the provisions of the estate recovery program and what actions may be taken against her estate at the time that she applied for enrollment in Medicaid."

concluding that the statute is best read to have implicitly created another, by mandating the impossible. To the contrary, we think the Act is more reasonably read as follows: MCL 400.112k made clear (to DHHS and Medicaid recipients alike) that all persons who "began receiving medicaid long-term care services" after September 30, 2007, could be subject to estate recovery for the services they would receive; MCL 400.112g(7) then required DHHS to "provide written information" about that recovery only when it became possible to do so—once "the provisions of" the recovery program had been approved by the federal government and could, in fact, be "describ[ed]."[10] We conclude that DHHS had no duty to "provide written information" under MCL 400.112g(7) before MMERP was federally approved in May 2011 or implemented on July 1, 2011, and so DHHS did not violate subsection (7) when it did not "provide written information" about MMERP to Ms. Rasmer when she applied for Medicaid in 2008.[11]

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[10] This analysis also forecloses the argument that the statute itself required DHHS to provide written information regarding MMERP at its "effective date," July 1, 2010. Because MMERP did not exist in final form before it was federally approved, it could not have been accurately described before mid-2011.

[11] The estate argues that in addition to violating MCL 400.112g(7), DHHS also violated the following federal guidance: "[DHHS] should provide notice to individuals at the time of application for Medicaid that explains the estate recovery program in your State." CMS, *State Medicaid Manual* § 3810(G)(1) (rev 75), available at <https://www.cms.gov/Regulations-and-Guidance/guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html> (accessed June 23, 2017) [https:// perma.cc/N6M5-FLNR]. The estate failed to raise this argument in the Court of Appeals and so it is not properly before us. But we observe, consistent with further federal guidance, that the provision relied on by the estate is not stated in mandatory terms. See U.S. Department of Health and Human Services, *Medicaid Estate Recovery* (April 1, 2005) at n 25 ("Note that this section [of the *State Medicaid Manual*] describes what states 'should' do, not what they 'must' do."), available at <https://aspe.hhs.gov/basic-report/medicaid-estate-recovery#note25> accessed June 23, 2017) [https://perma.cc/6USC-LZAF].

2. THE SUFFICIENCY OF DHHS'S WRITTEN INFORMATION

The estate further argues that when Ms. Rasmer received information about the estate-recovery program in September 2013, that information fell short of the requirements of MCL 400.112g(7). DHHS sought to comply with subsection (7) by including the following statement in the acknowledgment section of its eligibility application:

> 12. Estate Recovery. I understand that upon my death [DHHS] has the legal right to seek recovery from my estate for services paid by Medicaid. [DHHS] will not make a claim against the estate while there is a legal surviving spouse or a legal surviving child who is under the age of 21, blind, or disabled living in the home. An estate consists of real and personal property. Estate Recovery only applies to certain Medicaid recipients who received Medicaid services after the implementation date of the program. [DHHS] may agree not to pursue recovery if an undue hardship exists. For further information regarding Estate Recovery, call 1-877-791-0435.

According to the estate, this statement failed to give Ms. Rasmer enough information to put her on notice of "the particular actions that may be taken against her estate upon her death. In particular, the statement lacks any specificity as to the nature and scope of the estate recovery program and was clearly insufficient to make her aware of the potential financial consequences of estate recovery to her estate after her death."

DHHS's statement could have provided greater detail about MMERP—and perhaps, as a matter of best practices, it should have done so. But it is not clear that the MMERP Act required so much of DHHS. As noted

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And, indeed, the estate concedes that "the CMS' *State Medicaid Manual* is not binding law as such . . . ."

above, MCL 400.112k apprised persons like Ms. Rasmer that their participation in Medicaid would come with the possibility of estate recovery, and MCL 400.112g(7) required only that DHHS, after federal approval of MMERP and after it was otherwise ready to carry out such recovery, "provide written information to individuals seeking medicaid eligibility for long-term care services describing the provisions of [MMERP], including, but not limited to, a statement that some or all of their estate may be recovered." As it concerns the content of this "written information," subsection (7) is, by its plain language, open-ended and not particularly exacting. DHHS's statement was sufficient to meet the letter of the requirement, and we do not see a statutory violation in DHHS's failure to do more. Even accepting the estate's characterization of the statute's requirements, however, DHHS's statement sufficed. The statement's lead sentence, cast in the first person ("I," "my death," "my estate"), highlights that the individual seeking benefits falls within the "scope" of MMERP. The statement further mentions "recovery" or "estate recovery" five times and thus conveys that the "nature" of MMERP is to seek reimbursement from the individual's estate "for services paid by Medicaid." Finally, the statement speaks of a "claim" against an estate, thereby signaling the actions that may be taken against an estate—namely, a claim against the estate for the cost of the services paid by Medicaid and the potential for adjudication of the claim in probate court. We conclude that DHHS's statement meets the challenge posed by Ms. Rasmer's estate and complies with subsection (7).

3. PREMATURE IMPLEMENTATION

The Court of Appeals held that DHHS impermissibly sought to recover Medicaid disbursements made

between MMERP's effective date (July 1, 2010) and its implementation date (July 1, 2011). Although the panel majority cast the issue as sounding in due process, we analyze it as statutory because the Court's conclusion rested on its view that DHHS had failed to comply with a statutory restriction.[12]

The Court of Appeals looked to MCL 400.112g(5), which forbade DHHS to "implement [MMERP] until approval by the federal government [was] obtained." See *Gorney*, 314 Mich App at 297. It observed that "implement" means "carry out," "accomplish," and especially "give practical effect to and ensure of actual fulfillment by concrete measures . . . ." *Id*., quoting *Merriam-Webster's Collegiate Dictionary* (11th ed) (capitalization and quotation marks omitted). It then reasoned as follows:

> The DHHS did not implement the MMERP until it circulated instructions to its employees to begin seeking recovery from estates. This occurred on July 1, 2011, after the CMS approved the plan. However, the DHHS could not "implement" the MMERP *before* the federal government approved it. The DHHS sought to give practical effect to

[12] The Court of Appeals' view that MMERP had been unconstitutionally applied to recover Medicaid disbursements made between MMERP's effective date and its implementation date rested on its conclusion that DHHS had contravened the statute by "implementing," i.e., giving "practical effect to," the estate-recovery plan before federal approval. *Gorney*, 314 Mich App at 297. But not every government action taken in excess of statutory authority constitutes a due-process violation. Cf. *Amsden v Moran*, 904 F2d 748, 757 (CA 1, 1990) ("[A] regulatory board does not transgress constitutional due process requirements merely . . . by making demands which arguably exceed its authority under the relevant state statutes.") (quotation marks omitted); *Smith v Picayune*, 795 F2d 482, 488 (CA 5, 1986) ("Converting alleged violations of state law into federal . . . due process claims improperly bootstraps state law into the Constitution.") (quotation marks omitted). Moreover, for the reasons discussed, we disagree that DHHS violated the statute.

> its recovery plan by making it "effective" July 1, 2010. This violated MCL 400.112g(5). [*Gorney*, 314 Mich App at 297.]

We are not convinced by this reasoning. The Court recognized that "DHHS did not implement the MMERP until it circulated instructions to its employees" on July 1, 2011, *id*., from which it should have concluded that DHHS had not "implement[ed] MMERP until [after] approval by the federal government [was] obtained," MCL 400.112g(5), in May 2011. Yet the Court curiously concluded that subsection (5)'s ban on preapproval "implementation" had been violated because DHHS, in accordance with federal authorization, "sought to give practical effect to [i.e., implemented] its recovery plan by making it 'effective' July 1, 2010." *Gorney*, 314 Mich App at 297. In other words, the Court of Appeals concluded, MMERP was both not implemented until July 1, 2011, and implemented on July 1, 2010. On the present record we have no trouble concluding that DHHS did not "implement" MMERP before getting federal approval of the amendments in May 2011. The record reflects that, until then, DHHS's MMERP-related conduct was limited to "seek[ing] appropriate changes to the Michigan medicaid state plan and . . . apply[ing] for any necessary waivers and approvals from the federal [CMS] to *implement* [MMERP] . . . ." MCL 400.112g(3) (emphasis added).[13]

[13] In finding a statutory violation in DHHS's recovery efforts, it seems the Court of Appeals may have believed that, by limiting when DHHS could "implement" MMERP, MCL 400.112g(5) also limited the extent to which DHHS could seek recovery under that program; that is, DHHS could not seek to recover the amounts disbursed before the program received federal approval because to do so would be to "implement" the program too early. As discussed above, however, when the Legislature enacted MCL 400.112k, it made clear that individuals who "began receiving medicaid long-term care services" after September 30, 2007, could be subject to estate recovery for those services. We do not read subsection (5) to have imposed a separate limitation on the extent of the

We emphasize that in seeking to recover the amount disbursed back to the July 1, 2010 effective date, DHHS complied with both the federal effective date and the state implementation date. As noted above, the MMERP Act required DHHS to "seek appropriate changes to the Michigan medicaid state plan . . . ." MCL 400.112g(3). That plan "is a comprehensive written statement . . . describing the nature and scope of" Michigan's Medicaid program, 42 CFR 430.10, and setting forth the "policies in effect under" that program.[14] An amendment to a state plan must be submitted to the federal government for approval, see 42 CFR 430.12(c)(2), and federal law contemplates that an amendment's effective date may predate its submission date (and *a fortiori* its approval date), see 42 CFR 430.12; see also note 4 above. The MMERP Act says nothing about the effective date of the MMERP-related amendments to the state plan, but it does bar DHHS from implementing MMERP before federal approval. See MCL 400.112g(5). Because an effective date may predate approval and because implementation must be contemporaneous with or postdate approval, it follows that the MMERP-related state-plan amendments could lawfully be given effect as of a date before implementation. Indeed, the record here leaves no doubt that the federal government gave the state-plan amendments an effective date of July 1, 2010, and that DHHS implemented MMERP no earlier than May 2011. So DHHS did not violate the MMERP Act when

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recovery otherwise authorized under the MMERP Act; it simply required that DHHS not seek to carry out that recovery before federal approval had been received.

[14] Michigan Medicaid State Plan, p 1, available at <http://www.mdch.state.mi.us/dch-medicaid/manuals/michiganstateplan/michiganstateplan.pdf> (accessed June 26, 2017) [https://perma.cc/P3VG-SA3B].

in July 2011 it implemented the program by seeking to recover from the estates those amounts disbursed after July 2010.

For the reasons above, we conclude that DHHS was not barred by statute from pursuing estate recovery in these cases.

B. DUE PROCESS

The Court of Appeals held that DHHS could recover against the estates for benefits paid after MMERP's July 1, 2011 implementation date but that DHHS's efforts to recover "retroactively" to July 1, 2010, violated the estates' due-process rights.[15] DHHS challenges the Court of Appeals' constitutional determination as to that one-year period. Ms. Rasmer's estate[16] argues that the Court of Appeals' holding did not go far enough. It contends that DHHS cannot recover against the estate at all because Ms. Rasmer was not given constitutionally timely and sufficient notice of MMERP and because MMERP was "retroactively" applied to her. We address these arguments in turn.

1. DEPRIVATION OF A PROTECTED INTEREST

Both the state and federal Constitutions protect persons from deprivations by the government of "life,

[15] As discussed above, we think this argument is better characterized as alleging statutory, rather than constitutional, shortcomings.

[16] The estates of Ms. Gorney, Mr. French, and Ms. Ketchum purport to challenge in this Court the Court of Appeals' determination that DHHS could recover for benefits paid after July 1, 2011. We note that none of those estates applied for leave to appeal that decision in this Court. Their due-process challenges to recovery after this period are, therefore, waived. See MCR 7.305(C)(2) (governing timeliness of applications for leave to appeal in this Court). We note, however, that their arguments mirror those of Ms. Rasmer's estate, which we consider and ultimately reject.

liberty or property, without due process of law."[17] Const 1963, art 1, § 17; accord US Const, Am XIV, § 1. A threshold inquiry thus is "whether the interest allegedly infringed by the challenged government action . . . comes within the definition of 'life, liberty or property.' " *Bonner v Brighton*, 495 Mich 209, 225; 848 NW2d 380 (2014). Consistent with traditional notions of property ownership, we have recognized a "right to dispose of . . . property." *Olson v Rasmussen*, 304 Mich 639, 650; 8 NW2d 668 (1943). And the United States Supreme Court has determined that statutory entitlements to benefits, such as those offered by the Medicaid program, also "are appropriately treated as a form of 'property' protected by the Due Process Clause." *Atkins v Parker*, 472 US 115, 128; 105 S Ct 2520; 86 L Ed 2d 81 (1985).

The estates do not contend, however, that their decedents were improperly deprived of Medicaid benefits. Instead, they argue that the decedents were deprived of the right to plan during their lifetimes for the disposition of their property after death because they lacked notice that their estates would be encumbered by DHHS's creditor claim. We need not decide today whether the right articulated by the estates is an interest protected by the Constitution because, as we explain below, even if a due-process right is at stake, no due-process violation has been committed.

2. TIMELY AND SUFFICIENT NOTICE

The Rasmer estate argues that DHHS violated Ms. Rasmer's due-process rights by failing to give her

[17] Although Michigan's due-process clause "may, in particular circumstances, afford protections greater than or distinct from" its federal counterpart, the estates have not urged separate interpretations, "so we will not seek to determine otherwise." *AFT Mich v Michigan*, 497 Mich 197, 245; 866 NW2d 782 (2015).

"timely and sufficient" notice of MMERP and its consequences. Echoing the statutory arguments we rejected above, the estate argues that for notice of MMERP to have been constitutionally timely, DHHS would have needed to provide that notice when Ms. Rasmer first enrolled in the Medicaid program in 2009. Alternatively, the estate argues that, at a minimum, DHHS was constitutionally required to provide such notice before it could pursue estate recovery. These claims fail, however, because the estate cannot demonstrate any harm to the alleged interest, namely, Ms. Rasmer's right "to engage in lawful planning to avoid probate administration."

The recovery program limits its reach to "property and other assets included within an individual's estate that is subject to probate administration . . . ." MCL 400.112h(a). Thus, avoiding probate will also avoid the recovery program. But the estate gives no indication of how additional notice from DHHS would have changed Ms. Rasmer's approach to disposing of her property upon her death. Although the estate's brief identifies means to avoid probate—trusts, Lady Bird deeds,[18] and the like—it does not argue that or how Ms. Rasmer would have employed any of those means if she had received earlier written notice of MMERP. Nor does it explain how she was prevented from pursuing those estate-planning measures given the notice she received. Tellingly, the estate offers no suggestion that Ms. Rasmer sought to protect her estate from probate even after

[18] See *Black's Law Dictionary* (10th ed), p 503 ("[A *Lady Bird deed* is a] deed that allows a property owner to transfer ownership of the property to another while retaining the right to hold and occupy the property and use it as if the transferor were still the sole owner. This type of deed is used in a few states as an estate-planning tool to avoid probate."); see also *Bill & Dena Brown Trust v Garcia*, 312 Mich App 684, 687 n 2; 880 NW2d 269 (2015) (describing a Lady Bird deed).

she acknowledged, through her personal representative, in September 2013, the existence of MMERP and the possibility of recovery against her estate.

The estate's failure to demonstrate harm to the alleged interest also defeats its constitutional challenge to the notice's sufficiency. But this insufficient-notice argument fails for another reason as well. The estate argues that to provide constitutionally adequate notice, DHHS would need to "provide an individual with written materials clearly describing the provisions of [MMERP] and what actions may be taken against the estate at the time the individual applies for enrollment in [MMERP]." In other words, the estate contends that Ms. Rasmer was entitled to individualized notice of a burdensome legislative program. But we presume that the citizenry "know[s] the law," *Mudge v Macomb Co*, 458 Mich 87, 109 n 22; 580 NW2d 845 (1998), as long as the Legislature has "enact[ed] and publish[ed] the law, and afford[ed] the citizenry a reasonable opportunity to familiarize itself with its terms," *Texaco, Inc v Short*, 454 US 516, 532; 102 S Ct 781; 70 L Ed 2d 738 (1982); accord *Kentwood v Sommerdyke Estate*, 458 Mich 642, 664; 581 NW2d 670 (1998), citing *Texaco*, 454 US at 530. This is true even when the government makes changes in the law affecting property rights. See *Texaco*, 454 US at 536. And "participants in [a benefits] program [have] no greater right to advance notice of [a] legislative change . . . than [do] any other voters." *Atkins*, 472 US at 130. The estate points to no defect in the enactment or publication of the MMERP Act; and while it does argue that Ms. Rasmer lacked a reasonable opportunity to understand that enrollment in the Medicaid program would subject her estate to recovery, as we explain below, this argument misunderstands the Supreme Court's due-process jurisprudence.

Relying on *Mullane v Central Hanover Bank & Trust Co*, 339 US 306; 70 S Ct 652; 94 L Ed 865 (1950), and mirroring its statutory argument rejected above, the estate argues that neither the notice provided by the MMERP Act itself nor the "general and vague" individualized notice provided in the redetermination application was " 'reasonably calculated' to apprise a Medicaid applicant of the financial consequences of the estate recovery program." But the Supreme Court has made clear that the "due process standards of *Mullane* apply to an 'adjudication' that is 'to be accorded finality.' " *Texaco*, 454 US at 535, quoting *Mullane*, 339 US at 314. Here, that adjudication came in the form of the probate proceedings below,[19] and the estate does not allege that it lacked notice or an opportunity to be heard there. Nor could it have done so since the record reflects the estate's appearance in the matter and successful prosecution of a motion for summary disposition. The estate also appeared and defended itself before the Court of Appeals and was granted leave in and appeared before this Court. The estate charges DHHS with taking "legally unconstrained collection efforts," but it does not explain how, if at all, those efforts overcame the procedural safeguards present in these judicial proceedings, which indisputably complied with *Mullane*.[20] We, therefore, have little trouble

[19] In MCL 400.112g(3)(d), the Legislature directed DHHS to seek federal approval of the "actions [that] may be taken to obtain funds from the estates of recipients subject to recovery . . . , including notice and hearing procedures that may be pursued to contest actions taken under [MMERP]." DHHS sought and obtained approval to pursue collection through the probate courts. See Letter from CMS to DCH at 12-14.

[20] We recognize that the gist of the estate's *Mullane* argument is that Ms. Rasmer was deprived of notice that would have enabled her to avoid the probate proceedings in the first instance—and that being subject to such proceedings is not the "process" to which the estate believes it was entitled. But as explained below, insofar as Ms. Rasmer was entitled to

concluding that the estate's opportunity to challenge DHHS's recovery efforts in our state's judicial system, before any estate recovery took place, met this aspect of due process.[21]

That leaves the estate with the argument that specific and individualized notice was constitutionally required to apprise Ms. Rasmer of the law. The Supreme Court has rejected that notion: "it has never been suggested that each citizen must in some way be given specific notice of the impact of a new statute on his property before that law may affect his property rights." *Texaco*, 454 US at 536. Rather, as stated above, "a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply." *Id*. at 532. In 1993, Congress required states participating in Medicaid to "seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan," 42 USC 1396p(b)(1); see also note 2 above, with recovery to take place "from the individual's estate," 42 USC 1396p(b)(1)(A), (B), and (C). The MMERP Act was enacted in 2007 and directed DHHS to "establish and operate [MMERP] to comply with" the federal statute. MCL 400.112g(1). To that end, the Act required DHHS

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notice sufficient to allow her to protect her estate from probate, we conclude that state and federal law provided that notice.

[21] Cf. *United States v James Daniel Good Real Prop*, 510 US 43, 53; 114 S Ct 492; 126 L Ed 2d 490 (1993) ("The right to prior notice and a hearing is central to the Constitution's command of due process."); *Zinermon v Burch*, 494 US 113, 132; 110 S Ct 975; 108 L Ed 2d 100 (1990) ("In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so . . . ."); *Mudge*, 458 Mich at 99, quoting *Zinermon*, 494 US at 132. Although we conclude that the predeprivation procedures provided in our state courts met the requirements of due process, we should not be understood to have decided that due process required those procedures.

to "seek appropriate changes to the Michigan medicaid state plan," MCL 400.112g(3), the "comprehensive written statement . . . describing the nature and scope of" Michigan's Medicaid program, 42 CFR 430.10. The MMERP Act expressly noted that its provisions would apply exclusively "to medical assistance recipients who began receiving medicaid long-term care services after" September 30, 2007, MCL 400.112k, and that the recovery program would be limited to property subject to probate, see MCL 400.112h(a).[22] Taken together, those statutes were sufficient to provide constitutionally adequate notice to Medicaid beneficiaries that their estates could be encumbered by MMERP.

We, therefore, conclude that due process did not require DHHS to provide Ms. Rasmer with individualized notice of MMERP either when she enrolled in Medicaid or as a condition precedent to recovering disbursed funds.

3. RETROACTIVE RECOVERY

Ms. Rasmer's estate also suggests that the MMERP Act constitutes retroactive legislation, but the estate provides little by way of argument that the MMERP Act is retroactive, i.e., that it "appl[ies] to events antedating its enactment." *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 585; 624 NW2d 180 (2001), quoting *Landgraf v USI Film Prods*, 511 US 244, 282; 114 S Ct 1483; 128 L Ed 2d 229 (1994). In any

[22] Moreover, 2007 PA 73, approved by the Governor on the same day as the MMERP Act (2007 PA 74), amended MCL 700.3805(1)(f) to include certain debts, including "medical assistance payments that are subject to adjustment or recovery from an estate," in the priority scheme for payment of claims against an estate. Public Act 73 thus further underscored that property and other assets in Ms. Rasmer's estate would be subject to recovery under MMERP.

event, the MMERP Act appears plainly prospective. It was approved by the Governor on September 30, 2007, and given "immediate effect." 2007 PA 74. Its effect was limited "to medical assistance recipients who began receiving medicaid long-term care services *after* the effective date [i.e., September 30, 2007] of the amendatory act that added this section [i.e., 2007 PA 74]." MCL 400.112k (emphasis added). The law on its face, therefore, applies only to events postdating its enactment.[23] For these reasons, we conclude that the MMERP Act is not retroactive legislation.

The estates urge, alternatively, that DHHS violated their due-process rights by enforcing MMERP "retroactively." By this, they do not mean that DHHS attempted to apply MMERP to the estates of those who began receiving Medicaid benefits before the MMERP Act's effective date. Instead, two different retroactivity theories are advanced. First is the theory embraced by the Court of Appeals, that DHHS violated due process when it implemented MMERP on July 1, 2011, and sought to recover amounts disbursed back to the federally authorized effective date, July 1, 2010. We rejected that theory above, noting parenthetically that it seems best understood to assert a statutory, rather

[23] As the Supreme Court explained in *Landgraf*, a "statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law." 511 US at 269 (citation omitted). The Court elaborated in a footnote: "Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property; a new law banning gambling harms the person who had begun to construct a casino before the law's enactment or spent his life learning to count cards." *Id*. at 269 n 24. Here, by contrast, the MMERP Act's effective-date provision, MCL 400.112k, ensured that the law would take effect before any person to whom it applied had received Medicaid benefits.

than constitutional, violation. Second is the theory that DHHS violated due process by seeking to recover from estates the amount of those Medicaid benefits disbursed before the estates' decedents were provided with individualized written information about MMERP's provisions. As explained above, the estates received the notice to which they were entitled under due process, and the estates' decedents were not constitutionally entitled to "individualized notice of a burdensome legislative program." These "retroactivity" theories must also fail for the additional reason, elaborated above, that no estate has demonstrated any harm to its alleged interest. For these reasons, we conclude that due process does not bar DHHS's recovery efforts in these cases. We thus reverse the Court of Appeals' conclusion that DHHS could not recover for benefits paid from July 1, 2010, to July 1, 2011, and affirm its conclusion that due process does not otherwise bar estate recovery.

C. JUDICIAL REVIEW

Ms. Ketchum's estate argued in the courts below that DHHS was forbidden to pursue recovery against it by MCL 400.112g(4), which states as follows:

> [DHHS] shall not seek medicaid estate recovery if the costs of recovery exceed the amount of recovery available or if the recovery is not in the best economic interest of the state.

DHHS argues here that subsection (4) provides no judicially enforceable barrier to estate recovery even "if the costs of recovery exceed the amount of recovery available or if the recovery is not in the best economic interest of the state." Although Ms. Ketchum's estate interposed subsection (4) as a defense to DHHS's creditor claim, the probate court disposed of the claim

on other grounds. The estate revived the defense in the Court of Appeals, as an alternative basis to affirm the probate court. Although the Court of Appeals noted "that the probate court did not consider this issue on the record and [that] the estate's appellate argument is cursory," *Gorney*, 314 Mich App at 293, that Court nonetheless waded in. But it had no need to reach this issue. Neither do we. We, therefore, vacate the Court of Appeals' discussion of this issue so that the probate court on remand may, if appropriate, address it on a blank slate.

IV. CONCLUSION

As explained above, DHHS did not violate the statutory or constitutional rights of Ms. Rasmer, Ms. Gorney, Mr. French, Ms. Ketchum, or any of their estates. We thus affirm in part and reverse in part the Court of Appeals' judgment and remand these cases to the probate courts for proceedings consistent with this opinion.

MARKMAN, C.J., and ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, and WILDER, JJ., concurred with LARSEN, J.

RAY v SWAGER

Docket No. 152723. Argued on application for leave to appeal October 19, 2016. Decided July 31, 2017.

Michael A. Ray and Jacqueline M. Ray, acting as coconservators for their minor child, Kersch Ray, filed an action in the Washtenaw Circuit Court against Eric Swager, Scott A. Platt, and others, in part alleging that Swager was liable for the injuries suffered by Kersch when Kersch was struck by an automobile driven by Platt. Kersch was 13 years old and a member of the Chelsea High School cross-country team at the time of the accident; Swager was the coach of the team and a teacher at the high school. Kersch was struck by the car driven by Platt when Kersch was running across an intersection with his teammates and Swager during an early morning team practice. Plaintiffs alleged that Swager had instructed the runners to cross the road even though the "Do Not Walk" symbol was illuminated. Swager moved for summary disposition under MCR 2.116(C)(7), arguing that as a governmental employee he was entitled to immunity from liability under MCL 691.1407(2) of the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. The circuit court, Carol A. Kuhnke, J., denied Swager's motion, concluding that whether Swager's actions were grossly negligent and whether he was the proximate cause of Kersch's injuries—and therefore not entitled to immunity under the GTLA—were questions of fact for the jury to decide. Swager appealed. In an unpublished per curiam opinion, issued October 15, 2015 (Docket No. 322766), the Court of Appeals, BOONSTRA, P.J., and SAAD and HOEKSTRA, JJ., reversed and remanded the case to the circuit court for entry of summary disposition in favor of Swager. The Court of Appeals reasoned that Swager was immune from liability under MCL 691.1407(2) because reasonable minds could not conclude that Swager was the proximate cause of Kersch's injuries; rather, Platt's presence in the roadway and Kersch's own actions were the immediate and direct causes of Kersch's injuries, and the most proximate cause of Kersch's injuries was being struck by a moving vehicle. Plaintiffs sought leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant plaintiffs' application for leave to appeal or take other action. 499 Mich 988 (2016).

In an opinion by Justice VIVIANO, joined by Justices MCCORMACK, BERNSTEIN, and LARSEN, the Supreme Court, in lieu of granting leave to appeal, *held*:

The Court of Appeals failed to correctly analyze proximate cause. For purposes of MCL 691.1407(2), the phrase "the proximate cause" refers to legal causation, which is distinct and separate from factual causation. A proper proximate cause analysis under the GTLA does not involve weighing but-for, i.e., factual, causes when assessing whether a defendant is *the* proximate cause of the plaintiff's injury. Instead, so long as the defendant's conduct is a factual cause of the plaintiff's injuries, the court must assess foreseeability and the legal responsibility of the relevant actors to determine whether the conduct of a government actor, or some other person, is the proximate cause of a plaintiff's injury—that is, the one most immediate, efficient, and direct cause of the plaintiff's injuries. The Court of Appeals failed to correctly analyze proximate cause because it only weighed factual causes. *Dean v Childs*, 474 Mich 914 (2005), is overruled, and to the extent *Beals v Michigan*, 497 Mich 363, 375 (2015), relied on the order in *Dean*, that portion of *Beals* is disavowed.

1. Under the GTLA, governmental agencies and their employees are generally immune from tort liability when they are engaged in the exercise or discharge of a governmental function. An exception to the broad grant of tort liability, MCL 691.1407(2) provides that a governmental employee is immune from tort liability caused by the employee during the course of his or her employment if (1) the employee is acting or reasonably believes he or she is acting within the scope of his or her authority, (2) the governmental agency is engaged in the exercise or discharge of a governmental function, and (3) the employee's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

2. In every negligence action, including one involving a government actor's gross negligence, the plaintiff must establish both factual causation and legal causation (also known as proximate cause); these concepts are separate and distinct. Although prior opinions have not always been clear, the legal term of art "proximate cause" is distinct from factual causation and the two terms must not be conflated. Proximate cause is a term with a well-established peculiar and appropriate meaning in the common law that involves examining the foreseeability of the consequences of an actor's conduct to determine whether a defendant should be held legally responsible for those consequences; factual

causation, on the other hand, requires a plaintiff to establish that but for the defendant's conduct, the plaintiff's injury would not have occurred. While this Court has used the term "proximate cause" both as a broader term referring to factual causation and legal causation together and as a narrower term referring only to legal causation, the broader characterization merely recognizes that a court must find that the defendant's negligence was a cause in fact of the plaintiff's injuries before it can hold that the defendant's negligence was the proximate or legal cause of those injuries; in other words, proximate cause is not in issue if the plaintiff cannot establish factual causation.

3. A proper proximate cause analysis under the GTLA may not weigh but-for causes when assessing whether a defendant's conduct is *the* proximate cause of the plaintiff's injury. While a court must determine whether the defendant's conduct was a cause in fact of the plaintiff's injuries, a court must also assess proximate cause, that is, legal causation, which requires a determination of whether it was foreseeable that the defendant's conduct could result in harm to the plaintiff and whether the defendant's conduct was the one most immediate, efficient, and direct cause of the injury. The dissent's approach—which includes the weighing of factual causes in its proximate cause analysis—distorts the meaning of the phrase "the proximate cause" by severing it from the concept of legal causation, an approach not supported by caselaw or rules of statutory construction.

4. The Legislature's use of the phrase "the proximate cause" in MCL 691.1407(2) is consistent with the common-law understanding of that phrase at the time the GTLA was amended by 1986 PA 175. "Proximate cause" is a legal term of art with a well-established peculiar and appropriate meaning in the common law. For almost one hundred years, this Court has recognized that proximate cause involves the foreseeability of the consequences of the conduct of human actors. *Robinson v Detroit*, 462 Mich 439 (2000), and *Beals*, 497 Mich 363, are consistent with this understanding. Nothing in MCL 691.1407(2) evidences an intent by the Legislature to mandate that a court weigh the but-for causes of a plaintiff's injury when addressing the issue of proximate cause.

5. In *Dean v Childs*, 262 Mich App 51 (2004), the Court of Appeals held that the GTLA did not bar a claim against a firefighter who was alleged to have been grossly negligent when fighting a house fire that killed the plaintiff's children. The Supreme Court's subsequent order in *Dean*, 474 Mich 914—which reversed the judgment of the Court of Appeals and adopted the

reasoning of the dissenting Court of Appeals judge—is overruled. The dissenting Court of Appeals judge erroneously weighed factual causes to conclude that the fire was the proximate cause of the deaths of the plaintiff's children. Moreover, only a human actor's breach of a duty can be a proximate cause; nonhuman and natural forces, like a fire, cannot be the proximate cause of a plaintiff's injuries for purposes of the GTLA. Rather, the nonhuman and natural forces affect the question of foreseeability in a proximate cause determination because such factors may constitute superseding causes that relieve the actor of liability if the intervening force was not reasonably foreseeable. To the extent that *Beals* relied on the Supreme Court's order in *Dean*, that portion of the *Beals* opinion is disavowed.

6. The dissent's approach, which would weigh but-for causes to determine the most immediate, efficient, and direct factual cause of the plaintiff's injuries, is unsupported by the language of the statute or the common-law understanding of proximate cause and would eliminate the narrow exception to governmental immunity created by MCL 691.1407(2)(c). Moreover, the approach would give no meaning to the 1986 amendment of the GTLA because it would immunize government actors for every harm that is a foreseeable result of their gross negligence.

7. In this case, it was undisputed that Swager acted within the scope of his authority as a governmental employee for the school and that he was engaged in the exercise or discharge of a governmental function at the time Kersch was injured. The Court of Appeals correctly addressed whether Kersch, Platt, and the vehicle itself were factual causes of Kersch's injuries because one's conduct cannot be the proximate cause without also being a factual cause. However, the panel's analysis was incomplete because its inquiry confused proximate cause with cause in fact; in other words, it failed to properly distinguish between factual causation and legal causation. The Court of Appeals erred by attempting to determine whether any of the other factual causes was a more direct cause of Kersch's injury than Swager's alleged gross negligence, without first determining whether any of the asserted but-for causes were proximate causes. It also failed to determine whether Platt was negligent—a prerequisite to determining whether he was a proximate cause of Kersch's injuries. The Court of Appeals similarly failed to correctly analyze whether Kersch, a child, was negligent and a proximate cause of his own injuries; the Court should have assessed his actions to determine whether he acted with the degree of care that would reasonably be expected of a child of similar age, intelligence, capacity, and

experience under the circumstances of the case. Finally, even if the Court of Appeals had determined that another actor was negligent and was *a* proximate cause of Kersch's injuries, it still would have needed to determine whether the defendant's conduct was *the* proximate cause. This would require considering the defendant's actions alongside any other proximate causes to determine whether the defendant's actions were, or could have been, the one most immediate, efficient, and direct cause of the injuries. On remand, summary disposition would be appropriate if reasonable minds could not differ on this question.

Court of Appeals opinion vacated, and case remanded to the Court of Appeals for further proceedings.

Justice WILDER, joined by Chief Justice MARKMAN and Justice ZAHRA, dissenting, disagreed with the majority's conclusions regarding the analysis to be used when determining whether, under MCL 691.1407(2)(c), a government actor's gross negligence was "the proximate cause" of a plaintiff's injury. In *Robinson*, 462 Mich 439, this Court interpreted the phrase "the proximate cause" consistently with the common law to mean the one most immediate, efficient, and direct cause of the plaintiff's injury, and that analysis necessarily entails the consideration of factual causation. To determine which cause—among more than one—was "most immediate, efficient, and direct," one must consider the panoply of but-for causes and weigh their immediacy, efficiency, and directness. From *Stoll v Laubengayer*, 174 Mich 701 (1913), and *Glinski v Szylling*, 358 Mich 182 (1959) (opinion by SMITH, J.), through more current decisions in *Robinson*, 462 Mich 439, and *Beals*, 497 Mich 363, this Court has consistently afforded the phrase "proximate cause" its common-law meaning—that is, one that treated the question of proximate cause as incorporating consideration of both factual (i.e., but-for) causation as well as legal causation.

"Legal cause" is a misnomer insomuch as it has nothing at all to do with causation; it instead involves examining the foreseeability of consequences and whether a defendant should be held legally responsible for such consequences. In other words, legal causation is a limitation to the scope of liability under the GTLA, not a means of assigning liability. This does not, however, render legal causation irrelevant. If after comparing the immediacy, efficiency, and directness of all potential but-for causes of an injury, a court determines that the most immediate, efficient, and direct cause was the governmental actor's gross negligence, the court should then assess whether the governmental actor's conduct was also a legal cause of the injury (i.e., whether the injury

was a foreseeable consequence of the governmental actor's conduct). If not, the actor is immune under MCL 691.1407(2)(c).

The majority's interpretation largely divorced the meaning of the phrase "the proximate cause" from the concept of factual causation, in that the majority conflated but-for cause and legal cause, treating "legal cause" as if it had something to do with causation. The majority's interpretation of "the proximate cause" is also inconsistent with the meaning that "the proximate cause" had in this state's common law at the time MCL 691.1407(2)(c) was enacted. While the phrase "proximate cause" has been used synonymously with the term "legal cause," prior opinions of this Court—*Craig v Oakwood Hosp*, 471 Mich 67 (2004); *Skinner v Square D Co*, 445 Mich 153 (1994); *Moning v Alfono*, 400 Mich 425 (1977); *Glinski*, 358 Mich 182; *Stoll*, 174 Mich 701—demonstrate that before and after the Legislature's 1986 amendment of the GTLA, factual causation was an established element of the proximate cause analysis; indeed, they establish that the sine qua non of proximate cause was cause in fact. In addition, contrary to the majority's unsupported assertion, intervening natural forces and inanimate objects can be the proximate cause of a plaintiff's injury under the common law.

The majority's expansive interpretation of MCL 691.1407(2)(c) —that courts may not weigh but-for causes but must instead focus mainly on the legal cause analysis—was inconsistent with this Court's duty to construe exceptions to governmental immunity narrowly. Any ambiguity in whether the Legislature intended the phrase "proximate cause" to refer to legal cause only or to refer to both factual cause and legal cause had to be resolved in favor of using the more inclusive definition because doing so would lead to a narrower exception, and the Legislature's manifest intent to create an exception to governmental immunity did not obviate the Court's duty to construe that exception narrowly. Because the Legislature is presumed to have been aware that the exception set forth by MCL 691.1407(2) would be construed narrowly, had the Legislature wished to create a broad exception, it would have used language clearly demonstrating that intent.

The majority's failure to acknowledge that its holding is patently inconsistent with *Robinson* and *Beals*, and its resulting failure to perform a stare decisis analysis regarding *Robinson* and *Beals*, will undermine the rule of law, resulting in jurisprudential upset and uncertainty, with lower courts following either the *Robinson*/*Beals* analysis or the conflicting analysis announced in this case. The majority should have offered guidance on how to apply its holding—specifically, guidance regarding how to deter-

mine "the one most immediate, efficient, and direct cause" without weighing factual causes. The majority also should have explained how, in the wake of its decision, a plaintiff can carry the burden of pleading his or her claim in avoidance of MCL 691.1407(2). Lacking any practical guidance on how one determines proximate causation without weighing factual causes, it would seem nearly impossible for a plaintiff to satisfy that pleading requirement.

In this case, Swager was immune under MCL 691.1407(2), and thus entitled to summary disposition, because it was either Kersch's conduct or that of the driver—but not Swager's conduct—that was the one most immediate, efficient, and direct cause of Kersch's injuries. Accordingly, Justice WILDER would have affirmed on the basis that the Court of Appeals reached the correct outcome by duly following *Robinson* and *Beals*.

GOVERNMENTAL IMMUNITY — PROXIMATE CAUSE — DISTINCT FROM FACTUAL CAUSATION.

For purposes of MCL 691.1407(2) of the governmental tort liability act, MCL 691.1401 *et seq*., the phrase "the proximate cause" refers to legal causation, which is distinct and separate from factual causation; in determining whether a defendant, or some other person, is the proximate cause of the plaintiff's injury or damage, after determining that the defendant's conduct was a cause in fact of the plaintiff's injuries, the court must examine whether it was foreseeable that the defendant's conduct could result in harm to the plaintiff; the analysis does not involve weighing the but-for causes of the plaintiff's injury.

Johnson Law, PLC (by *Ven R. Johnson* and *Christopher P. Desmond*) for Michael A. Ray, Jacqueline M. Ray, and Kersch Ray.

Giarmarco, Mullins & Horton, PC (by *Timothy J. Mullins* and *John L. Miller*) for Eric Swager.

VIVIANO, J. At issue is whether the conduct of defendant Eric Swager,[1] who is a government employee,

[1] Defendants Scott A. Platt, Heather M. Platt, and Liberty Mutual Insurance Company are not involved in this appeal. For ease of reference, when we refer to "defendant" in this opinion, we are only referring to Eric Swager.

was—for purposes of the governmental tort liability act (GTLA), MCL 691.1401 *et seq*.—"the proximate cause" of the injuries suffered by plaintiff, Kersch Ray.[2] We hold that the Court of Appeals failed to correctly analyze proximate cause because it only weighed various factual causes of plaintiff's injuries to determine whether one of them was a more direct cause of plaintiff's injuries than defendant's conduct. Under the GTLA, a proper proximate cause analysis must assess foreseeability and the legal responsibility of the relevant actors to determine whether the conduct of a government actor, or some other person, was "the proximate cause," that is, as our caselaw has described it, "the one most immediate, efficient, and direct cause" of the plaintiff's injuries. Accordingly, in lieu of granting leave to appeal, we vacate the Court of Appeals' decision and remand to the Court of Appeals for further proceedings not inconsistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

In the fall of 2011, the then-13-year-old plaintiff was a member of the Chelsea High School cross-country team. Defendant was the coach. Shortly after the season began, defendant held an early morning practice; it was plaintiff's first morning practice as a member of the team. The practice began at 5:59 a.m., when it was still dark outside. At the beginning of the practice, defendant took the team off school grounds to run on public roads. During the run, the team approached an intersection with a two-lane highway. The "Do Not Walk" symbol was illuminated because the traffic light was green for the highway traffic. Defen-

[2] Plaintiffs Michael A. Ray and Jacqueline M. Ray are Kersch Ray's parents and coconservators. For ease of reference, when referring to Kersch Ray alone, we use the term "plaintiff."

dant and the group of runners he was with, which consisted of most of the team, stopped at the intersection. Defendant saw a vehicle in the distance, but he determined that it was far enough away to safely cross. He instructed the runners to cross the intersection by stating, "Let's go." It is unclear whether all the team members, including plaintiff, heard the instruction. Although most of the team safely crossed the road, a few runners in the back of the group were still in or near the roadway when the vehicle entered the intersection. The vehicle hit plaintiff and one of his teammates as they were crossing the road. Plaintiff was severely injured, and he has no memory of the accident.

In his deposition, the driver of the vehicle testified that he suddenly saw the runners crossing the intersection off to the right side of the road but that he did not see plaintiff in the intersection or have time to brake. The driver testified that he was not distracted and had been driving below the posted speed limit. While the driver initially admitted that he sped up when the traffic light turned yellow, he later stated that he did not recall whether he did anything in reference to the yellow light. The Washtenaw County Sheriff's officer who conducted an accident reconstruction concluded that the driver was not responsible for the accident.

Plaintiffs sued defendant and the driver.[3] Defendant moved for summary disposition under MCR 2.116(C)(7), asserting governmental immunity pursuant to the GTLA. Defendant also moved for summary disposition under MCR 2.116(C)(8) and (10). The trial court denied defendant's motion, stating that whether defendant's actions were grossly negligent and whether his actions

[3] Plaintiffs' suit against the driver, defendant Scott A. Platt, is not at issue here.

were the proximate cause of plaintiff's injuries were questions of fact for the jury to decide.

Defendant appealed by right, and the Court of Appeals reversed in an unpublished per curiam opinion.[4] The panel concluded that any factual disputes were not material because reasonable minds could not conclude that defendant was the proximate cause of plaintiff's injuries.[5] The panel determined that the presence of the driver in the roadway and plaintiff's own actions were more immediate and direct causes of plaintiff's injuries and held that "the most proximate cause of [plaintiff's] injuries is the fact that he was struck by a moving vehicle."[6]

Plaintiffs filed an application for leave to appeal in this Court, and we ordered oral argument on plaintiffs' application, directing the parties to address

> whether a reasonable jury could determine that the defendant's conduct was "the proximate cause" of plaintiff Kersch Ray's injuries where the defendant's actions placed the plaintiff in the dangerous situation that resulted in the plaintiff's injuries. MCL 691.1407(2)(c); *Robinson v City of Detroit*, 462 Mich 439, 462 (2000); *Beals v Michigan*, 497 Mich 363 (2015).[7]

II. STANDARD OF REVIEW

The applicability of governmental immunity is a question of law that is reviewed de novo.[8] We also

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[4] *Ray v Swager*, unpublished per curiam opinion of the Court of Appeals, issued October 15, 2015 (Docket No. 322766), pp 3-4.

[5] *Id*. at 2-3.

[6] *Id*. at 3-4. Because the panel held that defendant was not the proximate cause of plaintiff's injuries, it did not address whether reasonable minds could conclude that defendant was grossly negligent. *Id*. at 4 n 4.

[7] *Ray v Swager*, 499 Mich 988 (2016).

[8] *Beals v Michigan*, 497 Mich 363, 369; 871 NW2d 5 (2015).

review de novo a trial court's decision regarding a motion for summary disposition.[9]

III. BACKGROUND

Under the GTLA, governmental agencies and their employees are generally immune from tort liability when they are engaged in the exercise or discharge of a governmental function.[10] The act provides several exceptions to this general rule. One such exception is in MCL 691.1407(2), which provides in pertinent part:

> [E]ach . . . employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the . . . employee . . . while in the course of employment . . . if all of the following are met:
>
> (a) The . . . employee . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The . . . employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

Defendant, as a governmental employee, has the burden "to raise and prove his entitlement to immunity as an affirmative defense."[11] There is no dispute regarding whether defendant acted within the scope of his authority as a governmental employee for the school or whether he was engaged in the exercise or discharge of a governmental function. And the issue of whether defendant was grossly negligent is not presently before this Court. Accordingly, the only issue

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[9] *Id*.

[10] *Id*. at 370.

[11] *Odom v Wayne Co*, 482 Mich 459, 479; 760 NW2d 217 (2008).

before us is whether there is a question of material fact regarding whether defendant was "the proximate cause" of plaintiff's injuries under MCL 691.1407(2)(c).

IV. ANALYSIS

Proximate cause, also known as legal causation, is a legal term of art with a long pedigree in our caselaw.[12] Proximate cause is an essential element of a negligence claim.[13] It "involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences."[14] Proximate cause is distinct from cause in fact, also known as factual causation, which "requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred."[15] Courts must not conflate these two concepts.[16] We recognize that our own decisions have not always been perfectly clear on this topic given that we have used "proximate cause" both as a broader term referring to factual causation and legal causation together and as a narrower term referring only to legal causation.[17] All this broader characterization recog-

[12] A legal term of art must be construed and understood according to its peculiar and appropriate meaning. MCL 8.3a.

[13] *Moning v Alfono*, 400 Mich 425, 437; 254 NW2d 759 (1977) ("The elements of an action for negligence are (i) duty, (ii) general standard of care, (iii) specific standard of care, (iv) cause in fact, (v) legal or proximate cause, and (vi) damage.").

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

[15] *Id*.

[16] See *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586 n 13; 513 NW2d 773 (1994) ("The question of fact as to whether the defendant's conduct was a cause of the plaintiff's injury must be separated from the question as to whether the defendant should be legally responsible for the plaintiff's injury.") (quotation marks and citation omitted).

[17] See *Skinner*, 445 Mich at 162-163, citing *Moning*, 400 Mich at 437 ("We have previously explained that proving proximate cause actually entails proof of two separate elements: (1) cause in fact, and (2) legal

nizes, however, is that "a court must find that the defendant's negligence was a cause in fact of the plaintiff's injuries before it can hold that the defendant's negligence was the proximate or legal cause of those injuries."[18] In a negligence action, a plaintiff must establish both factual causation, i.e., "the defendant's conduct in fact caused harm to the plaintiff," and legal causation, i.e., the harm caused to the plaintiff "was the general kind of harm the defendant negligently risked."[19] If factual causation cannot be established, then proximate cause, that is, legal causation, is no longer a relevant issue.[20]

We take this opportunity to clarify the role that factual and legal causation play when analyzing whether a defendant's conduct was "the proximate

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cause, also known as 'proximate cause.' "). Professor Dan B. Dobbs describes the source of this confusion as follows:

> One major source of confusion about "proximate cause"—and thus another aspect of the pesky terminology problem—lies in the fact that many courts define the term in a way that gives it two distinct meanings. In one form or another, courts often say that the plaintiff, to prove proximate cause, must show (a) factual cause and (b) that the general type of harm was foreseeable. The effect of this definition is that two distinct legal issues can be called by the same name. [1 Dobbs, Hayden & Bublick, Torts, § 200, p 687.]

As we explain further below, our decision in *Beals* is an example of our Court's conflation of factual and legal causation. See *Beals*, 497 Mich at 374, 378.

[18] *Craig v Oakwood Hosp*, 471 Mich 67, 87; 684 NW2d 296 (2004). See also Prosser & Keeton, Torts (5th ed), § 42, pp 272-273 ("Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question whether the defendant should remain legally responsible for the injury.").

[19] Dobbs, § 124, p 389.

[20] See *Skinner*, 445 Mich at 163. Accordingly, we agree with the dissent that if an actor is not a factual cause of an injury, that actor cannot be considered a legal cause. We are therefore puzzled by the dissent's claim that we divorce "proximate cause" from the concept of factual causation.

cause" of a plaintiff's injuries under the GTLA.[21] In any negligence case, including one involving a government actor's gross negligence, a court must determine whether "the defendant's negligence was a cause in fact of the plaintiff's injuries . . . ."[22] But the court must also assess proximate cause, that is, legal causation, which requires a determination of whether it was foreseeable that the defendant's conduct could result in harm to the victim.[23] A proper legal causation inquiry considers whether an actor should be held legally responsible for his or her conduct, which requires determining whether the actor's breach of a duty to the plaintiff was a proximate cause of the plaintiff's injury.[24] It is not uncommon that more than one proximate cause contributes to an injury.[25] However, under the GTLA, we have held that when assessing whether a governmental employee was "the proximate cause" of the plaintiff's injuries, a court must determine whether the defendant's conduct was "the one most immediate, efficient, and direct cause of the injury . . . ."[26]

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[21] We note that a plaintiff must also prove that a government actor's conduct was *grossly* negligent to hold such a defendant liable under the GTLA. MCL 691.1407(2)(c).

[22] *Craig*, 471 Mich at 87.

[23] *Weymers v Khera*, 454 Mich 639, 648; 563 NW2d 647 (1997).

[24] See *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000) ("The one most immediate, efficient, and direct cause of the plaintiffs' injuries was the *reckless* conduct of the drivers of the fleeing vehicles.") (emphasis added). Because a proximate cause inquiry seeks "to determine the appropriate scope of a *negligent* defendant's liability," Dobbs, § 198, p 681 (emphasis added), it "is an issue that can only arise when the [actor] is negligent and his negligence can be identified as creating specified risks." *Id*. at § 210, p 731.

[25] *Brisboy v Fibreboard Corp*, 429 Mich 540, 547; 418 NW2d 650 (1988).

[26] *Robinson*, 462 Mich at 462. To the extent the dissent is concerned that this directive to consider the "one most immediate, efficient, and direct cause of the injury" provides lower courts with little guidance, we

Contrary to the dissent's assertion, "the proximate cause" is not determined by weighing factual causes. Such an approach distorts the meaning of "the proximate cause" by severing it from the concept of legal causation. There is no basis in our caselaw or our rules of statutory construction for interpreting "the proximate cause" as having nothing to do with the legal term of art "proximate cause." The Legislature amended the GTLA in 1986 to include the phrase "the proximate cause," and so we must determine what the term "the proximate cause" would have meant to the Legislature then.[27] Before 1986, we can find no case that reads the term "proximate cause," even when preceded by a definite article, to mean "but-for cause."[28]

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agree. But in the absence of briefing and argument on the issue, we decline to address how a court ought to decide, in a case in which there is more than one proximate cause, whether the defendant's conduct is "*the* proximate cause." For today, it is enough to clarify that only another *legal* cause can be more proximate than the defendant's conduct.

[27] See *Sam v Balardo*, 411 Mich 405, 425; 308 NW2d 142 (1981) ("[W]ords employed by the Legislature derive their meaning from the common-law usage at the time of the passage of the act . . . .").

[28] This is unsurprising, as the term "proximate cause" is applied by courts to those "considerations which limit liability even where the *fact of causation* is clearly established." Prosser & Keeton, § 42, p 273. Additionally, even our cases that confusingly treat "proximate cause" as meaning the *combination of* proximate cause and but-for cause seem to post-date the 1986 amendment of the GTLA. Our first characterization of "proximate cause" as meaning both "proximate cause" and "but-for cause" occurred in 1994. See *Skinner*, 445 Mich at 162-163.

We disagree with the dissent's suggestion that the Court in *Stoll v Laubengayer*, 174 Mich 701; 140 NW 532 (1913), treated "proximate cause" as a question of factual causation. In *Stoll*, we addressed whether the defendant's alleged negligence was the proximate cause of a child's fatal injuries sustained when her sleigh coasted under the defendant's horse-drawn wagon. *Id*. at 704-706. We considered the actions of the actors involved and concluded that "[b]ut for th[e] act of [the decedent] (subsequent to defendant's alleged negligent act, and therefore proxi-

Although some of our earlier decisions refer to factual causation in connection with proximate cause,[29] these cases merely reflect the unremarkable proposition that an actor cannot be a "proximate cause" without also being a "but-for cause."[30] They do not contradict the well-established understanding of proximate cause, which, as we have long recognized, involves the foreseeability of the consequences of the conduct of human actors, regardless of whether "a proximate cause" or "the proximate cause" is at issue. Almost one hundred years ago this Court stated the rule regarding proximate cause as follows:

> If a man does an act and he knows, or by the exercise of reasonable foresight should have known, that in the event of a subsequent occurrence, which is not unlikely to happen, injury may result from his act, and such subsequent occurrence does happen and injury does result, the

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mate to the injury) no accident could have occurred." *Id*. at 706. Accordingly, we concluded that the child's actions were a proximate cause of her injuries, so the defendant was not liable. *Id*. Nothing in *Stoll* purported to weigh but-for causes or suggested that the term "the proximate cause" somehow requires such an analysis. In fact, to do so would have been a marked departure from the then-applicable law of contributory negligence, which dictated that if the plaintiff's negligence "was in whole or in part a proximate cause" of the injury, there could be no recovery. *Krouse v Southern Mich R Co*, 215 Mich 139, 144; 183 NW 768 (1921). Under the contributory negligence doctrine, abolished in Michigan in 1979, see *Placek v Sterling Hts*, 405 Mich 638, 650; 275 NW2d 511 (1979), courts did not weigh but-for causes but instead considered whether the defendant's negligence was the sole proximate cause. See *Krouse*, 215 Mich at 145. See also Hayden, *Butterfield Rides Again: Plaintiff's Negligence as Superseding or Sole Proximate Cause in Systems of Purpose Comparative Responsibility*, 33 Loy LA L Rev 887, 901 (2000) ("[I]n the pre-comparative [negligence] era, the doctrine[] of sole proximate cause . . . functioned as convenient shorthand to explain an all-or-nothing result in a two-party situation.").

[29] See, e.g., *Moning*, 400 Mich at 440 n 13; *Glinski v Szylling*, 358 Mich 182; 99 NW2d 637 (1959) (opinion by SMITH, J.); *Stoll*, 174 Mich at 706.

[30] *Craig*, 471 Mich at 87.

> act committed is negligent, and will be deemed to be *the proximate cause* of the injury.[31]

This formulation, which is the "most general and pervasive approach" to proximate cause,[32] has been repeatedly reaffirmed by this Court.[33] We see no reason

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[31] *Northern Oil Co v Vandervort*, 228 Mich 516, 518; 200 NW 145 (1924) (quotation marks omitted; emphasis added), quoting *Tozer v Mich Central R Co*, 195 Mich 662, 666; 162 NW 280 (1917), and *Jaworski v Detroit Edison Co*, 210 Mich 317; 178 NW 71 (1920).

[32] See Dobbs, § 198, pp 682-683 ("The most general and pervasive approach to . . . proximate cause holds that a negligent defendant is liable for all the general kinds of harms he foreseeably risked by his negligent conduct and to the class of persons he put at risk by that conduct.").

[33] See, e.g., *Moning*, 400 Mich at 439 (noting that whether a cause is a proximate cause depends in part on foreseeability); *Nielsen v Henry H Stevens, Inc*, 368 Mich 216, 220-221; 118 NW2d 397 (1962) ("To make negligence *the proximate cause* of an injury, the injury must be the natural and probable consequence of a negligent act or omission, which, under the circumstances, an ordinary prudent person ought reasonably to have foreseen might probably occur as the result of his negligent act.") (emphasis added); *Parks v Starks*, 342 Mich 443, 448; 70 NW2d 805 (1955) ("*The proximate cause* of an injury is not necessarily the immediate cause; not necessarily the cause nearest in time, distance, or space. . . . In order that the plaintiff may recover it must appear that his injury was the natural and probable consequence of a negligent act or omission of the defendant which under the circumstances an ordinarily prudent person ought reasonably to have foreseen or anticipated might possibly occur as a result of such act or omission.") (emphasis added; quotation marks and citations omitted); *Nash v Mayne*, 340 Mich 502, 509; 65 NW2d 844 (1954) ("The confinement of plaintiff could not have been reasonably foreseen by defendant. It follows that the [conduct] of defendant could not be and was not *the proximate cause* of plaintiff's injury.") (emphasis added); *Roberts v Lundy*, 301 Mich 726, 730; 4 NW2d 74 (1942) ("It is elementary that, before conduct can constitute actionable negligence . . . that conduct must be found to be *the proximate cause* of the injury. . . . It cannot be said that a reasonable man should have foreseen or anticipated that the act [committed] . . . would result in the injury complained of here.") (emphasis added); *Weissert v Escanaba*, 298 Mich 443, 453; 299 NW 139 (1941) ("[T]he generally accepted test is that negligence is not *the proximate cause* of an accident unless, under all the circumstances, the accident might have been reasonably foreseen by a

why this "peculiar and appropriate" legal meaning should not be ascribed to the Legislature's reference to proximate cause in the GTLA.[34] Accordingly, we presume that by "proximate cause" the Legislature meant proximate cause.

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person of ordinary intelligence and prudence, and that it is not enough to prove that the accident is a natural consequence of the negligence, it must also have been the probable consequence.") (emphasis added); *Luck v Gregory*, 257 Mich 562, 569; 241 NW 862 (1932), citing *Stoll v Laubengayer*, 174 Mich 701; 140 NW 532 (1913) ("In order to constitute proximate cause, it must appear the injury to plaintiff was the natural and probable consequence of the negligence or wrongful act of the defendant, and that it ought to have been foreseen, in light of the attending circumstances.").

Moreover, other decisions of this Court in ordinary negligence cases have held that jury instructions using the phrase "the proximate cause" were erroneous because they were tantamount to an instruction that the plaintiff had to show that the defendant's negligence was the sole proximate cause before he could recover. See, e.g., *Kirby v Larson*, 400 Mich 585, 605; 256 NW2d 400 (1977) (opinion by WILLIAMS, J.); *Barringer v Arnold*, 358 Mich 594, 600; 101 NW2d 365 (1960); *Sedorchuk v Weeder*, 311 Mich 6, 10-11; 18 NW2d 397 (1945). See also *Dedes v Asch*, 446 Mich 99, 122; 521 NW2d 488 (1994) (RILEY, J., dissenting) ("Indeed, this Court has long interpreted the phrase 'the proximate cause' as one that is tantamount to an instruction that, before plaintiff could recover, he must show that defendant's negligence was 'the sole' proximate cause of the accident.") (quotation marks and citation omitted), majority opinion in *Dedes* overruled by *Robinson*, 446 Mich at 458-459. Nothing in these decisions suggests that use of the phrase "the proximate cause" was akin to an instruction that the jury had to weigh the various factual causes in the case.

[34] MCL 8.3a. See also *Hodge v State Farm Mut Auto Ins Co*, 499 Mich 211, 218; 884 NW2d 238 (2016) ("When the Legislature, without indicating an intent to abrogate the common law, 'borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.' "), quoting *Sekhar v United States*, 570 US 729, 733; 133 S Ct 2720, 2724; 186 L Ed 2d 794 (2013). The Legislature did not abrogate the common-law understanding of "the proximate cause" in the GTLA. See *Robinson*, 462 Mich at 462.

Most of our caselaw interpreting the GTLA is not to the contrary. In *Robinson*, we considered "whether the city of Detroit or individual police officers face[d] civil liability for injuries sustained by passengers in vehicles fleeing from the police when the fleeing car caused an accident."[35] We held that the government officials in question were immune from suit because a different proximate cause—"the *reckless conduct* of the drivers of the fleeing vehicles"—was the proximate cause of the plaintiff's injuries.[36] *Robinson* is therefore consistent with our holding today.

In *Beals*, we considered the defendant lifeguard's failure to intervene in the deceased's drowning.[37] While our analysis in that case was somewhat opaque, we believe *Beals* is best understood as holding that the lifeguard could not have been "the proximate cause" of the decedent's drowning because the plaintiff failed to show even a genuine issue of factual causation.[38] When a plaintiff attempts to establish factual causation circumstantially, that circumstantial proof must go beyond mere speculation.[39] The plaintiff in *Beals* failed to make this showing. We emphasized that any connection between the lifeguard's breach of a duty and the drowning was only speculative.[40] We also noted that "it [was] unclear that even a prudent lifeguard would have been able to observe and prevent the [deceased's] drowning," which further illustrated that the causal

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[35] *Robinson*, 462 Mich at 444.

[36] *Id*. at 462 (emphasis added).

[37] *Beals*, 497 Mich at 365. The underlying reason for the drowning was unknown. *Id*. at 367.

[38] See *Skinner*, 445 Mich at 163 ("A plaintiff must adequately establish cause in fact in order for legal cause or 'proximate cause' to become a relevant issue.").

[39] *Id*. at 164.

[40] See *Beals*, 497 Mich at 374.

connection was "simply too tenuous."[41] In other words, the plaintiff failed to show that the lifeguard was a but-for cause of the deceased's death. Accordingly, we held that the defendant lifeguard was not "the proximate cause" of the deceased's death for the purposes of the GTLA.[42] The holding, if not all of the reasoning, of *Beals* is consistent with our understanding of the GTLA's use of "the proximate cause."[43]

We recognize that our caselaw is not without its blemishes. In *Dean v Childs*, the Court of Appeals held that the GTLA did not bar a claim against a firefighter who was alleged to be grossly negligent when fighting a house fire that killed the plaintiff's children.[44] We issued an order summarily reversing for the reasons stated by the Court of Appeals' dissent,[45] which had weighed the various factual causes of the children's deaths to conclude that the proximate cause "was the fire itself, not defendant's alleged gross negligence in fighting it."[46]

This analysis was erroneous. Determining proximate cause under the GTLA, or elsewhere, does not

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[41] *Id*. at 374 n 23.

[42] *Id*. at 378. Because factual causation could not be established, we agree with the dissent that it was unnecessary for *Beals* to analyze legal causation.

[43] We do not share the dissent's concern that this opinion will be a cause of confusion in the lower courts and are disheartened by the dissent's thinly veiled invitation to lower courts to ignore this opinion in favor of the dissent's preferred interpretation of *Beals*. This makes the dissent's claim of fealty to precedent ring hollow. Again, because *Beals* involved the absence of factual causation, a necessary predicate to a finding of proximate cause, it does not stand for the proposition that courts should determine whether a defendant was "the proximate cause" under the GTLA by weighing but-for causes.

[44] *Dean v Childs*, 262 Mich App 48, 51-52; 684 NW2d 894 (2004).

[45] *Dean v Childs*, 474 Mich 914 (2005).

[46] *Dean*, 262 Mich App at 61 (GRIFFIN, J., dissenting).

entail the weighing of factual causes but instead assesses the legal responsibility of the actors involved. Moreover, because proximate cause is concerned with the foreseeability of consequences, only a human actor's breach of a duty can be a proximate cause.[47] Consequently, nonhuman and natural forces, such as a fire, cannot be considered "the proximate cause" of a plaintiff's injuries for the purposes of the GTLA. Instead, these forces bear on the question of foreseeability, in that they may constitute superseding causes that relieve the actor of liability if the intervening force was not reasonably foreseeable.[48] The dissenting Court of Appeals opinion in *Dean* failed to recognize these principles and erroneously concluded that the fire was the proximate cause of the children's deaths. Our subsequent order adopting the dissent was therefore in error. Accordingly, we overrule our order in *Dean*.[49]

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[47] See, e.g., Dobbs, § 198, pp 682-683 ("[A] negligent defendant is liable for all the general kinds of harm he foreseeably risked by his negligent conduct and to the class of persons he put at risk by that conduct."); Prosser & Keeton, § 42, p 264 (" 'Proximate cause' . . . is merely the limitation which the courts have placed upon the *actor's* responsibility for the consequences of the actor's conduct.") (emphasis added).

[48] See *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985).

[49] We do not do so lightly. "That a case was wrongly decided, by itself, does not necessarily mean that overruling it is appropriate." *Coldwater v Consumers Energy Co*, 500 Mich 158, 172; 895 NW2d 154 (2017). Stare decisis principles dictate that we must also consider "whether the decision defies practical workability, whether reliance interests would work an undue hardship were the decision to be overruled, and whether changes in the law or facts no longer justify the decision." *Id*. at 173.

Although *Dean* does not defy practical workability and there have been no intervening changes in law, the reliance interests are so minimal that further adherence to *Dean* is unwarranted. *Dean* is a peremptory order that has only been cited in two published decisions by Michigan courts. And there is no indication that our order "has caused a large number of persons to attempt to conform their conduct to a certain norm." *Paige v Sterling Hts*, 476 Mich 495, 511; 720 NW2d

V. APPLICATION

The Court of Appeals' proximate cause inquiry confused proximate cause with cause in fact. The panel focused on whether plaintiff, the driver of the vehicle, and the vehicle itself were *factual* causes of plaintiff's injuries.[50] This was a necessary inquiry because one's conduct cannot be the proximate cause without also being a factual cause. The panel's error was in its next step. Weighing these factual causes against defendant's actions, the Court of Appeals concluded that "there were obviously more immediate, efficient, and direct causes of [plaintiff's] injuries" than defendant's conduct.[51] According to the panel, "clearly the most proximate cause of [plaintiff's] injuries is the fact that he was struck by a moving vehicle."[52]

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219 (2006). Therefore, we conclude that *Dean* has not "become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Robinson*, 462 Mich at 466. These considerations, coupled with our determination that *Dean* was wrongly decided, persuade us to overrule it.

Finally, we note that in *Beals* we stated that *Dean* was analogous because both cases addressed claims involving a government employee's failure to intervene to prevent a death. *Beals*, 497 Mich at 375. Our brief discussion of *Dean* in *Beals* was not necessary to our ultimate conclusion that the lifeguard was not "the proximate cause" because factual causation could not be established. Nonetheless, because we overrule *Dean*, we also disavow the portion of *Beals* relying on *Dean*. We otherwise uphold the result and as much of the analysis in *Beals* as is consistent with the principle that a government actor's conduct cannot be "the proximate cause" of one's injuries without being a factual cause thereof.

[50] *Ray*, unpub op at 4 ("Had [plaintiff] himself verified that it was safe to enter the roadway, . . . the accident would not have occurred. Likewise, had [the driver] not been driving on the roadway that morning, or had he otherwise avoided [plaintiff], the accident would not have occurred.").

[51] *Id*.

[52] *Id*. at 3.

The Court of Appeals' analysis failed to properly distinguish between factual causation and legal causation. The panel did not assess the legal responsibility of any of the actors involved, but instead attempted to discern whether any of the other factual causes was a more direct cause of plaintiff's injury than defendant's actions. This was error. Determining whether an actor's conduct was "the proximate cause" under the GTLA does not involve a weighing of factual causes. Instead, so long as the defendant is *a* factual cause of the plaintiff's injuries, then the court should address legal causation by assessing foreseeability and whether the defendant's conduct was *the* proximate cause.[53]

To the extent the Court of Appeals' opinion attempted to analyze this issue,[54] its analysis was incomplete. An appropriate proximate cause analysis should have considered the conduct and any legal responsibility therefor of defendant, plaintiff, and the driver of the vehicle that struck plaintiff. Further, before an actor can be a proximate cause, there must be the prerequisite determination that the actor was negligent—that is, that the actor breached a duty. In this case, the panel never determined whether the driver was negligent. Without that determination, his actions could not be a proximate cause of plaintiff's injuries.[55] Similarly, the panel failed to correctly analyze whether plaintiff was negligent and a proximate cause of his own inju-

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[53] *Robinson*, 462 Mich at 462.

[54] See *Ray*, unpub op at 4 n 3 ("[Plaintiff] had an obligation to assess the dangers of the road and to guard against those dangers. By failing to do so, [plaintiff] was among the causes of the accident and, because his own actions more directly preceded the accident, [defendant] cannot be *the* proximate cause of [plaintiff's] injuries.") (emphasis in original).

[55] Because only a human actor's breach of a duty can be a proximate cause, we reject any suggestion that the vehicle alone could be the

ries. At the time of the accident, plaintiff was 13 years old. Unlike adults, who are held to the reasonable person standard, determining whether a child was negligent requires application of a subjective standard.[56] The court must assess whether the child acted with the degree of care that would reasonably be expected of a child of similar age, intelligence, capacity, and experience under the circumstances of the case.[57] The Court of Appeals erred by singularly focusing on plaintiff's age without also considering plaintiff's subjective characteristics and the relevant factual context.[58]

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proximate cause of plaintiff's injuries. See *Ray*, unpub op at 3 ("[T]he most proximate cause of [plaintiff's] injuries is the fact that he was struck by a moving vehicle.").

[56] Dobbs, § 134, p 421. See also M Civ JI 10.06 ("A minor is not held to the same standard of conduct as an adult.").

[57] *Clemens v Sault Ste Marie*, 289 Mich 254, 257; 286 NW 232 (1939). See also *Burhans v Witbeck*, 375 Mich 253, 255; 134 NW2d 225 (1965); *Ackerman v Advance Petroleum Transp, Inc*, 304 Mich 96, 106-107; 7 NW2d 235 (1942); Dobbs, § 134, p 421 ("The minor is . . . required to conduct himself only with the care of a minor of his own age, intelligence, and experience in similar circumstances . . . ."). The Court of Appeals failed to properly articulate this rule when it stated, "Children, even those considerably younger than [plaintiff], are expected to understand the danger attendant to crossing a street, and they are expected 'to use care and caution to guard against the dangers of such crossing.' " *Ray*, unpub op at 4 n 3 (citation omitted). This analysis was incomplete because it failed to take into account any circumstances other than plaintiff's age that might bear on whether plaintiff's conduct was negligent. The dissent repeats this error when it relies solely on plaintiff's age to conclude that plaintiff "could and should have verified that it was safe to enter the roadway before he voluntarily did so."

[58] See *Thornton v Ionia Free Fair Ass'n*, 229 Mich 1, 9; 200 NW 958 (1924) ("[A]ge alone is not the conclusive test. Experience and capacity are also to be considered."); *Cooper v Lake Shore & Mich S R Co*, 66 Mich 261, 266; 33 NW 306 (1887) ("Every case [involving a child] must depend upon its own circumstances, and it would be unreasonable to apply [the rule of contributory negligence], under all circumstances, without regard to the condition of things at the time.").

Finally, even if the panel had determined that another actor was negligent and was *a* proximate cause of plaintiff's injuries,[59] it still would have needed to determine whether defendant's actions were "*the* proximate cause." This would require considering defendant's actions alongside any other potential proximate causes to determine whether defendant's actions were, or could have been, "the one most immediate, efficient, and direct cause" of the injuries.[60] If, on the basis of the evidence presented, reasonable minds could not differ on this question, then the motion for summary disposition should be granted.[61] Because the Court of Appeals did not consider these issues in the first instance, we remand to that Court for reconsideration.[62]

VI. RESPONSE TO THE DISSENT

Having read the dissent with care, we are simply perplexed. We *agree* with the dissent that one cannot be *the* or even *a* proximate cause without also being *a* cause in fact. Our opinion is very clear on this point. See, e.g., page 63-64 of this opinion ("All this broader characterization recognizes, however, is that a court must find that the defendant's negligence was a cause

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[59] We emphasize that we do not decide whether a question of fact exists as to whether the driver, plaintiff, or both were negligent.

[60] *Robinson*, 462 Mich at 446.

[61] See *Jackson v Saginaw Co*, 458 Mich 141, 146; 580 NW2d 870 (1998). See also *Black v Shafer*, 499 Mich 950, 951 (2016) ("If reasonable minds could not differ regarding the proximate cause of a plaintiff's injury, courts should decide the issue as a matter of law.").

[62] Likewise, because the Court of Appeals did not address these issues, we decline to address whether defendant's actions were a but-for cause of plaintiff's injuries or whether defendant was grossly negligent. See *Ray*, unpub op at 2 n 1, 4 n 4. Nothing in our opinion forecloses defendant from raising these arguments on remand.

in fact of the plaintiff's injuries before it can hold that the defendant's negligence was the proximate or legal cause of those injuries.") (quotation marks and citation omitted); page 64 of this opinion ("If factual causation cannot be established, then proximate cause, that is, legal causation, is no longer a relevant issue."); page 67 of this opinion ("[T]hese cases merely reflect the unremarkable proposition that an actor cannot be a 'proximate cause' without also being a 'but-for cause.' "); page 73 of this opinion ("[O]ne's conduct cannot be the proximate cause without also being a factual cause."). We do not understand why the dissent repeatedly claims otherwise.

Neither can we follow the conclusion the dissent draws from our shared premise. We must remember that we are interpreting statutory language that the Legislature enacted in 1986. The question, therefore, is what the Legislature would have understood the phrase "the proximate cause" to mean in 1986. We believe that the answer to that question should draw on the decades of jurisprudence in this state, leading up to that date, defining "proximate cause." And, as our cases have uniformly held, one cannot be *a* or *the* "proximate cause" without being both a factual cause *and* a legal cause of the plaintiff's injuries.

The dissent's approach, however, would render legal cause irrelevant. Under the dissent's theory, any factual cause—even an inanimate one—can be "the proximate cause" if it is the "most immediate, efficient and direct" factual cause of the plaintiff's injuries. The dissent claims that this has been "the common-law meaning" attributed to the phrase " 'the proximate cause' . . . in our jurisprudence since 1913." If that were true—if one's actions could, for now over one hundred years, have been "the proximate cause" with-

out also being a legal cause—one would expect there to be volumes of cases from our Court standing for that proposition. But there is only one, our order in *Dean*, which we overrule today.[63] *Robinson* did not hold that one's actions could be "the proximate cause" without also being a *legal* cause; indeed, we held in *Robinson* that the drivers' *reckless* conduct was the proximate cause of the accident.[64] Neither did *Beals*; but to the extent that it relied on *Dean*, we disavow that portion of its reasoning. Not even *Stoll*, the 1913 case the dissent trumpets as the progenitor of the (elusive) "proximate cause without legal cause" line of cases, held any such thing.[65] And the cases the dissent cites to support its unique pitch do not do so; they stand only for a proposition with which we fully agree: "Long before MCL 691.1407(2) was enacted in 1986—and many times since—our common law has recognized that factual causation is . . . an integral part of 'proximate cause.' " In fact, it is more than integral: factual

[63] The dissent's reliance on *Robinson*, *Beals*, and *Dean* for this proposition is unavailing. And even if those cases fully supported the dissent, we would still find troubling its implicit view that three post-amendment cases tell us more about what the Legislature meant by its amendment of the GTLA than the decades of jurisprudence leading up to 1986. We reject any implication from the dissent that *Robinson* and *Beals* construed MCL 691.1407(2)(c) in a manner that deviated from the meaning of "proximate cause" at common law. If so, it would be those decisions, rather than our opinion, that "retroactively alter the meaning" of the phrase "the proximate cause" as used in MCL 691.1407(2)(c), because, as noted above, the Legislature has instructed us to define legal terms of art according to their "peculiar and appropriate meaning." MCL 8.3a. Further, we do not draw any conclusions from the fact that the Legislature has not amended the GTLA in light of the three post-amendment cases cited by the dissent. See, e.g., *Donajkowski v Alpena Power Co*, 460 Mich 243, 258; 596 NW2d 574 (1999) ("[L]egislative acquiescence is an exceedingly poor indicator of legislative intent.").

[64] *Robinson*, 462 Mich at 462.

[65] See note 28 of this opinion.

causation is a condition precedent to proximate cause. That is, one's conduct cannot be *a* or *the* "proximate cause" of a plaintiff's injury without also being a factual cause thereof. But just because something is a factual cause of an injury does not mean it is *a* or *the* "proximate cause" thereof. "Proximate cause" has for a century in Michigan, like every other American jurisdiction, required both a finding of factual *and* legal cause. And that is undoubtedly what the Legislature would have understood when it used this legal term of art in the GTLA in 1986.

The dissent would jettison this understanding in favor of an approach that weighs factual causes to determine which among them is the "most immediate, efficient, and direct." At the outset, we are not sure how this theory can be derived from MCL 691.1407(2)(c). Why, one might wonder, would the Legislature choose language well known in the law to denote one type of causation ("proximate cause") if it really meant another ("cause in fact")? And we struggle to understand what the dissent's approach would entail. Consider this case. What if: the coach had chosen a different route; the driver had arrived one minute earlier or one minute later to the intersection; plaintiff had not gone to cross-country practice that day; plaintiff had not joined the cross-country team; his parents had not chosen to live in this school district; his mother had not given birth to plaintiff; his parents had never met, etc. All of these, and more, are but-for causes of the accident. The "causes of an event go back to the dawn of human events, and beyond."[66] How from those infi-

[66] Prosser & Keeton, § 41, p 264. Indeed, it was factual causation's infinitude that led "proximate cause" to develop, at least a hundred years ago, as the limitation that is "placed upon [an] actor's responsibility for the consequences of the actor's conduct." *Id*. Proximate cause serves to limit "liability at some point before the want of a nail leads to

nite causes a court, or anyone, could determine which is the most immediate, efficient, and direct but-for cause, we do not know. The dissent provides no guidance in this regard, instead finding it "easier to disparage the product of centuries of common law than to devise a plausible substitute . . . ."[67] All the dissent offers is the legally unrecognizable assertion that defendant's alleged gross negligence was not the one most immediate, efficient, and direct cause of plaintiff's injuries because the injuries would not have occurred but for plaintiff's conduct and that of the driver. But a test that allows the mere existence of other but-for causes—which are by definition present in every case—to immunize government actors from liability for their grossly negligent conduct is really no test at all.

Finally, in addition to being unsupported by the plain language of the statute or our caselaw, the dissent's interpretation fails to consider the statutory history of the GTLA.[68] We have cautioned that "courts must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute."[69] Before

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loss of the kingdom." *CSX Transp, Inc v McBride*, 564 US 685, 707; 131 S Ct 2630; 180 L Ed 2d 637 (2011) (Roberts, C.J., dissenting).

[67] *McBride*, 564 US at 707 (Roberts, C.J., dissenting).

[68] "[Q]uite separate from legislative history is *statutory* history—the statutes repealed or amended by the statute under consideration. These form part of the context of the statute, and (unlike legislative history) can properly be presumed to have been before all the members of the legislature when they voted. So a change in the language of a prior statute presumably connotes a change in meaning." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 256.

[69] *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009).

1986, the GTLA did not address whether government actors were immune from tort liability.[70] After our 1984 decision in *Ross v Consumers Power Co (On Rehearing)* afforded qualified immunity from all tort liability to government actors if they met certain conditions,[71] the Legislature amended the GTLA to create a narrow exception to this broad grant of immunity. The exception, which is at issue in this case, does not extend immunity to those government actors whose conduct amounts to "gross negligence that is the proximate cause of the injury or damage."[72]

The dissent's approach, under which even inanimate objects could be the proximate cause, fails to give meaning to the 1986 amendment of the GTLA. That is, the dissent's approach would immunize government actors for every harm that is a foreseeable result of their gross negligence.[73] Under the dissent's reasoning, as best we understand it, a government actor whose gross negligence foreseeably causes a fire that burns

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[70] *Odom*, 482 Mich at 467-468.

[71] *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 633-634; 363 NW2d 641 (1984). Those conditions were "(1) [that] the acts were taken during the course of employment and the employees were acting, or reasonably believed that they were acting, within the scope of their authority, (2) [that] the acts were taken in good faith, and (3) [that] the acts were discretionary-decisional, as opposed to ministerial-operational." *Odom*, 482 Mich at 468.

[72] MCL 691.1407(2)(c).

[73] This approach, which is akin to a most-recent-in-time rule, has been widely discredited:

> It is of course obvious that if a defendant sets a fire which burns the plaintiff's house, no court in the world will deny liability upon the ground that the fire, rather than the defendant's act, was the nearest, or next cause of the destruction of the house. . . . There may have been considerable confusion about this in the distant past, but the question is certainly no longer open. [Prosser & Keeton, § 42, pp 276-277.]

the plaintiff's house to the ground could avoid liability by blaming the fire, notwithstanding that the resulting harm is precisely that which the actor's conduct foreseeably risked. Likewise, the plaintiff foreseeably injured by the grossly negligent discharge of a government actor's firearm would have no recourse—it is the bullet that is always the more direct cause. Under this approach, government actors do not injure people; the implements they use do. The dissent provides no explanation to the contrary. We believe the dissent's theory fails to give meaning to the 1986 amendment by eliminating the narrow exception to government immunity created by MCL 691.1407(2)(c).[74] If the Legislature had intended governmental officials to be absolutely immune from liability, we cannot make sense of the words they chose to accomplish that result. The 1986 amendment undoubtedly creates an *exception*, albeit a narrow one, to governmental immunity. To read it otherwise is to ignore the words of the statute.[75] "Where the [statutory] language is unambiguous, we presume that the Legislature intended the meaning

[74] The dissent contends that our argument is a "veiled reliance on the so-called 'absurd results' doctrine." We rely on nothing of the sort. We give effect to the plain text of the statute, which produces no absurdity—"proximate cause" as used in the GTLA means what it has meant for a century in the common law of Michigan and elsewhere; one cannot be "the proximate cause" of an injury without being both a factual and legal cause thereof.

[75] We are puzzled by the dissent's criticism of us for relating the statutory history of the GTLA. That history, the dissent acknowledges, consists only of the unassailable fact that the GTLA was amended to provide a narrow exception to governmental immunity when a government actor's gross negligence was the proximate cause of an injury. We are not aware of any rule suggesting that it is forbidden to acknowledge that a statute has been amended unless the statute is ambiguous—as the GTLA is not. Our charge is to give effect to the Legislature's amendments, which we have done by honoring the words they selected—"the proximate cause."

clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written."[76] Here, the Legislature amended the GTLA to provide a narrow exception to governmental immunity for grossly negligent acts that were "the proximate cause" of a plaintiff's injuries.[77] "Proximate cause" has for a hundred years in this state, and elsewhere, been a legal term of art; one's actions cannot be *a* or *the* "proximate cause" without being both a factual and a legal cause of the plaintiff's injuries. We give the text its plain meaning.

VII. CONCLUSION

Proximate cause requires determining whether the defendant's negligence foreseeably caused the plaintiff's injuries. That negligence (or gross negligence in the case of the GTLA) cannot have been a proximate cause of a plaintiff's injury if it is not both a factual and legal cause of the injury. A court should take all possible proximate causes into account when determining whether the defendant was "the proximate cause," i.e., "the one most immediate, efficient, and direct cause of the injury . . . ."[78] In this case, the Court of Appeals erred by instead attempting to discern whether the various but-for causes of plaintiff's injuries were a more direct cause of those injuries than defendant's alleged gross negligence, without first determining whether any of the asserted but-for causes were *proximate* causes. Accordingly, we vacate the Court of Appeals' decision and remand to the Court of Appeals for further proceedings not inconsistent with this opinion.

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[76] *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (quotation marks omitted).

[77] MCL 691.1407(2)(c).

[78] *Robinson*, 462 Mich at 462.

MCCORMACK, BERNSTEIN, and LARSEN, JJ., concurred with VIVIANO, J.

WILDER, J. (*dissenting*). I respectfully dissent. In my judgment, the Court of Appeals reached the correct outcome by duly applying our germane holdings in *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), and *Beals v Michigan*, 497 Mich 363; 871 NW2d 5 (2015).[1] Because the Court of Appeals committed no error in its application of *Robinson* and *Beals* to the facts of the instant case, I would affirm.

I

Robinson is our seminal case interpreting the "employee provision" of the governmental tort liability act (GTLA)[2]—MCL 691.1407(2)—which provides an exception to the GTLA's "broad" grant of tort immunity to governmental actors. *Robinson*, 462 Mich at 455, 458. In pertinent part, MCL 691.1407(2) provides:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service . . . while acting on behalf of a governmental agency if all of the following are met:

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[1] Indeed, under the doctrine of stare decisis, the Court of Appeals was *bound* to follow those decisions. See *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191; 880 NW2d 765 (2016); *Baumgartner v Perry Pub Sch*, 309 Mich App 507, 531 n 37; 872 NW2d 837 (2015).

[2] MCL 691.1401 *et seq*.

> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is *the proximate cause* of the injury or damage. [Emphasis added.]

In construing the phrase "the proximate cause" in *Robinson*, 462 Mich at 459, we relied on several well-settled principles of statutory interpretation:

> Because the Legislature is presumed to understand the meaning of the language it enacts into law, statutory analysis must begin with the wording of the statute itself. Each word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence. The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another. Where the language of the statute is clear and unambiguous, the Court must follow it.
>
> These rules of statutory construction are especially germane in the cases now before us because Michigan strictly construes statutes imposing liability on the state in derogation of the common-law rule of sovereign immunity. This Court has repeatedly acknowledged that governmental immunity legislation evidences a clear legislative judgment that public and private tortfeasors should be treated differently. [Quotation marks and citations omitted.]

In light of such principles, we held that "[t]he Legislature's use of the definite article 'the' " in the phrase "*the* proximate cause" clearly demonstrated "an intent to focus on one cause." *Id*. at 458-459. Recognizing that our "duty is to give meaning to the Legislature's choice of one word over the other," we decided that the phrase

"*the* proximate cause" must not be interpreted as synonymous with "*a* proximate cause." *Id*. at 461. Therefore, we afforded the phrase "the proximate cause" the common-law meaning that it has held in our jurisprudence since 1913:

> We are helped by the fact that this Court long ago defined "the proximate cause" as "the immediate efficient, direct cause preceding the injury." *Stoll v Laubengayer*, 174 Mich 701, 706; 140 NW 532 (1913). The Legislature has nowhere abrogated this, and thus we conclude that . . . the Legislature provided tort immunity for employees of governmental agencies unless the employee's conduct amounts to gross negligence that is the one most immediate, efficient, and direct *cause* of the injury or damage, i.e., the proximate cause. [*Id*. at 462 (emphasis added).]

The *Stoll* decision on which we relied in *Robinson* treated the question of proximate "cause" as one necessarily involving the consideration of factual (i.e., but-for)[3] causation. *Stoll*, 174 Mich at 706 ("But for this act of [the decedent] (subsequent to defendant's alleged negligent act, and therefore proximate to the injury) no accident could have occurred.").

In *Beals*, 497 Mich at 365-366, we applied the principles set forth in *Robinson* to a factual scenario in which the plaintiff, autistic 19-year-old William Beals, drowned in an indoor swimming pool while in the presence of the defendant lifeguard, William Harman, who was a governmental employee. "Applying this Court's rationale in *Robinson*," we held that

> Harman's failure to intervene in Beals's drowning cannot reasonably be found to be "the one most immediate,

[3] See generally *Craig v Oakwood Hosp*, 471 Mich 67, 86-87; 684 NW2d 296 (2004) ("The cause in fact element generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred.") (quotation marks and citation omitted).

> efficient, and direct cause" of Beals's death. While it is unknown what specifically caused Beals to remain submerged under the water, the record indicates that Beals voluntarily entered the pool and voluntarily dove under the surface of the shallow end into the deep end without reemerging. Although plaintiff alleges that Harman's inattentiveness prevented him from attempting a timely rescue of Beals, in our view, it is readily apparent that the far more "immediate, efficient, and direct cause" of Beals's death was that which caused him to remain submerged in the deep end of the pool without resurfacing.
>
> . . . That we lack the reason for Beals's prolonged submersion in the water does not make that unidentified reason any less the "most immediate, efficient, and direct" cause of his death. Consequently, while Harman's failure to intervene may be counted among the myriad reasons that Beals did not survive this occurrence, it certainly was not "the proximate cause" of his death for purposes of MCL 691.1407(2)(c). [*Beals*, 497 Mich at 373-374.]

In other words, even though Harman's conduct would undoubtedly have been recognized as "a" potential *legal* cause of the drowning under our ordinary negligence jurisprudence, in *Beals* we compared a number of potential factual (i.e., but-for) causes of Beals's drowning and determined that the behavior of the governmental employee was not "the" proximate cause.

It was unnecessary in *Beals* to analyze foreseeability or legal causation to conclude that the governmental actor was not *the* proximate cause of Beals's drowning—we were able to determine that Harman's conduct was not the one most immediate, efficient, and direct cause of Beals's death simply by comparing the but-for causes. That is because it is well settled in our negligence jurisprudence that the phrase "proximate cause" is "a legal term of art that incorporates *both* cause in fact and legal (or 'proximate') cause." *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004)

(emphasis added). See also *Weymers v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997) ("To establish proximate cause, the plaintiff must prove the existence of both cause in fact and legal cause.").[4] Indeed, while the term "proximate cause" has also been used as a synonym for "legal cause," see, e.g., *Haliw v Sterling Hts*, 464 Mich 297, 310; 627 NW2d 581 (2001) ("[L]egal cause or 'proximate cause'[5] normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences.") (quotation marks and citation omitted), well before 1986 we recognized that the "sine qua non"[6] of proximate cause is "cause in

[4] Accord *Black v Shafer*, 499 Mich 950, 951 (2016); *White v Hutzel Women's Hosp*, 498 Mich 881 (2015); *O'Neal v St John Hosp & Med Ctr*, 487 Mich 485, 496; 791 NW2d 853 (2010) (opinion by HATHAWAY, J.); *id.* at 508 (CAVANAGH, J., concurring); *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994), overruled in part on other grounds by *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2 (1999); *Moning v Alfono*, 400 Mich 425, 439-440, 440 n 13; 254 NW2d 759 (1977); *Glinski v Szylling*, 358 Mich 182, 196-197; 99 NW2d 637 (1959) (opinion by SMITH, J.); *Stoll*, 174 Mich at 706; *Auto-Owners Ins Co v Seils*, 310 Mich App 132, 157; 871 NW2d 530 (2015); *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004); *Adas v Ames Color-File*, 160 Mich App 297, 300-301; 407 NW2d 640 (1987).

[5] Were "legal cause" and "proximate cause" truly synonymous, there would be no need for this Court to refer to *both* concepts as a way of clarifying when it is referring to legal causation. As the Restatement of the Law Third, Torts recognizes, like "proximate cause," the phrase "legal cause" can be a misnomer, "contribut[ing] to the misleading impression that limitations on liability somehow are about factual cause." 1 Restatement Torts 3d: Liability for Physical & Emotional Harm, Special Note on Proximate Cause, ch 6, pp 492-493. See also Dobbs, Hayden & Bublick, Torts, § 200, p 687 ("One major source of confusion about 'proximate cause'—and thus another aspect of the pesky terminology problem—lies in the fact that many courts define the term in a way that gives it two distinct meanings.").

[6] "Sine qua non" means "[a]n indispensable condition or thing; something on which something else *necessarily* depends." *Black's Law Dictionary* (10th ed) (emphasis added).

fact." See *Glinski v Szylling*, 358 Mich 182, 196-197; 99 NW2d 637 (1959) (plurality opinion by SMITH, J.).[7] See also *Moning v Alfono*, 400 Mich 425, 439-440, 440 n 13; 254 NW2d 759 (1977) (explaining that "[p]roximate cause encompasses a number of distinct problems," one of which is "[t]he problem of causation in fact"), quoting Prosser, Torts (4th ed), § 42, p 244. "As a matter of logic, a court must find that the defendant's negligence was a cause in fact of the plaintiff's injuries before it can hold that the defendant's negligence was the . . . legal cause of those injuries." *Craig*, 471 Mich at 87. See also 4 Harper, James & Gray, Torts (2d ed), § 20.2, pp 89-91 ("Through all the diverse theories of proximate cause runs a common thread; almost all agree that defendant's wrongful conduct must be a cause in fact of plaintiff's injury before there is liability. This notion is not a metaphysical one but an ordinary, matter-of-fact inquiry into the existence or nonexistence of a causal relation as lay people would view it."). In other words, but-for causation is an indispensable part of the "proximate cause" inquiry. If something is

[7] The four-justice plurality in *Glinski*, 358 Mich at 196-197 (opinion by SMITH, J.), stated that

> [t]his expression, "proximate" cause, has bedeviled the law of torts for years. So much has been written concerning its "true" meaning that it would be a disservice to the profession, and presumptuous, to slay the dragon once more. Suffice to say it has no "true" meaning. It may be made to represent, at will, a number of entirely disparate elements in a negligence case, ranging from cause in fact to apportionment of damages. "No other formula," writes Dean Green, "so nearly does the work of Aladdin's lamp." It would advance the cause of justice if a term so chameleonlike were to be abandoned. This is beyond our power. It is too deeply imbedded in the cases and the literature for surgery so drastic. But we should insist that, whenever it is employed, the meaning sought to be ascribed to it be identified. Here it is being used as a synonym for the sine qua non, cause in fact. [Citation omitted.]

not a factual cause of an injury, it is not a "cause" of the injury at all, and ergo it cannot, as a matter of logic, be a *legal* cause. To hold otherwise is to accept the paradoxical outcome that an actor who did *not* cause an injury may nevertheless be deemed its "proximate cause."[8]

The test announced by *Robinson* and reaffirmed by *Beals* fits within this analytical framework and satisfies this Court's duty to narrowly construe the exception to immunity provided by MCL 691.1407(2)(c).[9] One cannot determine whether a governmental actor's conduct was "the one most immediate, efficient, and direct *cause*" of an injury without considering factual causation. In other words, to determine which cause—among more than one—was "most immediate, efficient, and direct," one must consider the panoply of but-for causes and weigh their immediacy, efficiency, and directness. Legal causation, on the other hand, only becomes a relevant consideration in GTLA litigation when "the one most immediate, efficient, and direct

[8] Because of the confusion wrought by the duality of meaning we have varyingly ascribed in our negligence jurisprudence to the phrase "proximate cause," it would arguably be a best practice to discontinue the use of that phrase entirely. See generally Restatement, ch 6, Special Note on Proximate Cause. But because the question before us is one of statutory interpretation—not negligence law—it would be inappropriate to rule on that issue today because any such ruling would necessarily be obiter dictum.

[9] To the extent that there is any ambiguity whether the Legislature intended "proximate cause" to denote legal cause only or to denote both factual cause and legal cause, the more inclusive definition (incorporating both) must be used because doing so leads to a narrower exception. *Beals*, 497 Mich at 370 (noting that the GTLA's exceptions to the "general rule" of governmental immunity "must be narrowly construed"). See also *Mack v Detroit*, 467 Mich 186, 196 n 10; 649 NW2d 47 (2002) ("[A]s this Court has consistently held since its seminal case" on the subject, "exceptions to governmental immunity are narrowly construed.").

cause" of the injury is a cause to which the law will not assign liability. See *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994) ("A plaintiff must adequately establish cause in fact in order for legal cause . . . to become a relevant issue.").[10] Put differently, legal cause acts only as a *limitation* to the scope of liability under the GTLA, not a means of *assigning* liability.[11] See *Moning*, 400 Mich at 439 ("Proximate cause encompasses a number of distinct problems including the *limits of liability for foreseeable consequences*.") (emphasis added).

Applying the above principles to the documentary evidence and well-pleaded allegations in this case,[12] it is evident that defendant Eric Swager's conduct was not "the proximate cause" of plaintiff Kersch Ray's injuries for purposes of MCL 691.1407(2). Even assuming, for the sake of argument, that Swager was grossly negligent in directing the team to cross the road,[13] and further assuming that Ray in fact heard Swager and entered the roadway on Swager's directive, no reasonable juror could conclude that Swager's conduct was the one most immediate, efficient, and direct cause of Ray's injuries. At a minimum, the 13-year-old Ray both could and should have verified that it was safe to enter

[10] *Skinner* was subsequently overruled in part on other grounds by *Smith*, 460 Mich at 455 n 2.

[11] Indeed, the majority acknowledges that "the term 'proximate cause' is applied by courts to those considerations which *limit* liability . . . ." (Quotation marks and citation omitted; emphasis added.)

[12] As this Court recognized in *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994), motions for summary disposition based on governmental immunity are governed by MCR 2.116(C)(7). "All well-pleaded allegations are viewed in the light most favorable to the nonmoving party unless documentary evidence is provided that contradicts them." *Haksluoto v Mt Clemens Regional Med Ctr*, 500 Mich 304, 309; 901 NW2d 577 (2017).

[13] This is a dubious assumption. See note 35 of this opinion.

the roadway before he voluntarily did so.[14] See, e.g., *Ackerman v Advance Petroleum Transp, Inc*, 304 Mich 96, 106, 107; 7 NW2d 235 (1942) (ruling that an eight-year-old child had the mental capacity to understand the dangers of crossing the street); *Pratt v Berry*, 37 Mich App 234, 238; 194 NW2d 465 (1971) ("[A]n ordinarily prudent seven-year-old child must look while crossing the street."). See also *Stoll*, 174 Mich at 706 (holding that a five-year-old child's act of sledding into the street was the proximate cause of her death because but for that act she would not have been injured).[15] As the Court of Appeals aptly reasoned:

> The contention that Ray essentially ran into the road in blind obedience to a verbal instruction from Swager simply does not alter the undeniable reality that Ray entered the road under his own power and he was then struck by a moving vehicle driven by someone other than Swager. Had Ray himself verified that it was safe to enter the roadway, as did many of his fellow teammates, the accident would not have occurred. Likewise, had Platt not been driving on the roadway that morning, or had he otherwise avoided Ray, the accident would not have occurred. In these circumstances, there were obviously more immediate, efficient, and direct causes of Ray's injuries than Swager's oral remarks. [*Ray v Swager*, unpublished per curiam opinion of the Court of Appeals, issued October 15, 2015 (Docket No. 322766), pp 3-4.]

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[14] This is not to discount the tragic and life-altering consequences that Ray and his family have endured because of the accident at issue in this case. However, it is the Legislature's prerogative—not this Court's—to decide if and when governmental actors are immune from tort liability. *Lash v Traverse City*, 479 Mich 180, 194; 735 NW2d 628 (2007).

[15] Although minors are held to a subjective standard of care, *Clemens v City of Sault Ste Marie*, 289 Mich 254, 256; 286 NW 232 (1939), plaintiffs have neither alleged nor offered proof of any subjective characteristic that left Ray less able to assess traffic than an ordinary high school freshman.

Put differently, it was either Ray's conduct or that of the driver—but not Swager's conduct—that was the one most immediate, efficient, and direct cause of Ray's injuries. But for Ray's conduct (his act of running into the roadway without assessing traffic despite a do-not-cross signal) and that of the driver (failing to yield to a pedestrian or failing to reasonably survey the roadway), Ray would not have sustained his injuries. Because Swager's alleged gross negligence was not "the" proximate cause of Ray's injuries, Swager was immune from suit under the GTLA and thus entitled to summary disposition.

II

Largely characterizing proximate cause as legal cause *only*, the majority incorrectly claims that "[o]ur first characterization of 'proximate cause' as meaning both 'proximate cause'[16] and 'but-for cause' " did not occur until our decision in *Skinner*, 445 Mich at 162-163. This ignores several earlier precedents, including our 1977 decision in *Moning*, 400 Mich at 439, 440 n 13 (explaining that "[p]roximate cause encompasses a number of distinct problems," one of which is "[t]he problem of causation in fact"), quoting Prosser, Torts (4th ed), § 42, p 244, the 1959 plurality decision in *Glinski*, 358 Mich at 196-197 (opinion by SMITH, J.) (explaining that cause in fact is the "*sine qua non*" of proximate cause),[17] and our 1913 decision in *Stoll*,

[16] I presume here that the majority means *legal* cause.

[17] This Court has, on numerous occasions, cited the *Glinski* plurality as authoritative. See, e.g., *Weymers*, 454 Mich at 648 n 12; *Brisboy v Fibreboard Corp*, 429 Mich 540, 547; 418 NW2d 650 (1988); *Zeni v Anderson*, 397 Mich 117, 141; 243 NW2d 270 (1976). In any event, binding or not, *Glinski* is certainly instructive about whether the 1986 Legislature would have considered but-for causation to be a proper part of the proximate cause analysis.

174 Mich at 706 ("But for this act of [the decedent] (subsequent to defendant's alleged negligent act, and therefore proximate to the injury) no accident could have occurred."). The majority asserts that over time this Court has improperly conflated factual and legal causation, but the very cases that the majority cites in support, including *Craig*, *Moning*, *Skinner*, and *Charles Reinhart Co v Winiemko*,[18] demonstrate that this Court has on numerous occasions recognized that a proper proximate cause analysis cannot take place without consideration of the sine qua non, cause in fact. The Legislature is presumed to have been aware of such decisions when it amended the GTLA to afford a narrow exception to governmental immunity,[19] and the majority cites no authority for the proposition that factual causation was *not* considered to be part of the proximate cause analysis under our common law in 1986. It is in this temporal context that we must consider the proper construction of the phrase "the proximate cause."

Because it is the Legislature's intent that controls, we are charged under MCL 8.3a with the duty of according the phrase "the proximate cause" the "peculiar and appropriate" legal meaning that it had at the time MCL 691.1407(2)(c) was enacted, not the meaning that we might wish to ascribe to that phrase today. See *Sam v Balardo*, 411 Mich 405, 425; 308 NW2d 142

[18] *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994) (plurality opinion by RILEY, J.) ("As in any tort action, to prove proximate cause a plaintiff in a legal malpractice action must establish that the defendant's action was a cause in fact of the claimed injury. Hence, a plaintiff 'must show that *but for* the attorney's alleged malpractice, he would have been successful in the underlying suit.' ") (citation omitted).

[19] *In re Bradley Estate*, 494 Mich 367, 384-385; 835 NW2d 545 (2013); *In re Medina*, 317 Mich App 219, 227-228; 894 NW2d 653 (2016).

(1981). Consequently, this Court's power to redefine over the years the phrase "proximate cause" for purposes of the common law[20] does not grant it the constitutional authority to retroactively alter the meaning of that phrase when interpreting MCL 691.1407(2)(c).

Nevertheless, that is precisely what the majority now does. Long before MCL 691.1407(2)(c) was enacted in 1986—and many times since—our common law has recognized that factual causation is, like legal causation, an integral part of "proximate cause." See, e.g., *Craig*, 471 Mich at 86 (" 'Proximate cause' is a legal term of art that incorporates both cause in fact and legal (or 'proximate') cause."); *Moning*, 400 Mich at 439, 440 n 13; *Glinski*, 358 Mich at 196-197 (opinion by SMITH, J.); *Stoll*, 174 Mich at 706 ("*But for* this act of [the decedent] (subsequent to defendant's alleged negligent act, and therefore proximate to the injury) no accident could have occurred.") (emphasis added).[21]

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[20] "[I]t is axiomatic that our courts have the constitutional authority to change the common law in the proper case." *North Ottawa Community Hosp v Kieft*, 457 Mich 394, 403 n 9; 578 NW2d 267 (1998). "However, this Court has also explained that alteration of the common law should be approached cautiously with the fullest consideration of public policy and should not occur through sudden departure from longstanding legal rules. . . . [W]hen it comes to alteration of the common law, the traditional rule must prevail absent compelling reasons for change." *Price v High Pointe Oil Co, Inc*, 493 Mich 238, 259-260; 828 NW2d 660 (2013).

[21] Accord *Black*, 499 Mich at 951; *White*, 498 Mich at 881; *O'Neal*, 487 Mich at 496 (opinion by HATHAWAY, J.); *id*. at 508 (CAVANAGH, J., concurring); *Skinner*, 445 Mich at 162-163; *Auto-Owners*, 310 Mich App at 157; *Manzo*, 261 Mich App at 712; *Adas*, 160 Mich App at 300-301. Similarly, a careful reading of *Tozer v Mich Central R Co*, 195 Mich 662, 666; 162 NW 280 (1917), demonstrates that the *Tozer* Court, like *Stoll* before it, considered but-for causation to be a proper part of its proximate cause analysis. See *id*. at 669 ("[I]f the cot had not been placed near the trunks, piled one upon the other, one or more of them would not have fallen upon

The majority, however, conflates these two prongs of proximate causation, treating "legal cause" as if it has something to do with causation, which it does not. See Dobbs, § 185, p 622 ("Scope of liability, formerly termed proximate cause, is not about causation at all but about the significance of the defendant's conduct or the appropriate scope of liability in light of moral and policy judgments about the very particular facts of the case."). The majority's conflation in this regard leads it to construe the phrase "*the* proximate cause"—i.e., the one most immediate, efficient, and direct *cause*—as if it is centered mainly on legal causation (i.e., scope of liability), with cause in fact acting only as a threshold consideration. From a purely logical standpoint, however, it is not possible to use the foreseeability-based limitations on liability provided by the concept of legal cause to affirmatively decide which cause, among several, was most immediate, efficient, and direct. Only by comparing factual causes can one discern their relative immediacy, efficiency, and directness.[22]

Stated another way, while accusing the dissent of "distort[ing] the meaning of 'the proximate cause' by severing it from the concept of *legal* causation,"[23] the majority seeks to divorce that same phrase largely from the concept of *factual* causation. But the majority does not explain how courts might determine what

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Mrs. Tozer, so that we think it clear that the proximity of the cot to the falling trunks was the proximate cause of the injury . . . .").

[22] Contrary to the majority's allegations otherwise, this approach does not "render legal cause irrelevant." Rather, legal cause becomes relevant *after* the panoply of but-for causes has been considered. If the one most immediate, efficient, and direct cause of an injury was the grossly negligent conduct of a governmental actor, a court should then assess whether such conduct was also a legal cause of the injury (i.e., if the injury was a foreseeable consequence of the governmental actor's conduct). If not, the actor is immune under MCL 691.1407(2)(c).

[23] Emphasis added.

constitutes "the one most immediate, efficient, and direct cause"[24] of an injury *without* weighing factual causes. Such a test—asking judges to determine what caused an injury *without considering its potential causes*—is akin to asking jurors to determine damages without any consideration of harm. The majority asks this state's jurists to take the "cause" out of causation. Yet, the majority provides no roadmap regarding how this state's jurists might go about accomplishing that feat.[25]

Additionally, after holding that lower courts are *not* permitted to weigh factual causes when determining "the proximate cause" under MCL 691.1407(2)(c), the majority goes on to state that a proper analysis *does* "require considering defendant's actions alongside any other potential proximate causes to determine whether defendant's actions were, or could have been, 'the one most immediate, efficient, and direct cause' of the injuries." (Citations omitted.) This statement makes no logical sense, however, unless factual causation *is* considered to be part of the "proximate cause" analysis. By "proximate cause," the majority actually means "legal cause." And as already explained, "legal cause" is

[24] *Robinson*, 462 Mich at 462.

[25] This will almost inevitably result in jurisprudential confusion and upset in lower courts. Moreover, the majority's failure to provide guidance about the application of its new interpretation of the phrase "the proximate cause" creates uncertainty for plaintiffs, who, when suing governmental actors, have the burden of pleading their claims in avoidance of governmental immunity. See *Mack*, 467 Mich at 201 ("[I]t is the responsibility of the party seeking to impose liability on a governmental agency to demonstrate that its case falls within one of the exceptions."). Accord *Hannay v Dep't of Transp*, 497 Mich 45, 58; 860 NW2d 67 (2014). Until the majority provides some practical guidance on how one determines proximate causation without weighing factual causes, it would seem nigh on impossible for a plaintiff to satisfy this pleading requirement.

a misnomer insomuch as it has nothing at all to do with *causation*; instead, it "involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences." *Skinner*, 445 Mich at 163; see also Dobbs, § 185, p 622 (explaining that legal cause[26] "is not about causation at all"). It is impossible to compare the responsibility of different actors on the basis of foreseeability without comparing their conduct—i.e., the potential causes in *fact*. Put differently, one cannot determine legal cause without comparing factual causes. How "weighing" such causes differs from "considering" them "alongside" one another, the majority does not explain.[27]

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[26] Dobbs refers to "legal cause" as "scope of liability" to ease confusion in the use of the term "causation." Dobbs, § 185, p 621.

[27] Notwithstanding this failure to fully explain the legal rule it announces today, the majority criticizes this opinion for failing to provide any "explanation" regarding (1) whether "a government actor whose gross negligence foreseeably causes a fire that burns the plaintiff's house to the ground could avoid liability by blaming the fire" and (2) whether a "plaintiff foreseeably injured by the grossly negligent discharge of a government actor's firearm would have [any] recourse . . . ." The majority's hypotheticals are so thinly fleshed out from a factual standpoint that to address them would be to box with shadows. It suffices to recognize—as *Beals* did—that "a chain of events might constitute the proximate cause of an injury or death in a different factual scenario." *Beals*, 497 Mich at 377 n 31. Accordingly, the mere presence of other but-for causes does not necessarily immunize a government actor from liability. Instead, a trial court must assess whether the government actor's gross negligence or some other but-for cause was the *most* immediate, efficient, and direct cause.

In addition, the majority asserts, without citation of authority, that inanimate objects or forces cannot be "the proximate cause" of an injury. This ignores the well-established concept "that for the overwhelming number of common law cases, ordinary rules of negligence and scope of liability (proximate cause)—including scope of risk rules—apply to intervening natural forces . . . ." Dobbs, § 210, p 731. There is, in fact, support for that proposition in our Model Civil Jury Instructions, specifically in M Civ JI 15.06 ("Intervening Outside Force (Other Than

Nor does the majority explain how its expansive interpretation of MCL 691.1407(2)(c) comports with our well-established duty to construe exceptions to governmental immunity narrowly. See *Yono v Dep't of Transp*, 499 Mich 636, 641; 885 NW2d 445 (2016) ("[W]e are to narrowly construe exceptions to governmental immunity . . . ."); *Beals*, 497 Mich at 370 (noting that the GTLA's exceptions to the "general rule" of governmental immunity "must be narrowly construed"); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006) ("Statutory exceptions to the immunity of governmental agencies are to be narrowly construed."); *Mack v Detroit*, 467 Mich 186, 196 n 10; 649 NW2d 47 (2002) ("[A]s this Court has consistently held since its seminal case" on the subject, "exceptions to governmental immunity are narrowly construed."). In concert, *Craig*, *Skinner*, *Moning*, *Glinski*, and *Stoll* clearly demonstrate that before 1986, during 1986, and after 1986 factual causation was a well-established element of "proximate cause" under our common law.[28] Thus, because the Legislature is presumed to be aware of judicial decisions interpreting

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Person)"), which instructs, in pertinent part, that "if you decide that the only proximate cause of the occurrence was [*description of force*], then your verdict should be for the [defendant / defendants]." (Brackets in original.) See also *McLane, Swift & Co v Botsford Elevator Co*, 136 Mich 664, 665; 99 NW 875 (1904) ("Defendant's neglect to clip and ship the oats had no direct relation to their destruction. It simply resulted in leaving them where they were burned by a fire for which defendant was not responsible. Defendant's neglect was therefore, at most, the remote cause, while the accidental fire was the proximate cause of plaintiff's loss.").

[28] Not to mention *Adas*, 160 Mich App at 300-301, which was decided just a year after MCL 691.1407(2)(c) was enacted and in which the Court of Appeals explained, "It is important to keep in mind when determining whether proximate causation exists that such causation is a legal relationship involving two separate and distinct concepts: cause in fact and legal cause." While *Adas* is not binding on this Court, it is instructive about what the 1986 Legislature thought a proper "proxi-

the common law and to legislate in accordance with them,[29] it must be presumed that when the Legislature used the phrase "the proximate cause" in MCL 691.1407(2)(c), it intended that phrase to include both factual causation and legal causation as described in *Stoll*, 174 Mich at 706.[30] Nevertheless, the majority treats "proximate cause" as if it merely denotes "legal cause," thereby construing MCL 691.1407(2)(c) as *broadly* as possible. By so ruling, the majority massively expands the exception to governmental immunity provided by MCL 691.1407(2)(c).

Indeed, the majority tacitly acknowledges this impact of its construction, stating that the current approach, which permits factual causation to be considered, "fails to give meaning to the 1986 amendment of the GTLA," leaving little room for exceptions to governmental immunity. That is, however, precisely what a *narrowly* drawn exception does—it leaves little room for exceptions to the general rule.

Moreover, contrary to the majority's assertions, the statutory history of the GTLA does not compel the result reached by the majority. The majority aptly observes that legislative history and statutory history are distinct concepts. The cardinal rule of statutory interpretation, however, is that "[w]here the [statutory] language is unambiguous, 'we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is re-

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mate cause" analysis entailed. See *Medina*, 317 Mich App at 227-228 (noting that the Legislature is presumed to be aware of decisions of the Court of Appeals).

[29] *Bradley Estate*, 494 Mich at 384; *Medina*, 317 Mich App at 227-228.

[30] As already explained, to the extent that there is any ambiguity whether the Legislature intended "proximate cause" to denote legal cause only or to denote both factual cause and legal cause, the definition incorporating both must be used. See note 9 of this opinion.

quired or permitted, and the statute must be enforced as written.' " *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002), quoting *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). One need not delve into statutory history, as the majority does, to discern that MCL 691.1407(2)(c) was intended to create an exception to governmental immunity. See *Conroy v Aniskoff*, 507 US 511, 519; 113 S Ct 1562; 123 L Ed 2d 229 (1993) (Scalia, J., concurring). As *Beals* recognized, the plain language of the GTLA proves the point quite nicely standing alone. See *Beals*, 497 Mich at 365 ("While governmental agencies and their employees are generally immune from tort liability under the [GTLA], MCL 691.1407(2)(c) provides an exception to this general rule . . . ."). Because nothing in the statutory history of the GTLA contravenes the plain meaning of the statutory language, the majority's discussion of statutory history, while perhaps academically interesting, is ultimately superfluous.

Nor does the obvious legislative intent to create an exception to governmental immunity obviate our duty to construe that exception *narrowly*. The majority disregards the presumption that the Legislature was aware, when it added MCL 691.1407(2)(c) to the GTLA, of our earlier decisions recognizing that exceptions to governmental immunity are narrowly construed.[31] Had the Legislature wished to provide a *broad* exception, it would have employed language manifesting that intent. It did not.

In the alternative, the majority contends that a narrow interpretation of MCL 691.1407(2)(c) is unten-

[31] See, e.g., *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 601; 363 NW2d 641 (1984), citing *Manion v State Hwy Comm'r*, 303 Mich 1, 19; 5 NW2d 527 (1942).

able because it "would immunize government actors for every harm that is a foreseeable result of their gross negligence." This argument is a veiled reliance on the so-called "absurd results" doctrine. See generally *Johnson v Recca*, 492 Mich 169; 821 NW2d 520 (2012). "To properly invoke the 'absurd results' doctrine," however, it must be shown "that it is *quite impossible* that the Legislature could have intended" the result in question. *Id*. at 193 (emphasis added). A proper analysis in this vein cannot rest merely on what seems to be the "obvious" legislative intent but should instead delve into substance and, in a given case, "might require a serious-minded analysis of the Legislature's policy objectives in enacting the statutes, the political realities and disagreements within the Legislature that adopted the statutes, the necessity for compromise and negotiation leading to enactment of the statutes, and the public impetus behind the statutes . . . ." *Id*. at 194. Because "this Court is not empowered to act as the people's lawmaker-in-chief," "it must be assumed that the language and organization of the statute better embody the 'obvious intent' of the Legislature than does some broad characterization surmised or divined by judges." *Id*. at 196-197. Here, the majority has failed to demonstrate that it is "quite impossible" that the Legislature intended the exception to governmental immunity set forth by MCL 691.1407(2)(c) to be a narrow one.

Furthermore, although it engages in little stare decisis analysis,[32] the majority's holding is patently inconsistent with *Robinson* and *Beals*. A mere two years ago, the *Beals* majority of six—including two members of the instant majority—did precisely what the instant majority assigns as error in this case,

[32] A stare decisis analysis is applied solely to *Dean v Childs*, 474 Mich 914 (2005), which the majority imprudently overrules.

comparing a number of factual causes of the drowning and determining that the behavior of the governmental employee was not the one most immediate, efficient, and direct cause. *Beals*, 497 Mich at 373-374. Nor is *Beals* an outlier in that respect. The dissenting Court of Appeals opinion on which we relied in *Dean v Childs*, 474 Mich 914 (2005), employed the same analytical framework. See *Dean v Childs*, 262 Mich App 48; 684 NW2d 894 (2004) (GRIFFIN, J., concurring in part and dissenting in part). Notably, the *Beals* majority cited *Dean* favorably, remarking that *Dean* and *Beals* were "analogous." *Beals*, 497 Mich at 375.

Nevertheless, the instant majority overrules *Dean* while merely criticizing our conspicuously similar decisions in *Robinson* and *Beals* and disavowing *Beals*'s reliance on *Dean*. "[W]e should be consistent rather than manipulative in" our application of stare decisis. See *Lawrence v Texas*, 539 US 558, 587; 123 S Ct 2472; 156 L Ed 2d 508 (2003) (Scalia, J., dissenting). To maintain such consistency, it is vital that this Court openly recognizes when it is issuing a holding that is inconsistent with settled precedent, even if only in part. It is poor practice for "this Court to simply ignore precedents with which it disagrees." *Beasley v Michigan*, 483 Mich 1025, 1029 (2009) (CORRIGAN, J., dissenting). Doing so permits conflicting lines of caselaw to develop, which yields jurisprudential uncertainty and variations in outcome that turn solely on which holding—among our several inconsistent holdings—a lower court chooses to follow. Ultimately, this undermines the rule of law.

As this Court unanimously recognized earlier this term, "Generally, in order to 'avoid an arbitrary discretion in the courts, it is indispensable that [courts] should be bound down by strict rules and precedents

which serve to define and point out their duty in every particular case that comes before them[.]' " *Coldwater v Consumers Energy Co*, 500 Mich 158, 172; 895 NW2d 154 (2017), quoting The Federalist No. 78 (Hamilton) (Rossiter ed, 1961), p 471 (alterations in original). " 'Liberty finds no refuge in a jurisprudence of doubt.' " *Lawrence*, 539 US at 586 (Scalia, J., dissenting), quoting *Planned Parenthood of Southeastern Pa v Casey*, 505 US 833, 844; 112 S Ct 2791; 120 L Ed 2d 674 (1992). Therefore, "principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed." *Coldwater*, 500 Mich at 172 (quotation marks and citation omitted).

In the instant case, if the majority disagrees with the holdings in *Robinson* and *Beals* (as its criticism of those decisions seemingly indicates), it should perform a stare decisis analysis and conclusively decide whether to overrule them. As former Chief Justice CORRIGAN once noted in a different context,

> If it intends to alter legal principles embedded in this Court's decisions, then the . . . majority should explain its reasons clearly and intelligibly. Instead, the . . . 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. [*Beasley*, 483 Mich at 1030 (CORRIGAN, J., dissenting).]

Here, because the majority avoids the stare decisis question altogether, treating its instant holding and the holding in *Beals* as if they are consistent,[33] two

[33] The majority mischaracterizes *Beals*'s holding in an effort to reconcile *Beals* with the majority's holding in this case. *Beals* never held that the lifeguard's conduct was not *a* cause in fact of the plaintiff's death, likely because an expert testified that Beals's drowning " 'could have been and should have been easily prevented.' " *Beals*, 497 Mich at 347 n 22. We

lines of cases will almost inevitably arise in lower courts, one following the *Beals* analysis and another attempting to follow, to the extent that it might be possible to do so, the analysis set forth by the majority today.[34] Then again, given the inherent unworkability of the purported "test" set forth by the majority, in the future lower courts may simply avoid the proximate cause issue altogether, instead focusing on the "gross negligence" requirement of MCL 691.1407(2)(c).[35]

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explicitly recognized in *Beals* that "[b]ut for the applicable immunity statute, a question of fact m[ight have] remain[ed] as to defendant's liability for the deceased's death." *Id*. at 365-366. No concurrence was issued asserting that the plaintiff failed to establish "cause in fact," and the lone dissent did not once mention factual causation. If, as the majority implies, immunity had nothing to do with our decision in *Beals* (i.e., the defendant in *Beals* was not liable under ordinary negligence standards because he was not a "cause in fact" at all), then there would be no impediment to extending that holding to a private entity, such that a negligent or grossly negligent lifeguard can *never* be liable in negligence for a drowning death. But that is not the law of this state. See *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450; 633 NW2d 418 (2001). The *Beals* lifeguard's entitlement to summary disposition was entirely dependent on his status as a governmental employee. Because he was a governmental employee and his conduct was not "the proximate cause" of the drowning under the GTLA, he was entitled to immunity. To suggest otherwise is to engage in revisionist history.

[34] Because the majority does not overrule *Beals* but only partially disavows it, it is entirely proper to acknowledge here that *Beals* retains precedential value. Doing so is not, as the majority contends, a "thinly veiled invitation to lower courts to ignore" today's majority opinion, an ironic twist of phrase when the majority chooses to partially disavow *Beals* in semantic avoidance of stare decisis—disavowing rather than overruling—while repeatedly citing *Robinson*, the keystone precedent in this state's stare decisis jurisprudence. Stare decisis should apply to the disavowal of this Court's previous decisions no differently than it does when they are overruled. See *Thomas v Washington Gas Light Co*, 448 US 261, 272; 100 S Ct 2647; 65 L Ed 2d 757 (1980) (plurality opinion by Stevens, J.) ("The doctrine of *stare decisis* imposes a severe burden on the litigant who asks us to disavow one of our precedents.").

[35] On that basis, too, I believe that the Court of Appeals reached the correct outcome in this case. Given the other students who successfully

Finally, in response to the majority's assertion that this opinion is "unsupported by the plain language of the statute or our caselaw," I simply note three things. First, it is this opinion that relies on the language of MCL 691.1407(2)(c) to support its interpretation of the GTLA, while the majority is compelled to resort to an analysis of statutory history. See pages 100-101 of this opinion. Second, I would construe MCL 691.1407(2)(c) by following *Robinson*, *Dean*, and *Beals*. Third, in stark contrast to the majority opinion, this opinion is not forced to overrule, disavow, or reconcile prior pronouncements from this Court in order to explain its result or avoid tension with existing precedent.

III

For all of those reasons, I dissent. Because the Court of Appeals reached the correct outcome for the correct reasons by following *Robinson* and *Beals*, I would affirm.

MARKMAN, C.J., and ZAHRA, J., concurred with WILDER, J.

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crossed the road at Swager's instruction, there does not appear to be a genuine issue of material fact that Swager's alleged conduct in this case was "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a).

PEOPLE v LYLES

Docket No. 153185. Argued on application for leave to appeal March 9, 2017. Decided August 1, 2017.

William Lyles, Jr., was convicted following a jury trial in the Wayne Circuit Court before James Lacey, J., of first-degree murder, MCL 750.316, for the 1983 stabbing death of Andrew "Melvin" Weathers. At the time of his death, Weathers lived in a house with several individuals, including Louise Kountz, whom defendant had previously dated, and Kountz's two teenage daughters. Defendant had previously lived in the home for about four years but had moved out the summer before the murder. In December 1983, a perpetrator broke into the home through a basement window, disabled the electricity, placed the family dog in the basement freezer, and then proceeded upstairs to stab Weathers in his bedroom, using a knife from the home's kitchen. While leaving the house to call for help, Kountz's daughters saw a figure whom they believed to be defendant; the build of the figure matched that of defendant, and one daughter smelled a distinctive stale cigarette odor that she associated with defendant. Police obtained a warrant for defendant's arrest but were unable to locate him until 2012, at which point defendant was arrested and charged with first-degree murder. At trial, the prosecution introduced evidence of defendant's prior acts of domestic violence toward Kountz during their relationship, including the testimony of Kountz's daughters, Weathers' sister, another individual who had lived in the Kountz home, and three neighbors, two of whom had been Kountz's long-time next-door neighbors. In response, defendant introduced evidence of his character for peacefulness, including the testimony of a close family friend who had moved to California to attend college three years before the murder but returned to the neighborhood during school breaks. After the court instructed the jury, defendant objected to the adequacy of the instructions, requesting that the trial court provide the model instruction explaining to the jury that defendant's evidence of good character alone could create a reasonable doubt. The court did not provide the requested instruction and instead provided an instruction regarding testimony about witnesses' truthfulness and testimony about defendant's lack of good character. Defen-

dant again objected, and the trial court noted the objection but did not alter the instructions. Defendant was convicted and sentenced to life in prison without the possibility of parole. Defendant appealed. In an unpublished per curiam opinion, issued July 22, 2014 (Docket No. 315323), the Court of Appeals, BECKERING, P.J., and HOEKSTRA and GLEICHER, JJ., reversed defendant's conviction and remanded for a new trial on the ground that the trial court had failed to instruct the jury regarding defendant's good-character evidence. The prosecution sought leave to appeal in the Supreme Court, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 497 Mich 960 (2015). On October 30, 2015, the Supreme Court issued an order remanding the case to the Court of Appeals to properly apply the harmless-error standard set forth in *People v Lukity*, 460 Mich 484 (1999), because the Court of Appeals had improperly relied on cases that did not apply the current standard. 498 Mich 908 (2015). On remand, the Court of Appeals again reversed defendant's conviction in an unpublished per curiam opinion, issued December 22, 2015 (Docket No. 315323), concluding that the court's instructional error was not harmless under the *Lukity* standard. The prosecution sought leave to appeal in the Supreme Court, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 500 Mich 875 (2016).

In an opinion by Justice LARSEN, joined by Chief Justice MARKMAN and Justices ZAHRA and WILDER, the Supreme Court, in lieu of granting leave to appeal, *held*:

Preserved, nonconstitutional errors are subject to harmless-error review. MCL 769.26 provides that no judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. A defendant carries the burden of showing that it is more probable than not that the error complained of was outcome-determinative. In making this determination, the reviewing court should focus on the nature of the error presented to it in light of the weight and strength of the untainted evidence. In this case, despite the dissent's allusion to other nonpreserved errors, the only error presented to this Court was the trial court's denial of defendant's request for an instruction informing the jury that defendant's

good-character evidence alone could create a reasonable doubt. The Court of Appeals concluded that the trial court's instructional error was not harmless because it "eviscerated the significance of defendant's character evidence," which was defendant's "best defense" to the prosecution's evidence of his past violence. But when considering whether the failure to give an instruction was harmless error, the question is whether the instruction would have made a difference in the outcome, and answering this question requires a court to consider not only the relationship between the instruction and the defendant's defense strategy, but also whether that strategy would have been sufficient to create a reasonable doubt given the proofs as a whole. In this case, the prosecution presented evidence that the perpetrator was familiar with the house in which the murder occurred. And the prosecution presented evidence that defendant was identified the night of the murder; an arrest warrant was issued for defendant a few months after the murder, but defendant had fled the state. Additionally, numerous witnesses testified to defendant's abuse of Kountz: Weathers' sister saw defendant hit Kountz nearly every day; Kountz's daughters witnessed physical abuse, and one witnessed sexual assault; a former housemate testified to defendant hitting Kountz; and several neighbors recounted repeated physical abuse. In his defense, defendant called three witnesses: his sister, a former girlfriend, and his lone character witness—a family friend who had grown up on the same block as defendant but who had moved to California for school three years before the murder. She occasionally returned to Michigan, including during the summers, where she would visit defendant's family home daily but would only see defendant if he happened to be visiting the family home. She testified that defendant was a peaceful person who did not have a reputation for being abusive. She also testified that she saw defendant with Kountz about three or four times and did not observe any abuse. In reviewing the weight and strength of the evidence, the prosecution's evidence, including evidence of defendant's bad character offered by witnesses who had many chances to observe defendant in the early 1980s, far outweighed defendant's good-character evidence, which was both substantively weaker and was offered by a witness who had little contact with defendant during the relevant period and who no longer lived in the same city. Defendant was not denied the opportunity to present his good-character evidence; he was only denied a proper instruction that good-character evidence, if believed by the jury, could alone produce a reasonable doubt. The Court of Appeals' critical error was focusing on the importance of the good-character instruction to defendant's defense strategy

instead of evaluating the likelihood of defendant's prevailing on that strategy. Given the evidence at trial and considering the only claim of error presented by defendant to the Supreme Court—the trial court's failure to give one instruction on how the jury could consider the testimony of defendant's lone good-character witness—defendant failed to show that it was more probable than not that the outcome would have been different if the jury had been properly instructed. Therefore, the Court of Appeals erred by holding that defendant had met the *Lukity* harmless-error standard.

Court of Appeals' judgment reversed; defendant's conviction reinstated.

Justice MCCORMACK, joined by Justices VIVIANO and BERNSTEIN, dissenting, would have upheld the Court of Appeals' conclusion that the failure to instruct the jury regarding defendant's good-character evidence was not harmless to the jurors' verdict and therefore necessitated a new trial. Contrary to the majority's characterization, the Court of Appeals panel conducted a thorough and complete harmless-error analysis under *Lukity*'s standard, and an examination of the entire cause confirmed that the panel's conclusion was correct. The defendant's trial was a pure contest of credibility and character. By the time of the trial in 2013, the original case file, including the reports, witness statements, and any other evidence it might have contained, had been completely lost, and neither Kountz nor many of the officers involved in the original investigation were alive or available to testify. Therefore, to reconstruct the events that occurred on the night of the murder, the prosecution heavily relied on the 30-year-old, unsubstantiated memories of Kountz's then-teenaged daughters—with a majority of the testimony about that night (and defendant's place within it) coming solely from the one daughter who admittedly hated defendant at the time of the murder and was responsible, 30 years later, for setting in motion the events that led to his trial. The prosecution also focused intently on proving, through testimony from these daughters and other family friends, that defendant had persistently and violently abused and harassed Kountz over the years leading up to the murder. Like the murder charge, there was no physical evidence or documentation to substantiate these decades-old, uncharged acts of domestic violence; furthermore, none of the prosecution's witnesses could explain how or why defendant's alleged treatment of Kountz might have led defendant to kill Weathers that night. Nonetheless, the prosecution turned defendant's alleged abuse of Kountz into the overriding theme of his

trial for murdering Weathers. To counter this character attack, defendant presented three witnesses, including a long-time school principal who had known defendant her entire life and who testified regarding defendant's character for peacefulness. The jurors were tasked with determining defendant's guilt on the basis of these proofs; the court, however, only provided the jurors with instructions regarding the prosecution's proofs. The court failed to instruct the jurors that defendant's proofs—his good-character evidence, the only evidence he presented—could, alone and as a matter of law, create a reasonable doubt and foreclose a finding of guilt. Accordingly, the jurors were given no legal guidance regarding whether and how they could consider defendant's good-character evidence in reaching a verdict, let alone that this evidence could in itself determine that verdict. Instead, the jurors heard nothing from the court regarding defendant's evidence and were instructed only on the ways in which the prosecution's evidence could lead them to a conclusion of guilt beyond a reasonable doubt. Considering the nature of this error and the weight and strength of the evidence untainted by the error, it affirmatively appears that the court's failure to instruct the jury regarding the potentially dispositive legal effect of defendant's good-character evidence was not harmless to the jurors' verdict. Namely, it affirmatively appears more probable than not that, had the jurors been properly instructed, at least one of those jurors would have recognized the doubt cast by defendant's evidence as the "reasonable" sort countenanced by the law to foreclose a finding of guilt and would not have voted to convict defendant. Accordingly, and as the Court of Appeals panel thoroughly and correctly explained, a new trial is required under *Lukity* to ensure that any verdict on this murder charge is reliable under the law. Justice MCCORMACK would have denied leave and allowed a new trial to go forward.

JUDGMENTS — ERROR IN PROCEDURE — JURY INSTRUCTIONS — HARMLESS-ERROR REVIEW — RELATIONSHIP BETWEEN INSTRUCTIONAL ERRORS AND TRIAL STRATEGY.

MCL 769.26 provides that no judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice; a defendant carries the burden of showing that it is more probable than not that the error was outcome-

> determinative; in making this determination, the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence; when considering whether the failure to give an instruction was harmless error, the question is whether the instruction would have made a difference in the outcome, and answering this question requires a court to consider not only the relationship between the instruction and the trial strategy, but also the strength of that strategy relative to the proofs as a whole.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Madonna Georges Blanchard*, Assistant Prosecuting Attorney, for the people.

Daniel J. Rust for defendant.

LARSEN, J. In his trial for first-degree murder, the trial court improperly denied defendant's request for an instruction informing the jury that his evidence of good character could create a reasonable doubt. We now consider whether defendant has shown that it is more likely than not that this error was outcome-determinative. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Defendant was permitted to introduce his good-character evidence; it was, however, minimal and strongly contradicted by the prosecution's witnesses. Given this and the other evidence implicating defendant in the murder, we cannot conclude that the absence of the instruction, the only error alleged here, made the difference. Defendant has not shown that it is more likely than not that the outcome would have been different if the jury had been given this instruction. Accordingly, we reverse the judgment of the Court of Appeals and reinstate defendant's conviction for first-degree murder.

I. FACTS

In 2013, defendant was convicted by a jury of first-degree murder, MCL 750.316, for the 1983 stabbing death of Andrew "Melvin" Weathers. At the time of his death, Weathers lived in a house in Highland Park with a relative, Louise Kountz, her teenage daughters, Melissa Kountz and Kimberly Stokes, as well as a family friend, Jimmy Godwin. Defendant had previously dated Louise Kountz and had lived in the Highland Park home for about four years, before moving out the summer before the murder. According to many witnesses, defendant had been violent and abusive toward Kountz during their relationship. After defendant had moved out of the home, he told Kountz's daughters that he blamed Weathers for the break-up of his relationship with Kountz, saying that "[t]his is Melvin's fault." He threatened that "if it's the last thing I do I'm going to get Melvin."

In the early morning of December 28, 1983, while the household was asleep, a perpetrator broke into the home through a basement window, disabled the electricity, placed the family's dog in the basement freezer, and then proceeded upstairs to stab Weathers in his bedroom, using a knife from the home's kitchen. The household awoke to the sounds of an intruder and Weathers groaning. Kountz told her daughters to go next door and call the police. As they walked down the dark stairway from the upstairs bedrooms to the main floor, the daughters saw someone ahead of them whom they believed to be defendant. The build of the figure matched that of defendant, and one daughter smelled a distinctive stale cigarette odor that she associated with defendant. The daughters ran to a neighbor's home and told their neighbor that defendant had killed Weathers. The police arrived and, in the dining room,

discovered defendant's brown loafers with a sponge taped to one of their soles.[1]

In February 1984, the police obtained a warrant for defendant's arrest. The police immediately placed defendant's warrant into the Law Enforcement Information Network (LEIN) so that his warrant would show up if defendant encountered law enforcement anywhere in the country. The police searched for defendant locally, including at the homes of his relatives. Defendant's family did not provide any information as to defendant's location, but the police learned from other sources in the community that defendant had left the state shortly after Weathers' death. The police reached out to their out-of-state counterparts, but they could not locate defendant. At one point, due to budgetary issues, the Highland Park Police Department's participation in the LEIN program ended. And for several years, the Highland Park Police Department was closed. When it reopened, a new detective was assigned to Weathers' murder case. In 2012, the police finally located defendant at his mother's house in Oak Park.

When the police first approached defendant and informed him that they were investigating a cold murder case, defendant lied and stated that his name was "Mark Jackson." He could not provide any identification but consented to having the officers take his photograph. The officers sent the photo to one of Kountz's daughters, who confirmed that it was defendant, the man she believed killed Weathers. The officers then arrested defendant for Weathers' murder. After waiving his *Miranda* rights,[2] defendant told

[1] The prosecution theorized that defendant had used the sponge to quiet his movements as he moved through the occupied house.

[2] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

police that he had left town shortly after the murder because he feared Kountz and her family. He did not return to Michigan for more than two decades. He denied stabbing anyone in 1983 and denied ever hurting or threatening Kountz.

Defendant was tried in 2013. At trial, the prosecution introduced evidence of defendant's prior acts of domestic violence.[3] In response, defendant introduced evidence of his character for peacefulness. After the trial court instructed the jury, defendant objected to the adequacy of the instructions, including the omission of his requested character-evidence instruction, M Crim JI 5.8a(1), which reads:

> You have heard evidence about the defendant's character for [peacefulness / honesty / good sexual morals / being law-abiding / (*describe other trait*)]. You may consider this evidence, together with all the other evidence in the case, in deciding whether the defendant committed the crime with which (he / she) is charged. Evidence of good character alone may sometimes create a reasonable doubt in your minds and lead you to find the defendant not guilty.

The trial court then gave several more instructions to the jury, including the following:

> [Y]ou've heard the testimony of --- about witness' [sic] truthfulness. You may consider this evidence together

[3] Before trial, the Court of Appeals reversed the trial court's pretrial determination that evidence of the prior acts of domestic violence was inadmissible. See *People v Lyles*, unpublished order of the Court of Appeals, entered January 7, 2013 (Docket No. 313665); see also MCL 768.27b(1) ("[I]n 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."). Defendant did not appeal that decision, nor has he argued posttrial that the prosecution's evidence was improperly admitted.

> with all other evidence in the case in deciding whether you believe the testimony of the witness, in[] deciding how much weight to give to that witness. The prosecutor has examined some of the defendant's character witnesses as to whether or not they heard anything bad about the defendant. You should consider such cross-examination only in deciding whether or not you believe the character witness and whether they described the [defendant] fairly.
>
> The prosecutor also has called witnesses who have testified that the defendant did not have good character of the other acts.

Defendant again objected because the requested instruction related to the evidence of defendant's character for nonviolence and peacefulness, not to his witnesses' truthfulness. He also argued that the prosecution did not call any witnesses to rebut his good-character evidence.[4] The trial court noted the objection but did not alter the instructions. The jury convicted defendant of first-degree murder. The trial court sentenced him to life in prison without the possibility of parole.

The Court of Appeals reversed defendant's conviction and remanded for a new trial on the ground that the trial court had failed to instruct the jury regarding defendant's evidence of his good character. *People v Lyles*, unpublished per curiam opinion of the Court of Appeals, issued July 22, 2014 (Docket No. 315323), p 5. This Court heard oral argument on the prosecution's application for leave to appeal and then issued an order remanding the case to the Court of Appeals to properly apply the governing standard, set forth in *Lukity*, for evaluating whether the error was harmless. See *People*

[4] Although the prosecution did not call witnesses to rebut the testimony of defendant's good-character witnesses, the prosecution had already introduced evidence that defendant had committed acts of domestic violence in its case-in-chief.

v Lyles, 498 Mich 908, 908 (2015) (criticizing the Court of Appeals for citing older cases from this Court for the proposition that the failure to give a character-evidence instruction automatically requires reversal). On remand, the Court of Appeals purported to apply the *Lukity* harmless-error standard and again reversed defendant's conviction. The court reasoned that the trial court's error in failing to give the proper instruction had "eviscerated the significance of defendant's character evidence, which was crucial to his defense, and wholly undermined his effort to establish that he was a peaceful person who could not have committed such a vicious murder." *People v Lyles (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued December 22, 2015 (Docket No. 315323), p 3.

The prosecution again seeks this Court's leave to appeal, arguing that the Court of Appeals erred by holding that the instructional error was harmful. We ordered oral argument on the application. *People v Lyles*, 500 Mich 875 (2016).

II. ANALYSIS

Preserved, nonconstitutional errors are subject to harmless-error review, governed by MCL 769.26:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

We interpreted this statute in *Lukity* and held that a defendant carries the burden of showing that "it is more probable than not that the error was outcome

determinative." *Lukity*, 460 Mich at 495-496. "In making this determination, the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence." *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000).

Here, the Court of Appeals' critical error was focusing on the importance of the good-character instruction to defendant's defense strategy instead of evaluating the likelihood of defendant's *prevailing* on that strategy. When considering whether the error was harmless, the question is whether the instruction *would have made a difference in the outcome*. See *Lukity*, 460 Mich at 495-496. Answering this question requires a court to consider not only the relationship between the instruction and defendant's defense strategy, but also the strength of that strategy relative to the proofs as a whole. Defendant's character evidence was extremely weak. But he was not denied the opportunity to present it; he was only denied a proper instruction that the jury could consider this evidence with all the other evidence in the case and that good-character evidence, if believed by the jury, could alone produce a reasonable doubt. Even if the jury had been properly instructed, it is not more likely than not that defendant's character evidence would have been sufficient to create a reasonable doubt, given the prosecution's evidence; and so defendant failed to show that the instructional error was harmful.

A. THE PROSECUTION'S EVIDENCE

We state at the outset two hurdles in the prosecution's case: the trial took place almost 30 years after

the murder and any physical evidence[5] had been inadvertently destroyed in the intervening years.[6] Yet defendant had been identified as a suspect immediately after the murder. Kountz's daughters accused defendant on the night of the murder, and an arrest warrant for defendant was issued just a few months later in February 1984. Defendant, however, had fled the state. His sudden absence was palpable. For months before the murder, beginning when he had moved out of the house, defendant had not left Kountz or her family alone. On one occasion, he returned to the house and got into an argument with Kountz that resulted in her having a bloody nose. He repeatedly called the house and asked about Kountz. Several times, bricks were thrown at the house, and although no one saw defendant throwing them, the bricks, as well as the harassing visits and phone calls, stopped after the murder and defendant's leaving the state. The family did not see or hear from defendant again until he was arrested in 2012.

In addition to the suspicions raised by defendant's flight, there was evidence that the perpetrator of the crime had inside knowledge of the house and the habits of its occupants. The residents' dog stayed in the basement at night; the perpetrator broke in through a basement window and placed the dog in the basement

[5] A laboratory report from the Detroit Police Department indicates that two pieces of evidence were sent to the forensic laboratory for testing during the original investigation. The murder weapon was tested for fingerprints, but the prints were not usable. No description of the second piece of tested evidence has survived, though the original detective on the case believed that some bloody clothing and bed sheets were collected as evidence.

[6] Any physical evidence was inadvertently destroyed due to a series of unfortunate events: the city of Highland Park went into receivership, there was flooding at the police department building, the police department building was torn down, and the courthouse was closed and abandoned.

freezer. The perpetrator unscrewed two fuses, disabling the house's electricity. Then, the perpetrator went upstairs to the kitchen, grabbed a knife from the knife block, and, without waking the other occupants of the home, entered Weathers' bedroom, where he stabbed Weathers before fleeing.

Kountz's daughters identified defendant as the perpetrator on the night of the murder. After waking to the sound of someone in the house, Kountz told her daughters to go next door and call the police. As the girls walked down the stairs, they could see another person heading downstairs ahead of them. One of them was able to see and smell the man,[7] and she was certain it was defendant. The other girl saw the size and build of the man and thought it was defendant. The girls went straight to their neighbor's home to call the police and told their neighbor and her daughter that defendant had killed Weathers. After returning to the house, one of the daughters found a pair of men's loafers; one of the loafers had a sponge taped to the bottom. The shoes had not been there the night before. The daughter identified the shoes as belonging to defendant.

B. DEFENDANT'S CHARACTER EVIDENCE

Defendant called only three witnesses during the trial. The first was his sister, Geraldine Johnson. She

[7] She had lived in the same house as defendant for four years prior to defendant moving out the summer before the murder occurred and so was presumably quite familiar with defendant's scent. She described defendant as having a distinctive smell of stale cigarettes. Another witness testified that around the 1980s defendant had a distinctive "weird odor," such as "how some people don't wash a lot and it's like coming through their pores, he always stank." A detective who encountered defendant in 2012 described defendant as "very unkept," with "I'm not sure how to describe the smell, an unwashed smell, possibly with smoker's smell."

testified that defendant graduated from high school in 1971 and then worked at General Motors before enlisting in the United States Army from 1974 to 1977, after which he returned to Highland Park and worked at Chrysler.

Defendant's second witness was Jo Ann Davenport, a former girlfriend who had dated defendant for about a year around 1972, 11 years before the murder. She testified that defendant had not abused her during their relationship. A few years after their relationship ended, she had moved away from Highland Park. She did not stay in touch with defendant but would occasionally see him in passing when she visited her family back home. She could not remember the last time she had seen him. She testified that when she had visited her old neighborhood, she had heard nothing about defendant's abusing any girlfriends in the early 1980s.

Defendant's third witness, Kim Harden, described defendant as being "like a cousin" to her because their parents were very close. They grew up on the same block, and although Harden had moved to California for school three years before the murder, she returned to Michigan on occasion, including during the summers. She testified that during these return trips, she would visit defendant's family home daily, but she would only see defendant if he happened to be visiting his family home. She saw defendant with Kountz about three or four times during the 1980s, and not once did she observe verbal or physical abuse. She described defendant as a peaceful person who did not believe in violence. She also testified that during the 1980s, defendant did not have a reputation for being an abusive person.

The jury heard all of this evidence; the error was in failing to properly instruct the jurors on the use of the good-character evidence:

> You may consider this evidence, together with all the other evidence in the case, in deciding whether the defendant committed the crime with which (he / she) is charged. Evidence of good character alone may sometimes create a reasonable doubt in your minds and lead you to find the defendant not guilty. [M Crim JI 5.8a(1).][8]

We note that the jury *was* instructed that "[a] reasonable doubt is a fair, honest doubt growing out of the evidence or the lack of evidence," that "[y]ou must think about all of the evidence and decide each piece of evidence, what it means and how important you think it is. That includes whether you believe what each of the witnesses said," and that "it is your job to decide what the facts of the case are. You must decide which witnesses you believe and how important you think their testimony is."

We cannot conclude that the absence of the good-character instruction made the difference in the outcome. Or to put it differently, we cannot say that if only the jury had been properly instructed, the verdict would have been altered because of this good-character evidence. In terms of character evidence alone, the prosecution's evidence of defendant's past violence toward Kountz was far stronger. The victim's sister, Carrie Weathers, who had lived in the house for a time, described defendant's relationship with Kountz as "brutal," testifying that she saw defendant hit Kountz

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[8] Under MCR 2.512(D)(2), "[p]ertinent portions of the instructions approved by the . . . Committee on Model Criminal Jury Instructions . . . must be given in each action in which jury instructions are given" if they are applicable, they accurately state the applicable law, and they are requested by a party.

"just about every other day." One of Kountz's daughters testified that once, when Kountz asked defendant if Weathers' sister could move back into the house, defendant refused, demonstrating his anger by stabbing a butcher knife in the middle of a bed. Kountz's daughters also testified to defendant's abuse toward their mom, including rape and repeated instances of other violence. George Arnold, who had lived in the house for less than a year around 1981 or 1982, testified that he saw defendant hit Kountz and that once, when he had tried to intervene, defendant had struck him. Jeffrey Trent, a neighbor, testified that defendant and Kountz had a violent relationship and that on one occasion defendant asked Kountz to look under the hood of his car; when she bent over, he kicked her and slammed the hood on the upper half of her body. Kountz's long-time next-door neighbors, Carolyn and Camille Rhodman, similarly testified to observing defendant abuse Kountz on multiple occasions. At face value, the prosecution's evidence of bad character, offered by those who had many chances to observe defendant in the early 1980s, far outweighed defendant's good-character evidence, which was both substantively weaker and was offered by witnesses who had little contact with defendant during the relevant time period and who no longer lived in the same city. And, of course, the jury did hear and could weigh defendant's proffered good-character evidence; the only error was that the jurors were not instructed on character evidence in particular, including that, if they believed this evidence, it was permissible for them to conclude, based on this evidence alone, that there was reasonable doubt.

The Court of Appeals erred by focusing on the instruction's importance to defendant's *defense* rather than focusing on its importance to the verdict. Com-

pare *Lyles (On Remand)*, unpub op at 3 ("In effect, this error by the trial court eviscerated the significance of defendant's character evidence, which was crucial to his defense, and wholly undermined his effort to establish that he was a peaceful person who could not have committed such a vicious murder."), with *Lukity*, 460 Mich at 495-496 ("[A] preserved, nonconstitutional error is not a ground for reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative.") (quotation marks omitted). But even the Court of Appeals' conclusion that "[d]efendant's best defense . . . was his evidence regarding his peaceful character,"[9] *Lyles (On Remand)*, unpub op at 5, is belied by the fact that defense counsel did not think it important to make a good-character argument in either the defendant's opening or closing arguments.[10] The prosecution argues, here and in the Court of Appeals, that the failure to include the good-character argument in opening or closing arguments is relevant in considering the importance of the omitted instruction to the defense theory. The Court of Appeals dismissed the prosecution's argument, reasoning that

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[9] Despite its conclusion that the instructional error "eviscerated the significance of defendant's character evidence, which was crucial to his defense," *Lyles (On Remand)*, unpub op at 3, the Court of Appeals did not recount this crucial evidence or describe it at all other than in this one sentence: "In particular, in contrast to the violence described by several of the witnesses, defendant presented evidence of his peaceful character in the form of reputation and opinion testimony from a woman who had known defendant all her life and lived on defendant's street for many years." *Lyles (On Remand)*, unpub op at 2.

[10] Instead, defendant argued that the prosecution's evidence of domestic violence should not be believed because there were no police reports, the victim (Louise Kountz) did not testify (she had passed away), and Kountz's daughters had incentives to lie. The rest of defendant's opening and closing statements consisted of pointing out the lack of physical evidence and the age of the case.

"[r]egardless of whether counsel emphasized this evidence during closing, a properly instructed jury should have been told that the character evidence could, on its own, create a reasonable doubt." *Lyles (On Remand)*, unpub op at 4 n 1. We agree that a properly instructed jury would have received the instruction. But that goes to whether there was *error*, not to whether the error was *harmless*.

Even if the Court of Appeals were right, however, that defendant's good-character evidence was his best defense, defendant was permitted to introduce this evidence. The instructional error is not reversible error unless the defense likely would have succeeded at trial.[11] See *Lukity*, 460 Mich at 495-496. Given the

[11] The Court of Appeals relied on two of our cases for its conclusion that there was reversible error here because "[b]y failing to give the key part of the instruction requested by defendant, the trial court prevented the jury from having the opportunity to properly weigh defendant's character evidence." *Lyles (On Remand)*, unpub op at 4. The Court of Appeals failed to note that the first, *People v Silver*, 466 Mich 386; 646 NW2d 150 (2002) (opinion by TAYLOR, J.), is a fractured decision of our Court and that the opinion from which it quoted represents the views of only two Justices. As for the second, *People v Rodriguez*, 463 Mich 466, 474; 620 NW2d 13 (2000), the Court of Appeals relied on our statement that the instruction was "crucial to the defendant's defense and was clearly supported by the evidence." That was not the extent of our analysis of the instructional error in *Rodriguez*, however. The defendant was convicted of evading the use tax on a van that he claimed he planned to sell at auction after repairing; the requested instruction would have informed the jury that property purchased for resale is exempt from the use tax. We concluded that "[u]nder [MCL 205.94(c)], the defendant was—if a properly instructed jury were to believe his version of the facts—exempt from the tax." *Id*. at 472. Thus, "[t]here is no question that the error undermined the reliability of the verdict . . . ." *Id*. at 474. Accordingly, we examined "the entire cause," MCL 769.26, and determined that the specific circumstances of that case rendered the instructional error outcome-determinative. *Rodriguez* does not stand for the proposition that any instructional error that affects an issue that is "crucial to the defendant's defense"—regardless of the strength of the evidence in support of that defense—requires reversal.

evidence at trial, it is not "more probable than not" that the outcome would have been different if the jury had been properly instructed on how it could consider the evidence defendant offered regarding his good character. See *id*. at 496. Therefore, the Court of Appeals erred by holding that defendant had met the *Lukity* harmless-error standard.[12]

III. CONCLUSION

Defendant has failed to show that the instructional error more likely than not affected the outcome of his trial for first-degree murder. Accordingly, we reverse the judgment of the Court of Appeals and reinstate defendant's conviction.

MARKMAN, C.J., and ZAHRA and WILDER, JJ., concurred with LARSEN, J.

MCCORMACK, J. (*dissenting*). Of the many judgments I must make in this job, harmlessness is among the hardest and most humbling. Identifying errors is simple by comparison; dig deeply enough into the record and law, and you'll see if one is there. Determining that error's harm to the outcome, however, requires much more—particularly when that outcome is a jury verdict. As we well know, appellate courts are not

[12] Much of the dissent seems to us flavored by issues not raised in this Court, such as whether the jurors should have heard the evidence, held admissible by the Court of Appeals, regarding defendant's persistent violence toward Kountz, whether the trial court made other instructional errors, or whether defense counsel should have objected at various points in the proceeding. Whether or not those errors might be cognizable in another forum, they are not before us here. We wholeheartedly agree, however, with the first paragraph of the dissent: determining whether an error was harmless can be a difficult task. In considering the facts of this case, in light of the claim of error presented to us, we simply see this case differently than the dissent.

juries, and we do not become them when reviewing their verdicts for harm. Rather, in performing that review, we must respect the role and work of the jurors in reaching the verdict they did, while still scrutinizing the reliability of that verdict now that a defect in its making has been exposed. We must try to discern, from a cold and silent record, what those jurors may have been thinking, but without thinking for them. We must measure their verdict based not on whether we agree with it ourselves, but on whether we can still trust it enough, as a matter of law, to reflect how they would have decided the case had it not been wrongly presented to them. And of course, the stakes, particularly in a criminal matter, couldn't be higher: whether a criminal conviction, with all it entails, remains intact despite a failing in the system of justice through which it was secured; or whether that failing instead requires another trial—and all the expenditures that attend it, emotional and otherwise—to ensure any verdict on the charge is reliable under the law.

This task is as daunting as it is daily. And so, as courts tend to do, we (with the Legislature's help) have developed various standards to guide us in handling it. Those standards have changed over time (sometimes rather abruptly), and they are tailored to match the general nature and circumstances of the error at issue. Occasionally, a case makes their application relatively straightforward: an error is so clearly important to a verdict, or so clearly irrelevant to it, that its harm can be measured in fairly short order. That is not this case.

We are no strangers to the defendant's jury trial for the 1983 murder of Andrew "Melvin" Weathers. This is the second time we've considered it. It's also the second time we have been asked by the prosecutor, and have agreed, to consider the specific question before us:

whether the trial court's misinstruction of the jury regarding the defendant's character evidence was harmless, contrary to what the Court of Appeals panel (now twice) concluded.[1] Indeed, this is the only question about this case we have ever taken up. The standard governing that question is provided by *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), and didn't change from the first time we considered the question to the second. After the first time, we concluded that, while the Court of Appeals panel had recited this settled standard in its unpublished opinion, it may not have truly applied the standard in its analysis. We chose to remand for that Court to perform that fact-intensive task, as intermediate appellate courts so routinely do. *People v Lyles*, 498 Mich 908 (2015).

In another unpublished opinion, the panel did as we directed, articulating the harmlessness standard set forth in *Lukity* and detailing its application to the facts of this case. The result remained unchanged: the court's error was not harmless to the jurors' verdict, and thus a new trial was required.

And so, here we are again. Only this time, a majority of this Court has concluded that the panel's award of relief should be reversed. I cannot see why.

I. THE PANEL'S OPINION ON REMAND

As the panel summarized, the following standard governs the harmlessness question before us:

> MCL 769.26 "presumes that a preserved, nonconstitutional error is not a ground for reversal unless after an

[1] See *People v Lyles*, unpublished per curiam opinion of the Court of Appeals, issued July 22, 2014 (Docket No. 315323); *People v Lyles (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued December 22, 2015 (Docket No. 315323).

> examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative.["] *Lukity*, 460 Mich at 495-496 (quotation marks omitted). Consequently, the burden is on defendant to "demonstrate that after an examination of the entire cause, it shall affirmatively appear that the error asserted has resulted in a miscarriage of justice." *Id*. at 495 (quotation omitted). "In making this determination, the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence." *People v Rodriguez*, 463 Mich 466, 474; 620 NW2d 13 (2000), quoting *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000). See also *People v Mitchell*, 301 Mich App 282, 286; 835 NW2d 615 (2013). "The object of this inquiry is to determine if it affirmatively appears that the error asserted undermines the reliability of the verdict." *Lukity*, 460 Mich at 495 (quotation marks and citations omitted). "In other words, the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Id*. [*People v Lyles (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued December 22, 2015 (Docket No. 315323), p 3.]

The majority does not take issue with this articulation of the *Lukity* standard. Nor is there any reason to do so. Instead, the majority seems concerned that the panel went astray in its application of this standard, "purport[ing]" to apply it but, once again, not actually doing so. More specifically, the majority posits that the panel's "critical error was focusing on the importance of the good-character instruction to defendant's defense strategy instead of evaluating the likelihood of defendant's *prevailing* on that strategy"—that is, "focusing on the instruction's importance to defendant's *defense* rather than focusing on its importance to the verdict." In support, the majority repeatedly points to the panel's conclusion that the trial court's instruc-

tional error "eviscerated the significance of defendant's character evidence, which was crucial to his defense, and wholly undermined his effort to establish that he was a peaceful person who could not have committed such a vicious murder"—at one point holding it right up against *Lukity*'s fully stated harmlessness standard, as if to better expose its inadequacy.

It is true: the panel did evaluate how the court's misinstruction to the jury interacted with the defense presented by the defendant at his trial. To the extent the majority suggests this was itself a legal error, I can't agree. A (properly instructed) jury arrives at its verdict only after assessing both the prosecution's proofs and the defendant's defense to those proofs; the importance of an error to that defense is thus quite relevant to its importance to the ensuing verdict. I do not read *Lukity* or any other case to suggest otherwise, nor has the majority cited any authority to that effect.[2] To the contrary, assessing just how big an impact an error has had on a defendant's defense falls comfort-

[2] The majority criticizes the panel for citing, in support of this portion of its analysis, two cases from this Court: *People v Silver*, 466 Mich 386; 646 NW2d 150 (2002), and *People v Rodriguez*, 463 Mich 466, 474; 620 NW2d 13 (2000). The panel, however, merely cited these cases as general support for its conclusion that "the nature of the error" in this case was significant because, "[b]y failing to give the key part of the instruction requested by defendant, the trial court prevented the jury from having the opportunity to properly weigh defendant's character evidence." *Lyles (On Remand)*, unpub op at 4. Both *Silver* and *Rodriguez* strike me as fairly read to provide such general support (and although, as the majority notes, *Silver* was a fractured decision, I do not see, with respect to the point for which the panel cited it here, disagreement among the two Justices who joined the opinion and the two who concurred). While both cases may be distinguishable in other respects from the instant case, the panel—by signaling its citation to them with a "Cf."—did not purport to suggest otherwise. Simply put, I fail to see any error in the panel's limited reliance on these cases, or in the more general point it cited them to support.

ably within *Lukity*'s mandate that the reviewing court "focus[] on the nature of the error . . . ." *Lukity*, 460 Mich at 495 (citation and quotation marks omitted). That is precisely what the panel did here.

To read the majority's opinion, you'd think that's all the panel did—that it simply looked at "the nature of the error," found it very significant to the defendant's defense, and called it a day. Were that the case, then the panel's analysis might very well have fallen short of the requirement that it "assess[] [the error] in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Id*. But that's not what the panel did. Rather, immediately after summarizing the "eviscerat[ing]" effect of the court's error on the defendant's character evidence and defense, the panel went on to explain that, "considering the nature of this error in the context of the evidence presented by the prosecution, we are persuaded that defendant has met his burden of demonstrating that it is more probable than not that a different outcome would have resulted without the error." *Lyles (On Remand)*, unpub op at 3-4. The panel then detailed at length why that was the case, evaluating over multiple paragraphs the very same proofs the majority summarizes here and concluding that, "[u]ltimately, considering the entire cause, we are persuaded that the trial court's failure to give the requested character evidence instruction eviscerated the effect of defendant's proffered character evidence and that such an error cannot be considered harmless in light of the evidence relied upon by the prosecution," and thus "defendant has met his burden of establishing that it is more probable than not that the error was outcome determinative." *Id*. at 4-6.

The majority does not engage with, or even acknowledge, this substantial portion of the panel's harmlessness analysis, and so it is difficult to discern what exactly they might think is so wrong with it: what critical evidence the panel clearly neglected or misstated, or what fatal mistake of law it made in carrying out its fact-intensive application of *Lukity*'s settled standard. From my own review, I can't find any such thing, or any reason why this Court should reverse the panel's analysis and conclusion. We gave the panel a job to do. It did that job, and showed its work. That work was deliberate and thorough, well beyond what we ourselves are often asked to review. And as "an examination of the entire cause" confirms, it was correct.

II. THE ENTIRE CAUSE

As acknowledged by both the panel and the majority, the defendant's trial for the 30-year-old murder of Andrew "Melvin" Weathers was exceptional for what it lacked. Though a warrant for the defendant's arrest was issued within a few months of the crime in 1983, the case went cold after initial efforts to locate the defendant failed—and only got colder as the years progressed.[3] By the time of the defendant's trial in 2013, the original case file had been completely lost, along with any reports, witness statements, or other evidence it might have contained.[4] Gone too were most

[3] As the majority notes, a number of circumstances seemingly contributed to this state of affairs, including the defendant's move to another state, the shuttering of the police department originally in charge of the investigation, and the absence of the arrest warrant from the Law Enforcement Information Network.

[4] A copy of the original arrest warrant, it seems, survived; it was mentioned at trial, but not entered into evidence and thus not submitted to the jury.

officers who had been involved in the original investigation[5] as well as Louise Kountz, who had died a few years before the trial and was the only conceivable link between the defendant and the crime.[6] As the majority says, these circumstances certainly posed "hurdles" in the case. Whether moreso for the prosecution or for the defendant, however, I don't think it's possible to say. Whatever inculpatory or exculpatory information these now-gone sources may have held, neither the parties nor the jurors would have the benefit of knowing. They all would need to look elsewhere for proof of the defendant's guilt.

A. THE PROOFS AT TRIAL

For the prosecution, this meant leaning heavily on Louise's daughters, Melissa Kountz and Kimberly Stokes,[7] to reconstruct the events of that December

[5] One such officer testified at trial, but as the majority notes, he could recall little about the evidence collected beyond that the murder weapon had been tested for fingerprints and the prints proved unusable. Nonetheless, and without further substantiation or explanation, the officer averred that he did not "ever receive any lab results, additional evidence, or any information that caused [him] to change [his] mind about this defendant being the right person" to "charge[] with this murder"—and even suggested in passing that the evidence "just strengthened" that impression. Defense counsel raised no objection to this testimony, and the defendant did not challenge it on appeal.

[6] As the majority notes, Melvin was related to the Kountz family and was living in Louise's house (along with her daughters and another man) at the time of the murder. The defendant and Louise had begun dating roughly four to five years before the murder; the defendant had lived in the house with Louise and her daughters during that time, which overlapped to some extent with Melvin's stay in the house. The defendant, however, had moved out of the house a number of months before the murder, after Louise had ended their relationship.

[7] Melissa and Kimberly were Louise's children from a prior marriage, which ended shortly before she began dating the defendant—though it seems Louise continued to go by her married name after the divorce.

night in 1983 when Melvin was murdered (and to place the defendant within them). At the time of the murder, Melissa and Kimberly were 13 and 16 years old, respectively. Per their testimony, they were both in the house when the murder occurred, and they both remembered seeing, through the darkness, a shadow cast by the perpetrator that struck them as roughly the same shape and size as the defendant.[8] Both also recalled running out of their house right afterward and to their neighbors' to call the police; according to the neighbors' ensuing testimony, one of the girls blurted out that the defendant had killed Melvin (though one neighbor thought Melissa had said as much, whereas the other thought it had been Kimberly).[9] Lastly, both recounted a phone call with the defendant roughly a month or two before the murder, in which he blamed

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Louise's prior husband had been Melissa's biological father, and Kimberly's adoptive one for all but the first year of her life. According to the defendant, Louise had left the girls' father for him. The defendant then lived with Louise and the girls for roughly four or five years before moving out at Louise's behest sometime in the summer of 1983.

[8] In her 2012 statement to police, however, Kimberly was seemingly less certain about the source of this shadow, saying that she did not remember seeing the defendant in the house on the night in question. Also missing from both Melissa's and Kimberly's pretrial accounts was any mention of the apparent source of light that permitted the shadow to be cast in the otherwise dark house—a detail both of them offered for the first time in their trial testimony. In any event, according to their trial testimony, Melissa and Kimberly noticed this shadow when they were hurrying down the stairs right behind the murderer, who himself was rushing and stumbling. They were in this highly precarious position, they testified, because they had been told to go downstairs and across the street to tell the neighbors to call the police—despite the fact that the murderer had just headed downstairs and there apparently were still-functional rotary phones safely located in the house upstairs.

[9] According to one of the neighbors, however, and in apparent tension with the daughters' account of their immediate flight from the scene, police had already arrived at Louise's house by the time the two girls reached her doorstep. Further confusing matters, Kimberly had origi-

Melvin for the demise of his relationship with Louise and vowed to "get" Melvin. Why the defendant might have blamed Melvin—let alone why he might have blamed him so intensely as to plot and carry out his murder—neither they, nor anyone else at trial, could say.

Kimberly had nothing more to offer regarding who the perpetrator of this crime might be. The remainder of what the jury heard on that score—all the details that were offered to lend some definition to the shadow in the house—came solely from Melissa: from the manner in which the perpetrator broke into the house and obtained the murder weapon;[10] to the odor of stale, Kool-brand cigarettes she smelled on him (which she associated with the defendant);[11] to the pair of the defendant's shoes, with a sponge taped to one their soles, which apparently materialized in the house after

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nally told police during their 2012 investigation that it was Louise who had called the police after they "all" had gone over to the neighbors' house.

[10] While this testimony was offered to suggest, as the majority notes, that the perpetrator was familiar with the house, the testimony did not indicate any familiarity unique to the defendant or beyond that which could have been gained by the various other individuals who visited or stayed in the house over the years (or through speaking with any one of them).

[11] Melissa said she smelled this odor at the same time as she glimpsed the shadow of the perpetrator. Kimberly, who was standing right by Melissa at that time (and who had been living with the defendant for just as long as Melissa), did not remember any such smell on the night of the murder. Nor did she, or anyone else, testify to the defendant having, at the relevant time, the distinctive smell Melissa attributed to both him and the perpetrator. And while another witness who was not present that night testified that he generally remembered the defendant having a "weird odor . . . [l]ike, you know how some people don't wash a lot and it's like coming through their pores," he suggested no association between that odor and cigarettes and couldn't remember if the defendant smoked.

the killing.[12] And the jury also learned two other things from Melissa: that she hated the defendant at the time of the murder for his treatment of her and her mother;[13] and that she set in motion the events that led to his trial some 30 years later, contacting the police in 2012, seemingly out of the blue, to inquire about the status of the (by then, very cold) case.[14]

From these accounts, the jurors learned that Melissa and Kimberly believed the defendant killed Melvin—now and, per their testimony, then. Even if the jurors were to credit this belief, it left ample room for doubt. The prosecution thus focused on proving something else: that the defendant persistently and violently abused and harassed Louise. As the majority notes, the prosecution very nearly wasn't permitted to do so. In a pretrial ruling, the trial court had deemed such evidence inadmissible under MRE 403 because it was unfairly prejudicial to the defendant. The prosecution appealed, however, and successfully secured an order from the Court of Appeals peremptorily reversing that determination. *People v Lyles*, unpublished order of the Court of Appeals, entered January 7, 2013 (Docket No. 313665). And with this appellate blessing

[12] According to Melissa, she found these shoes in the downstairs dining room, neatly arranged with their heels against the wall; she had not noticed them there the night before. She did not speculate as to why, if the defendant wore these shoes to commit the crime, he would have stopped mid-flight, after rushing and stumbling down the stairs, to remove and arrange them before proceeding out of the house into the winter's night, seemingly unshod.

[13] Kimberly, for her part, denied that she hated the defendant at the time of the murder, but said that she "disliked his ways" and that his treatment of her mother "made [her] angry."

[14] Melissa testified that she had contacted police about the case on one prior occasion, sometime between 2003 and 2006, after seeing one of the defendant's relatives—but the officer she spoke with then was not "helpful."

in hand, the prosecution turned the defendant's abuse of Louise into the overriding theme of his trial for murdering Melvin.[15]

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[15] Before trial, the prosecution had moved to admit evidence regarding the defendant's abuse of Louise under MRE 404(b) or MCL 768.27b (pertaining to "defendant's commission of other acts of domestic violence")—the latter of which, it bears noting, did not become available as a potential basis for admitting this evidence until 2006. See MCL 768.27b(6). The parties disputed whether the instant murder charge was an "offense involving domestic violence" such that it would fall within the scope of MCL 768.27b (thereby opening the door for the evidence of Louise's abuse to be admitted under that rule). In its ruling, the trial court did not expressly decide that threshold question, instead concluding that the evidence was inadmissible under either the statute or MRE 404(b) because, per MRE 403, its "prejudicial [effect] . . . substantially outweigh[ed] any demonstrated relevan[ce]" it had to the charged offense. The court further noted, with respect to MRE 404(b), that the character inference raised by the evidence weighed against its admissibility.

In peremptorily reversing this ruling, the order of the Court of Appeals did not address whether the prosecution's offered evidence passed threshold admissibility standards under either MCL 768.27b or MRE 404(b), but it concluded that the trial court had "failed to make two distinct inquiries under the balancing test of MRE 403, which are whether introduction of the prior acts will be unfairly prejudicial and then to weigh the probative value or relevance of the evidence against the unfair prejudice." *Lyles*, unpub order at 1. The order reasoned that the "[a]dmission of the domestic violence acts against Louise Kantz [sic] will provide a full and complete picture of defendant's history involving the victim and the occupants of Louise's house, including Louise, and will tend to shed light on the likelihood that defendant is the perpetrator who broke into the house and stabbed his ex-girlfriend's cousin." *Id*. (quotation marks and citation omitted). The order continued: "Furthermore, the prior acts are not marginally probative nor is it likely that the evidence will be given undue or preemptive weight by the jury, especially if the trial court minimizes the prejudicial effect by properly instructing the jury." *Id*. (quotation marks and citation omitted). Needless to say, the concluding condition of that rationale may have been overly optimistic. Regardless, despite the cursory and critical nature of this ruling, the defendant's counsel did not seek our review of it then and did not further challenge the admission of this evidence at trial beyond renewing, for the record, the general MRE 403 challenge that the Court of Appeals' order had already rejected. Nor did his appellate

As with the actual crime with which the defendant was charged, there was nothing in the way of physical evidence, records, reports, or other documentation to substantiate these uncharged acts of abuse. Nor was it even clear whether any such evidence ever existed. But as the majority summarizes, the prosecution's witnesses had much to say about it. Melissa and Kimberly testified about the abuse at length, and other prosecution witnesses testified to little else; indeed, of the prosecution's nine witnesses, only the two investigating officers did not speak on the topic. These other seven witnesses were all friends and family of the Kountzes, and together, they painted a very grim picture of the defendant's relationship with Louise: one defined by physical, sexual, and verbal abuse, which was carried out with regularity and without remorse in full view of her family and neighbors, and which continued to manifest itself even after Louise had ended the relationship and the defendant had moved out of the house.

None of these witnesses, however, could—or even attempted to—explain how or why the defendant's treatment of Louise might have led the defendant to kill Melvin that night. There was no testimony, for instance, that Melvin had ever tried to intervene or even object to the abuse, that he had ever become the target of it himself, or that he had otherwise gotten entangled in the defendant's relationship with Louise at any point.[16] No, the driving purpose of all this

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counsel challenge this ruling, the subsequent admission of the domestic-violence evidence at trial, or trial counsel's effectiveness with respect to this evidence, in the direct appeal of his conviction.

[16] To the contrary, Melvin was described as younger than the defendant, "small" and "on the frail side" relative to him, and "scared" by his alleged violent conduct, fleeing the room when it would occur. This was in contrast to Melissa and some others, who testified to attempting to

testimony was not to show why or how the defendant killed Melvin, but instead to show that he *could* have killed Melvin, that he was capable of it, because that sort of violence and brutality was in his character. It's just the kind of man he was; he had, as the prosecution told the jurors, a "tendency towards violence," and these accounts of his abuse of Louise were "highly probative" of that tendency and thus "the fact that he committed" Melvin's murder. And from its opening remarks through to its closing ones, the prosecution made clear to the jurors that this was an inference upon which they could, and should, hang their hats—in evaluating the circumstantial proofs it had presented, and in determining whether the defendant should be convicted. As the prosecution asked the jurors in closing, "Do you really think [these witnesses] all want to come in here and waste their time to get somebody who wasn't a vicious abuser?"[17]

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stop the defendant at times and getting into altercations with him in the process. There was also some testimony, as the majority notes, that the defendant and Melvin's sister—who testified at trial and had lived in Louise's house at some point well prior to Melvin moving in—didn't get along, resulting in the sister moving out and the defendant and Louise later arguing about whether she could move back in. Melissa provided the sole testimony about the details of that argument, saying that it ended with the defendant expressing his anger by getting a knife from the kitchen and stabbing a mattress. There was no testimony or other indication, however, that Melvin was involved in any of the apparent ill will between his sister and the defendant or that the defendant attributed any of it to him.

[17] Similarly, the prosecution, in closing, pointed to testimony regarding the defendant's military service, which the defendant had offered to cast doubt on the time line of certain events offered in the prosecution's proofs, and argued to the jurors that such service "doesn't mean you get to come home and beat women, and slam hoods on their head, and rape them in front of their children." The prosecution then stressed that "[t]here is one person responsible for that [abusive conduct], and one person only, and that's the defendant. Because he wanted to be in control, he wanted to be the boss. Just like there's only one person who

The defendant did not take the stand, but an investigating officer testified to statements the defendant made upon his arrest in 2012.[18] In those statements, the defendant denied much of what was asked of him, including that he had stabbed anyone in 1983 or had ever threatened Louise, and while he acknowledged leaving the state after he and Louise broke up, he explained it was out of fear of her and her family.[19] Although he himself didn't testify, the defendant did

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is responsible for driving that [knife] into Melvin's heart that night, the defendant." And while the prosecution would later note to the jurors that "this case is not about Louise," it was only after telling the jurors that "each and every person has to account for their misdeeds in life," that "the defendant needs to be held accountable right here, right now for what he did," and that "the only blind eye anyone is asking you . . . to turn is to the horrible things that this man did, to just let it slide, [because] it won't help Louise."

[18] As the majority notes, the officer testified that, when he initially approached the defendant, stated his purpose, and asked the defendant's name, the defendant provided an alias. This testimony, however, was not corroborated by the officer's written report of the encounter, which did not indicate an alias (despite there being a specific location on the report to do so), or by the defendant's subsequent statement to police, which did not address it at all.

[19] The proofs at trial did not make clear precisely when the defendant left the state: sometime after he moved out of Louise's home but before the murder occurred; immediately after the murder; or sometime later, after he had been identified as a suspect and/or a warrant was issued for his arrest. The prosecution suggested that he left town immediately after the murder based on testimony from Melissa and Kimberly that they never saw the defendant after the murder and that certain harassing behavior toward the house, which they attributed to the defendant, had ceased once the murder occurred. Neither Melissa nor Kimberly, however, testified to actually witnessing the defendant engage in this behavior, or to seeing him at all since an altercation at the house in October 1983. The investigating officer at the time, meanwhile, testified that he began attempting to locate the defendant upon issuance of the arrest warrant in early February 1984 (a little over a month after the murder); after failing to determine the defendant's whereabouts from speaking with his family members, the officer ultimately learned that the defendant had "gone down south" at some unspecified time.

present evidence to counter the prosecution's character attack that had come to dominate his trial; this came in the form of reputation and opinion testimony regarding his general character for peacefulness, and was the extent of the proofs.[20] In particular, he presented the testimony of Kim Harden. Harden was, at the time of trial, a long-time school principal; she was younger than the defendant and had known him her whole life. She testified that she had grown up in the same neighborhood as the defendant and had spent time with him on a daily basis throughout those years until she left for college in 1980. After that, she would return home whenever school wasn't in session and would again see the defendant on a daily basis, if he was around. He was, according to Harden, "like a cousin to [her]," someone she looked up to "as a mentor, [a] role model"; he was "the reason why [she] finished college," and his home was "like [her] second home." And based on all the time she spent with him and what she knew of him, she opined that he was—including at the time relevant to this case—"a peaceful person" who "didn't believe in violence" and who had affirmatively counseled her against violent responses to trouble. She further testified that this was his reputation in the community as well at that time—a community which included the Kountzes (whom she also knew). And while, over these years, she had seen the defendant with Louise as well as with other girlfriends on various occasions, she had never seen him verbally or physically abuse any of them, nor had she heard anything from anyone to that effect; she had only ever seen him treat them well, including Louise. He was, Harden

[20] Indeed, this was the only form of affirmative evidence the defendant was permitted to offer as to his good character; unlike the prosecution, his proofs could not include specific instances of past conduct. See MRE 405; *People v Williams*, 134 Mich App 639, 642; 351 NW2d 878 (1984).

said, "always nice and kind" to Louise in the four or five times she saw them together, and she didn't ever know him to be any other way. The prosecution did not cross-examine her.[21]

B. THE COURT'S INSTRUCTIONS TO THE JURORS

As is typical, the parties' presentation of the case was bookended by the court's instructions to the jurors—which, as the court stressed at both ends, provided the jurors with "the law that you're to apply to the facts as you find the facts to exist" and which "[y]ou must take . . . as I give it to you." As is also typical, the court instructed the jurors on the elements of the charged offenses and on an assortment of other standard matters common to criminal trials—including, as the majority notes, general advisements about the meaning of "reasonable doubt" and the jury's role as the finder of fact (and with it, the arbiter of credibility). The court, however, wove amidst these standard instructions some of its own making, including the one that launched this case on its long appellate odyssey. A few of these bear particular mention. First, the court instructed the jurors regarding the prosecution's voluminous testimony about the defendant's abuse of Louise. Before doing so, the court had discussed with the parties the proper instruction for this evidence, with

[21] As the majority summarizes, the defendant also presented testimony from two other witnesses. First, his sister testified to some basic biographical information about him, such as his history of employment and military service. Then, a former girlfriend, who had lived in his and the Kountzes' neighborhood and had dated him for roughly a year at one point, testified that (1) she had had a "[v]ery nice" relationship with the defendant, free from any verbal or physical abuse, and (2) during the time period relevant to this case, she had never heard anything in the neighborhood about the defendant being verbally and physically abusive to his girlfriend at that time.

the parties ultimately agreeing that M Crim JI 4.11a (regarding "Evidence of Other Acts of Domestic Violence") would be best. This model instruction provides:

> (1) The prosecution has introduced evidence of claimed acts of domestic violence by the defendant for which [he / she] is not on trial.
>
> (2) Before you may consider such alleged acts as evidence against the defendant, you must first find that the defendant actually committed such acts.
>
> (3) If you find that the defendant did commit those acts, you may consider them in deciding if the defendant committed the [offense / offenses] for which [he / she] is now on trial.
>
> (4) You must not convict the defendant here solely because you think [he / she] is guilty of other bad conduct. The evidence must convince you beyond a reasonable doubt that the defendant committed the alleged crime, or you must find [him / her] not guilty.[22]

This, however, was not the instruction the court then provided to the jurors. Instead, the court instructed:

> You have heard a lot of evidence, testimony that the respondent committed some improper acts against Louise Kountz, who was at the time his girlfriend. They had that type of relationship. It appears from the testimony that that testimony of his improper acts against someone is not the decedent and who is accused of murdering, that testimony you must very carefully consider it for certain purposes. You may only think about whether that evidence intends to show that the defendant had a motive to kill Andrew Weathers, the decedent, and also that it tends to show to you that the complete picture of the defendant's history as it relates to the part of it that Melvin, the decedent Andrew Weathers.

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[22] Brackets appearing in quotations of the Michigan Criminal Jury Instructions in this opinion appeared in the original.

> You've heard that testimony involving Louise Kountz, the deceased Andrew Weathers, Melvin, the deceased --- now, Louise Kountz died, I guess, just four or five years ago and of natural --- not in this murder, but she was living at this address at 88 Louise Street in Highland Park, and that there were other people living at that address. And that the other people have testified as to improper acts that the defendant committed not against Andrew Weathers, but against Louise Kountz for the most part.
>
> You must carefully balance that testimony of improper acts so not to prejudice yourself against this defendant and this murder, to only that he had a motive and he was in this environment, the decedent Andrew Weathers.
>
> Now, I mentioned motive, in that bit of the instructions as to those improper acts committed, if you find that they were, in fact, committed, against, if you will, Louise Kountz, who was --- well, you know the relationship between her and the defendant. That those acts were for motive of the defendant to kill someone else, Melvin, not Ms. Kountz.

This, it seems, was an amalgam between the agreed-upon M Crim JI 4.11a and M Crim JI 4.11, the model instruction for evidence admitted under MRE 404(b)[23]—with substantial liberties taken by the court as to both. For instance, while the court advised the jurors that they "must carefully balance that testimony

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[23] M Crim JI 4.11 provides:

> (1) You have heard evidence that was introduced to show that the defendant committed [a crime / crimes / improper acts] for which [he / she] is not on trial.
>
> (2) If you believe this evidence, you must be very careful only to consider it for certain purposes. You may only think about whether this evidence tends to show:
>
> *[Choose one or more from (a) through (g):]*
>
> (a) That the defendant had a reason to commit the crime;
>
> (b) That the defendant specifically meant to _____;

of improper acts so [as] not to prejudice yourself against this defendant and this murder," it did not expressly advise them, as both M Crim JI 4.11 and 4.11a would have, that they "must not convict the defendant here because you think [he] is guilty of other bad conduct."[24]

At this point, the prosecution asked to approach the bench, but the court preferred to finish its instructions first. Ultimately, the court instructed the jurors on various other aspects of the prosecution's proofs, including that (1) "evidence that the defendant moved

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(c) That the defendant knew what the things found in [his / her] possession were;

(d) That the defendant acted purposefully—that is, not by accident or mistake, or because [he / she] misjudged the situation;

(e) That the defendant used a plan, system, or characteristic scheme that [he / she] has used before or since;

(f) Who committed the crime that the defendant is charged with.

(g) *[State other proper purpose for which evidence is offered.]*

(3) You must not consider this evidence for any other purpose. For example, you must not decide that it shows that the defendant is a bad person or that [he / she] is likely to commit crimes. You must not convict the defendant here because you think [he / she] is guilty of other bad conduct. All the evidence must convince you beyond a reasonable doubt that the defendant committed the alleged crime, or you must find [him / her] not guilty.

[24] On direct appeal, the defendant raised a very cursory challenge to this instruction, which the Court of Appeals panel addressed briefly in its first unpublished opinion, after concluding the defendant was entitled to a new trial based on the instructional error now before us. The panel observed that "although the trial court's instructions on other acts evidence may not have been so inadequate as to warrant reversal, they were certainly imperfect" and should, on retrial, be corrected to adhere to the model instructions. *Lyles*, unpub op at 6. The panel also briefly rejected two other, similarly cursory challenges the defendant had raised. *Id*. The defendant did not seek our review of any of these rulings.

away . . . does not prove his guilt" but may reflect "a consciousness of guilt," and the jurors "must decide whether the evidence is true and if true, whether it shows that the defendant had a guilty state of mind"; (2) "[t]he prosecutor does not have to prove that the defendant had a reason to commit the alleged crime, she only has to show that the defendant actually committed the crime or that he meant to do so"; and (3) "you may use the [prosecution's] identification testimony alone to convict the defendant as long as you believe the testimony and you find that it proves beyond a reasonable doubt that the defendant was the person who committed the crime."

After the court finished its instructions, counsel for both sides raised a number of concerns and omissions—including the court's failure to provide the agreed-upon instruction under 4.11a, and its failure to instruct the jury on the defendant's character evidence under M Crim JI 5.8a(1), which provides:

> (1) You have heard evidence about the defendant's character for [peacefulness / honesty / good sexual morals / being law-abiding / (*describe other trait*)]. You may consider this evidence, together with all the other evidence in the case, in deciding whether the defendant committed the crime with which (he / she) is charged. Evidence of good character alone may sometimes create a reasonable doubt in your minds and lead you to find the defendant not guilty.[25]

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[25] M Crim JI 5.8a provides in full:

> (1) You have heard evidence about the defendant's character for [peacefulness / honesty / good sexual morals / being law-abiding / (*describe other trait*)]. You may consider this evidence, together with all the other evidence in the case, in deciding whether the defendant committed the crime with which (he / she) is charged. Evidence of good character alone may sometimes create a reasonable doubt in your minds and lead you to find the defendant not guilty.

The court then recalled the jury and rattled off further instructions. It did not revisit its instruction regarding the domestic-violence evidence, but—as we well know at this point, and in apparent response to defense counsel's request for M Crim JI 5.8a(1)—it did provide the following instruction:

> [Y]ou've heard the testimony of --- about witness' [sic] truthfulness. You may consider this evidence together with all other evidence in the case in deciding whether you believe the testimony of the witness, in[] deciding how much weight to give to that witness. The prosecutor has examined some of the defendant's character witnesses as to whether or not they heard anything bad about the defendant. You should consider such cross-examination only in deciding whether or not you believe the character witness and whether they described the [defendant] fairly.
>
> The prosecutor also has called witnesses who have testified that the defendant did not have good character of the other acts.

> [(2) The prosecutor has cross-examined (one / some) of the defendant's character witnesses as to whether they had heard anything bad about the defendant. You should consider such cross-examination only in deciding whether you believe the character witnesses and whether they described the defendant fairly.]
>
> [(3) The prosecutor also called witnesses who testified that the defendant does not have the good character described by the defendant's character witnesses. This evidence can only be considered by you in judging whether you believe the defendant's character witnesses and whether the defendant has a good character for (*describe trait*). It is not evidence that the defendant committed the crime charged.]

As the instruction's Use Notes make clear, and as the parties here don't dispute, only Subsection (1) of this instruction applied to this case, as the prosecution did not cross-examine "the defendant's character witnesses as to whether they had heard anything bad about the defendant" and did not call any witnesses to rebut them.

This, of course, wasn't M Crim JI 5.8a(1), and neither it nor any other instruction made any mention of the defendant's character evidence or its potential legal effect on the jurors' assessment of reasonable doubt. Instead, it was another court-fashioned amalgam, seemingly derived from M Crim JI 5.8 ("Character Evidence Regarding Credibility of Witness")—an instruction that the parties neither requested nor had reason to request, given the evidence presented.[26] The court didn't simply swap 5.8a for 5.8, however. The court modified the last sentence of M Crim JI 5.8(3) to refer not to testimony about the defendant's bad character for truthfulness but instead to testimony about his bad character "of the other acts"—hearkening the jury back once again to the evidence of the defendant's abuse of Louise and the character inference to be drawn therefrom, but lending no further guidance as to

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[26] M Crim JI 5.8 provides in full:

> (1) You have heard evidence about the character of [*name witness*] for truthfulness. You may consider this evidence, together with all the other evidence in the case, in deciding whether you believe the testimony of [*name witness*] and in deciding how much weight to give that testimony.
>
> [(2) The prosecutor has cross-examined (one / some) of the defendant's character witnesses as to whether they had heard anything bad about the defendant. You should consider such cross-examination only in deciding whether you believe the character witnesses and whether they described (him / her) fairly.]
>
> [(3) The prosecutor also called witnesses who testified that the defendant does not have a good character for truthfulness. This evidence can only be considered by you in judging the believability of the defendant's testimony. It is not evidence that (he / she) committed the crime charged.]

As with M Crim JI 5.8a, there is seemingly no dispute that the second two subsections of M Crim JI 5.8 are inapplicable here. The same holds true for the first subsection of 5.8, as neither party provided character evidence regarding the truthfulness of any witness who testified at trial.

how that inference could be considered. Defense counsel again objected, but—after a seemingly prescient but unheeded aside by the trial court that judges "get in trouble when they ad lib"—the instructions went unchanged and the jurors went forward with their deliberations,[27] ultimately returning the guilty verdict now before us once again.[28]

III. WHAT AFFIRMATIVELY APPEARS

With "the entire cause" examined, then, what "affirmatively appears"? This case was a pure contest of credibility and character. Though charged with the murder of Melvin, the defendant's trial was more about his abuse of Louise—and what that uncharged misconduct said about the kind of person he was. Did the defendant kill Melvin? By the time of trial, there simply wasn't any hard evidence that either side could offer to guide the jurors on that question. There were 30-year-old memories and beliefs and inferences, but no substantiation, and no lucid reason why the defen-

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[27] Puzzlingly, the jurors were not provided with a written copy of the court's instructions and, when they requested as much during deliberations, the court, without explanation, only agreed to give them a copy of the two instructions it provided on the elements of each charged offense (first-degree and second-degree murder).

[28] What I have summarized in this opinion is but a glimpse of the trial court's apparent difficulties in instructing the jurors and carrying out other procedural matters in this trial; a full cataloging is not needed here, but the record well reflects them, and they are troubling. At oral argument before this Court, the prosecutor suggested that they might be attributable to the fact that the judge who ended up presiding over this trial was a former probate-court judge who was standing in and had not previously presided over a murder case. How exactly these circumstances came to pass, and whether they may account for the court's difficulties, the record doesn't show—nor does any of that matter. The jurors, the defendant, and Mr. Weathers deserved better from our courts than what the record here betrays, particularly with a matter as grave as murder on the line.

dant would have snuck into Louise's house in the dead of a random winter's night for no purpose other than to plunge a knife through Melvin's chest while he slept. So the prosecution asked the jurors a different question: Was the defendant a murderer? Was he the sort of man that had such malice and violence inside him? And the prosecution focused intently on proving that he must be—because, just look what he did to Louise. Of course, there wasn't any hard evidence on this secondary question, either, and so the parties found the friends and memories they could. The Kountz family found more, but the defendant found some, and each presented to the jurors what they had.

From these proofs, the jurors were tasked with determining the defendant's guilt. They were given legal rules for making that assessment, rules which were to shape and bind how they could, as a matter of law, answer the questions posed to them and determine whether the defendant's guilt of the crime charged had been proved beyond a reasonable doubt. Rules which would, in turn, assure us, as appellate courts, that the decision reached was not merely one of passion or bias, but of law. And rules which we correspondingly, and duly, presume the jurors follow with rigorous, near-panacean precision. See, e.g., *People v Breidenbach*, 489 Mich 1, 13; 798 NW2d 738 (2011); *People v Dupree*, 486 Mich 693, 711; 788 NW2d 399 (2010); *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998); *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003); *People v Crawford*, 232 Mich App 608, 619; 591 NW2d 669 (1998) ("A court must instruct the jury so that it may correctly and intelligently decide the case.").

The court correctly instructed the jurors on the role these rules must play in their verdict. But the court

then botched the rules themselves—namely, by failing to inform the jurors that, as a matter of law, the defendant's character evidence could in itself give rise to a reasonable doubt that would foreclose a finding of guilt. Instead, the jurors heard about a phantom cross-examination of the defendant's witnesses regarding his bad character and about the "other acts" testimony the prosecution had offered to prove that bad character (and through it, his guilt).

As is beyond dispute at this point, this was a mistake; the defendant was entitled to have the jurors informed of the potential legal significance of his evidence of good character, not to have them needlessly reminded of his alleged bad character. The panel detailed why this mistake, given both its nature and the weight and strength of the untainted evidence otherwise presented to the jurors, was not harmless to the jurors' verdict and thus required a new trial under *Lukity*. *Lyles (On Remand)*, unpub op at 3-6. The majority, however, seems to think that this mistake simply couldn't have been that bad. I don't see why—or how the panel reversibly erred in applying *Lukity* to conclude otherwise.

First, I agree with the panel that "the nature of th[is] error" was, in a word, big. It deprived the jurors of instruction on whether and how they could consider the only affirmative evidence the defendant could and did offer on what became the core question at his trial: whether he was the kind of man who would commit the crime charged. And to make matters worse, the instruction instead gestured the jurors toward the *prosecution's* evidence to that effect. It thus strikes me as perfectly apt to say, as the panel did, that the court's misinstruction "eviscerated the significance of [the] defendant's character evidence" and, with it, his "best

defense to th[e prosecution's] evidence of his past violence,"[29] *id*. at 3, 5—thereby tainting the jurors' consideration of that evidence in reaching a verdict on his guilt.

But how much harm could there really have been from this? Not much, the majority says. The jurors,

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[29] In criticizing the panel's reasoning on this point, the majority calls out this language, but incompletely. It says the panel concluded "that '[d]efendant's best defense . . . was his evidence regarding his peaceful character,' " when in fact, as noted above, the panel's full statement was more targeted—that his "evidence regarding his peaceful character" was his "best defense *to* [*the prosecution's*] *evidence of his past violence*" and was "rendered largely ineffective by the trial court's failure to properly instruct the jury on its use." *Lyles (On Remand)*, unpub op at 5 (emphasis added). The panel elsewhere spoke more broadly regarding the defense's strategy at trial, which was "to deny responsibility for the murder," "argue[] that there was no evidence tying [him] to" it, and "bolster the credibility of [those] denials, and . . . refute the prosecution's evidence of [his] past violence, by introducing evidence that [he] was a peaceful individual." *Id*. at 4. I see no flaw in any of these characterizations.

The majority also questions why, if the defendant's character evidence were so important to his defense, his counsel didn't raise it in her opening or closing arguments to the jurors. The record before us doesn't make that clear. Maybe she was counting on the court's jury instructions to do the important work with respect to this evidence, or had some other strategic reason. (If that were so, however, one might have expected an even more strenuous objection by counsel to the court's failure to correct its misinstruction.) Or maybe—and as seems more likely, all things considered—she simply mishandled this key aspect of the defendant's case, just like the trial court did. That is a question for another day (and one to be answered under a different standard of prejudice than what governs here, see *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984)). In any event, I fail to see how counsel's handling of this evidence in arguments, deficient or not, affects whether the evidence, on the record before us, did constitute the "best defense" the defendant had to the prosecution's attack on his character, which was central to his trial. To the contrary, counsel's failure to argue this evidence to the jurors only exacerbated the harm from the court's failure to instruct them on the evidence and the potentially dispositive legal effect it could have on their determination of guilt.

after all, heard and were permitted to consider the defendant's character evidence; the error here was "only" a misinstruction about that evidence. Given their presumptive import to a verdict, however, jury instructions, and errors therein, can't be brushed aside quite so easily; indeed, the harm from an instructional error can be so inherently pervasive as to categorically require a new trial, no matter how cleanly the evidence may have come in. See, e.g., *People v Cain*, 498 Mich 108, 117 n 4; 869 NW2d 829 (2015) (listing "defective reasonable-doubt instructions" among the errors that have been deemed to be structural). And here, while the jurors were presented with the defendant's character evidence, they were given no legal guidance, no rule, regarding whether and how they could consider this evidence in reaching a verdict. More specifically, and most importantly, they were not told that the evidence could itself legally determine that verdict. This is no small thing.

Attempting to make it smaller, the majority points to other instructions the jurors did receive—that "[a] reasonable doubt is a fair, honest doubt growing out of the evidence or the lack of evidence," and that they, as jurors, must consider and weigh all the evidence in reaching a verdict. These are generic rules—fundamental and important, to be sure, but not necessarily adequate in themselves to meet the instructional needs of every case. If they were, it seems there would never be any need to provide, nor any harm from failing to provide, the many, more specific instructions that build them out—that inform the jury how they can consider and weigh the particular types of evidence in a given case, and how that evidence can and cannot prove guilt beyond a reasonable doubt. That's the sort of information imparted by M Crim JI 5.8a(1), and neither these general instructions, nor any others the

jurors heard, provided it. We presume the jurors follow the rules, not that they already know them.

And if anything, the rules the court did provide to the jurors only made the harm from this omission worse. The jurors did, after all, receive instructions akin to M Crim JI 5.8a(1); they simply were given only the ones that governed the prosecution's proofs. The defendant, they were told, could be convicted based on the prosecution's "identification testimony alone," if they believed it proved his guilt beyond a reasonable doubt. His move out of state, on the other hand, couldn't alone prove his guilt, but it could be taken to show his "consciousness of guilt." And he could be convicted, they also learned, without any proof of motive. If they were looking for motive, however, they could consider the evidence of the defendant's "improper acts" against Louise, which could also be considered to show "th[e] environment" Melvin was in, "the complete picture of the defendant's history" in that regard, and—as suggested by the court's subsequent misinstruction—"that the defendant did not have good character." They were told to "carefully balance that testimony . . . so [as] not to prejudice yourself against this defendant and this murder," but they were not told (per the model instructions) that they "must not convict the defendant here solely because you think [he] is guilty of other bad conduct." As the majority notes, the propriety of these instructions (or, for that matter, of the evidence to which they pertained) isn't before us here. But as part of the "entire cause," their relationship with the instant error is. And these (mis)instructions made that error's harm all the more palpable. Amidst all this exposition on the legal meaning and effect of the prosecution's evidence, not a word about that of the defendant's—as if his evidence had none.

No matter, says the majority, because "[e]ven if the jury had been properly instructed, it is not more likely than not that [the] defendant's character evidence would have been sufficient to create a reasonable doubt, given the prosecution's evidence[.]" The court's misinstruction, however, cannot be so readily isolated from the jurors' assessment of the proofs, given how fundamentally it compromised the jurors' ability to weigh those proofs in reaching their verdict; they simply did not know that the defendant's evidence could, legally speaking, be enough in itself to defeat the prosecution's case. To have this legal effect, the defendant's evidence only had to cast a reasonable doubt over the prosecution's proofs in the eyes of one juror. Why could the defendant's evidence not have done so? What "weight and strength," to use *Lukity*'s terms, did the "untainted evidence" possess that prevented it? Let's review that evidence: The recounted memories of a shadow in a dark house that reminded Louise's teenage daughters, in that moment of violence, of the man who had replaced their father and beat their mother. The recounted memories of the girls' frantic announcement of that suspicion to their neighbors right afterward. A few other memories about that night 30 years ago and the man's suspected place within it, recounted solely by the daughter who hated him and ensured he was now being brought to trial. The recounted memories of a phone call before that night in which the defendant said he'd "get" Melvin—though no one could say why. The defendant's flight from town at some point, either because he did "get" Melvin or because he feared the Kountzes were out to get him.

Was this evidence enough, as a matter of law, to sustain the defendant's conviction? We haven't been asked that question, but perhaps. Does it leave ample room for a juror, upon hearing testimony about the

defendant's peaceful character, to reasonably doubt his guilt? Absolutely. But, the majority continues, that good-character evidence was "extremely weak" and "far outweighed" by the bad-character evidence of the defendant's abuse of Louise. I lack the majority's confidence in that assessment. The prosecution certainly produced more pages of testimony on the topic than the defendant did, but that testimony does not strike me as clearly or inherently more objective or reliable. The jurors may very well have seen strength in the prosecution's numbers and credited the accounts of abuse provided by Louise's friends and family. They also may have discounted those memories, in whole or in part, as too old, too unsubstantiated, or too distorted by a long-festering contempt for the defendant and a desire that he be punished somehow, some way, for whatever he'd done to Louise. Likewise, the jurors may have found little import in Kim Harden's memories of a man whom she knew long ago, but whom she didn't really see with Louise all that much—or they may have found some objectivity and reliability in the opinions of this long-time school principal who had known the defendant very well but wasn't mixed up in the strife between him and the Kountzes. The record doesn't betray what the jurors, together or separately, might have thought about all this character evidence—just that they were only instructed by the court on how to think about the prosecution's bad-character evidence in determining guilt. Twice.

And even if the jurors did, as the majority does now, credit the prosecution's character evidence over the defendant's, what does that tell us about the harm to their verdict from the court's misinstruction about that evidence? The jurors may have believed the defendant was a "vicious abuser" of Louise, or even a bad person overall, and a proper instruction on the defendant's

evidence may not have changed these impressions. But the jurors were not tasked with rendering a verdict on any of that. Rather, to convict the defendant, they still had to get from this other-acts evidence, and any impressions of the defendant it conjured, to the unanimous conclusion that he was guilty, beyond a reasonable doubt, of murdering Melvin. The instructions traced the legal paths the jurors could take through the prosecution's proofs to that conclusion. We don't, and can't, know which path they each may have taken. But we do know none of them was told that the defendant's evidence could provide its own path to a different outcome. And what assurance is there in the record that, had the jurors been apprised of this path—provided it as a rule—none would have followed it?

That, ultimately, is the core of our inquiry here: how reliably can we say, on the record before us, that these 12 jurors would have unanimously agreed on the defendant's guilt for murdering Melvin, had the court not misinstructed them on the reasonable doubt that could, as a matter of law, arise from the defendant's character evidence alone. We, of course, are not those jurors, and harmlessness review does not require or invite us to be; what matters is the reliability of their verdict, not our own agreement with it.[30] Did the

[30] See, e.g., *People v Mateo*, 453 Mich 203, 221; 551 NW2d 891 (1996) (discussed approvingly in *Lukity* and explaining, *inter alia*, that "courts analyzing preserved error in terms of their view regarding whether the defendant is guilty have been wrong," as "[t]he defendant's right to a fair trial by jury requires that preserved error be reviewed in terms of its effect on the factfinder"). Accord *Sullivan v Louisiana*, 508 US 275, 279; 113 S Ct 2078; 124 L Ed 2d 182 (1993) ("Harmless-error review looks, we have said, to the basis on which the jury *actually rested* its verdict. The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty

defendant kill Melvin? I don't know. Will a new set of jurors, properly instructed, conclude beyond a reasonable doubt that he did? I don't know that, either. But even if I knew those things, they wouldn't answer the question before us.

Here is what I do know—what affirmatively appears to me, after examining this entire cause: The jurors were asked to assess the defendant's guilt for a 30-year-old murder on the basis of unsubstantiated memories and character inferences drawn from sources of questionable reliability. These proofs teemed with doubt—a doubt which the defendant encouraged through the presentation of his own character evidence. The court provided the jurors with rules they must, and presumptively did, follow in measuring that doubt and deciding whether they could, as a matter of law, still convict the defendant in spite of it. But the court only provided rules for the prosecution's proofs. It did not instruct the jury that the defendant's proofs—his evidence of good character, the only evidence he presented—could, alone and as a matter of law, create a reasonable doubt and foreclose a finding of guilt. Instead, the jurors were reminded again about the prosecution's evidence on that central issue at trial while the defendant's proofs went wholly without mention, as if they didn't warrant it, legally or factually. Did this failure to inform the jurors of the potentially dispositive legal effect of the defendant's evidence undermine the reliability of their guilty verdict? Is it more probable than not that, had this rule been given to the jurors, it would have made a difference to at least one of them in how they viewed that evidence?

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verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.") (quotation marks and citation omitted).

That one of them would have realized that, when it came to their legal determination of guilt, the defendant's evidence could be worth not only something, but everything? That the doubt it generated could be, in itself, the "reasonable" sort countenanced by the law to foreclose a finding of guilt? And that, because of this, the defendant—for whatever else he did or whatever else he was—should and could not be convicted under the law for the 1983 murder of Andrew "Melvin" Weathers? On these proofs, in this cause, I say yes. The court's error was not harmless. A new trial is needed to ensure that any verdict on this charge is reliable under the law.[31]

This was also the conclusion of the Court of Appeals panel. Its work on this question was careful and correct. It did what we asked, and well. We should leave its work in place. We should allow a new trial to go forward. We should deny leave. I dissent.

VIVIANO and BERNSTEIN, JJ., concurred with MCCORMACK, J.

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[31] Indeed, if the court's error as to M Crim JI 5.8a(1) doesn't require relief in this case, I struggle to think of a case in which such an error would. At oral argument, the prosecutor was similarly stumped on this point. Of course, that wasn't of particular concern to the prosecutor, as she had urged us—in both of this case's trips to this Court—to dispense with the instruction entirely, as legally unnecessary and improper. Both times, we declined this invitation. The model instruction comports with the law in this state, and a party is entitled to have it presented to the jury when the evidence supports it. The court's failure to provide it here was indisputably erroneous and subject to review for harmlessness. But, with the majority's ruling here, I am not sure if any force is left to that legal conclusion, or if this Court now has effectively done, through harmlessness review, what the prosecutor really wanted us to do. What meaning is there to assigning error, after all, if there can never be any consequence to that error? Or, as this Court has elsewhere wondered, "What is the point in applying a harmless error rule if the error is always going to be harmless?" *People v Francisco*, 474 Mich 82, 91 n 10; 711 NW2d 44 (2006).

PEOPLE v WHITE

Docket No. 149490. Decided December 26, 2017.

Anthony T. White pleaded guilty in the Berrien Circuit Court to charges of armed robbery, MCL 750.529, and breaking and entering, MCL 750.110, in connection with the robbery of a gas station during which he held a gun to the cashier's head. The court, Dennis M. Wiley, J., sentenced defendant to 108 to 480 months in prison for armed robbery and 23 to 120 months in prison for breaking and entering. The court had assessed defendant 10 points for Offense Variable (OV) 4, MCL 777.34, to reflect its finding that serious psychological injury requiring professional treatment occurred to a victim. This finding was based solely on the facts that defendant had held a gun to the cashier's head and that she heard a trigger being pulled, which the court concluded was sufficient to support its scoring of OV 4 despite the lack of evidence that the cashier had suffered psychological distress as a result. The Court of Appeals denied defendant's delayed application for leave to appeal, and defendant sought leave to appeal in the Supreme Court.

In a unanimous per curiam opinion, the Supreme Court, in lieu of granting leave to appeal and without hearing oral argument, *held*:

Points for OV 4 may not be assessed solely on the basis of a trial court's conclusion that a serious psychological injury would normally occur as a result of the crime perpetrated against the victim, and evidence of fear while a crime is being committed, by itself, is insufficient to assess points for OV 4. Accordingly, the trial court erred by assessing 10 points for OV 4. Because the subtraction of 10 points lowered defendant's guidelines range for his guilty plea to armed robbery from a minimum of 81 to 135 months in prison to a minimum of 51 to 85 months in prison, the judgment of sentence was vacated and the case was remanded for resentencing. To the extent that *People v Apgar*, 264 Mich App 321 (2004), held that a victim's fear during a crime was sufficient to assess 10 points for OV 4 without any other showing of psychological harm, it was overruled.

1. MCL 777.34(1)(a) provides that OV 4 is correctly scored at 10 points when a serious psychological injury requiring professional treatment occurred to a victim. The trial court here assessed 10 points on the sole basis of its conclusion that a person would typically suffer a psychological injury when confronted with the instant crime. However, to support a score of 10 points, MCL 777.34 requires that serious psychological injury occurred to a victim, not that a reasonable person in that situation would have suffered a serious psychological injury. Accordingly, the trial court erred in scoring OV 4.

2. Defendant's admission during his plea that the victim was afraid that he was going to shoot her could have supported scoring OV 4 at 10 points under *Apgar*, which was often cited for the proposition that a victim's expression of fearfulness during a crime was sufficient to assess 10 points for OV 4. However, the fact that a victim is afraid at the time of the incident, by itself, does not give rise to a serious psychological injury requiring professional treatment. Therefore, to the extent that *Apgar* held that a victim's fear during a crime, by itself and without any other showing of psychological harm, was sufficient to assess 10 points for OV 4, it was overruled, and defendant's admission was insufficient to sustain the trial court's scoring.

Judgment of sentence vacated; case remanded to the circuit court for further proceedings.

Justice CLEMENT took no part in the decision of this case.

1. CRIMINAL LAW — SENTENCING GUIDELINES — OFFENSE VARIABLE 4 — SERIOUS PSYCHOLOGICAL INJURY REQUIRING PROFESSIONAL TREATMENT — NATURE OF THE CRIME.

Points for Offense Variable 4, which pertains to when a serious psychological injury requiring professional treatment occurred to a victim, may not be assessed solely on the basis of a trial court's conclusion that a serious psychological injury would normally occur as a result of the crime perpetrated against the victim (MCL 777.34(1)(a)).

2. CRIMINAL LAW — SENTENCING GUIDELINES — OFFENSE VARIABLE 4 — SERIOUS PSYCHOLOGICAL INJURY REQUIRING PROFESSIONAL TREATMENT — EVIDENCE OF VICTIM'S FEAR DURING CRIME.

Evidence that a victim experienced fear while a crime was being committed, by itself, is insufficient to assess points for Offense Variable 4, which pertains to when a serious psychological injury requiring professional treatment occurred to a victim (MCL 777.34(1)(a)).

State Appellate Defender (by *Jeanice Dagher-Margosian*) for defendant.

PER CURIAM. The issue in this case is whether the trial court erred by assessing 10 points for Offense Variable (OV) 4 ("serious psychological injury" to a victim occurred) when the only evidence to support this scoring was the victim's fear while the crime was being committed. We conclude that (a) points for OV 4 may not be assessed solely on the basis of a trial court's conclusion that a "serious psychological injury" would normally occur as a result of the crime perpetrated against the victim and (b) evidence of fear while a crime is being committed, *by itself*, is insufficient to assess points for OV 4. Accordingly, the trial court erred by assessing 10 points for OV 4. Because the subtraction of 10 points lowers defendant's guidelines range for his guilty plea to armed robbery, MCL 750.529, from a minimum of 81 to 135 months in prison to a minimum of 51 to 85 months in prison, we vacate the sentence of the trial court and remand for resentencing. *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006).[1]

Defendant and an accomplice entered a gas station in Berrien County with guns drawn. Defendant held a gun to the cashier's head and demanded money while his accomplice searched the store. The cashier gave them money, and they ordered her to lie down until they left. The victim told police that she thought she heard a trigger being pulled, but neither of the guns went off. During his plea colloquy, defendant agreed that the victim "was afraid that [defendant] was going

[1] Defendant also pleaded guilty to one count of breaking and entering, MCL 750.110, and the trial court sentenced defendant to 23 to 120 months in prison on that charge.

to shoot her." At sentencing, the trial court rejected defendant's challenge to the scoring of OV 4 at 10 points, reasoning:

> Clearly, any person who has been held at gunpoint has some psychological distress, and, clearly, in a situation where they believe their life may be ending. I would suggest when they hear what they believe to be a trigger pulled, that that would heighten their psychological distress to somewhat a greater—much greater degree. While there's nothing, per se, indicating this—that there—that she actually suffered psychological distress, there's nothing to indicate that she was fine, either. And, the Court believes it is reasonable to draw a conclusion that as a result of being held at gunpoint with a trigger being pulled, that she suffered some type of psychological injury that might require some type of psychological counseling at some time in the—in the future.

There was no victim impact statement, preliminary examination, or victim statement in evidence at sentencing. As calculated by the court, defendant's minimum sentence guidelines range was 81 to 135 months, and the trial court sentenced him to 108 to 480 months in prison. The Court of Appeals denied defendant's delayed application for leave to appeal.

OV 4 is correctly scored at 10 points when a "serious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). The trial court here assessed 10 points on the sole basis of its conclusion that people would *typically* suffer a psychological injury when confronted with the instant crime. However, a trial court "may not simply assume that someone in the victim's position would have suffered psychological harm because MCL 777.34 requires that serious psychological injury '*occurred* to a victim,' " not that a *reasonable* person in that situation would have suffered a "serious psychological injury." *People v Lockett*,

295 Mich App 165, 183; 814 NW2d 295 (2012). Accordingly, the trial court erred in scoring OV 4.

However, our review of the trial court's scoring of OV 4 is not limited to the reasoning provided by the trial court. *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011). Defendant's admission during his plea that the victim "was afraid that [defendant] was going to shoot her" may alternatively support scoring OV 4 at 10 points on the basis of *People v Apgar*, 264 Mich App 321; 690 NW2d 312 (2004). In *Apgar*, the Court of Appeals held that "[b]ecause the victim testified that she was fearful during the encounter with defendant, we find that the evidence presented was sufficient to support the trial court's decision to score OV 4 at ten points." *Id*. at 329. *Apgar* is often cited for the proposition that a victim's "expression of fearfulness" during a crime is sufficient to assess 10 points for OV 4. See, e.g., *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009). However, a recent Court of Appeals decision rejected that reasoning, concluding that "the fact that [the victim] was afraid at the time of the incident, by itself, does not give rise to a serious psychological injury requiring professional treatment." *People v Beach*, unpublished per curiam opinion of the Court of Appeals, issued April 18, 2017 (Docket No. 330140), p 6. We agree with the *Beach* panel and overrule *Apgar* to the extent it held that a victim's fear during a crime, *by itself and without any other showing of psychological harm*, is sufficient to assess 10 points for OV 4.[2] While crime victims are often obviously, and understandably, frightened when a crime is being perpe-

[2] See also *Davenport*, 286 Mich App at 200; *People v Earl*, 297 Mich App 104, 109; 822 NW2d 271 (2012); *People v Williams*, 298 Mich App 121, 124; 825 NW2d 671 (2012).

trated, this fear does not necessarily result in a "serious psychological injury" and, as addressed earlier, a court cannot merely assume that a victim has suffered a "serious psychological injury" solely because of the characteristics of the crime. Accordingly, defendant's admission is insufficient to sustain the trial court's scoring.[3]

On remand, the trial court shall consider defendant's issue regarding the assessment of court costs and shall not impose a fine for the defendant's conviction of armed robbery. Because the statute under which the sentence was imposed, MCL 750.529, does not specifically provide for the imposition of a fine, one may not be imposed. See *People v Cunningham*, 496 Mich 145, 157; 852 NW2d 118 (2014); MCL 769.1k(1)(b)(*i*).

MARKMAN, C.J., and ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, and WILDER, JJ., concurred.

CLEMENT, J., took no part in the decision of this case.

[3] Of course, a victim's fear while a crime is being committed may be highly relevant to determining whether he or she suffered a "serious psychological injury [that] may require professional treatment" and thus may be considered together with other facts in determining how to score OV 4. We merely hold that, *absent other evidence of psychological harm*, fear felt during the crime is insufficient to assess points for this variable.

DAWLEY v HALL

Docket No. 155991. Decided January 3, 2018.

Joanne D. Dawley, individually and as personal representative of the estate of her husband, James Armour II, brought a tort action in the Wayne Circuit Court against Rodney W. Hall, the driver of a vehicle involved in a motor vehicle collision in Lake County that allegedly caused Armour's death. Defendant moved to transfer venue to Mason County or Lake County, claiming among other things that he conducted business in Mason County by owning and operating a resort there. The Wayne Circuit Court, John A. Murphy, J., granted the motion and transferred venue to Mason County in March 2015. Ten months later, plaintiff moved under MCR 2.223 to change venue back to Wayne County after discovery revealed that defendant was merely a member of the investment company that owned the resort in Mason County and not its owner. The Mason Circuit Court, Susan K. Sniegowski, J., denied the motion, and plaintiff appealed. The Court of Appeals, WILDER and SWARTZLE, JJ. (BORRELLO, P.J., concurring in the result only), reversed and remanded for transfer of venue to Wayne County. 319 Mich App 490 (2017). Defendant sought leave to appeal.

In a unanimous per curiam opinion, the Supreme Court, in lieu of granting leave to appeal and without hearing oral argument, *held*:

Plaintiff's motion for a change of venue was not permitted under MCR 2.223(A), which only permits a court to change venue on timely motion of a defendant or on the court's own initiative. The Court of Appeals' decision ordering a transfer of venue was vacated.

1. MCR 2.223(A) states that if the venue of a civil action is improper, the court shall order a change of venue on timely motion of a defendant or may order a change of venue on its own initiative with notice to the parties and opportunity for them to be heard on the venue question. Neither avenue contemplates a plaintiff's motion. Similarly, the relevant venue statute, MCL 600.1651, does not provide for a plaintiff's motion to change venue, but it states that a defendant may move for a change of venue within the time and in the manner provided by court rule,

in which case the court will transfer the action to a proper county on such conditions relative to expense and costs as provided by court rule and MCL 600.1653. By expressly recognizing that the defendant and the court can effect a change in venue but including no similar provision for the plaintiff, the rule and the statute must be read to exclude the plaintiff. Considered together, the court rules and the statute in this case demonstrate purposeful choices about which actors can seek to effect a change in venue. Accordingly, the decision not to include the plaintiff in MCR 2.223(A) must be interpreted as a meaningful choice to preclude plaintiffs from filing motions under that rule.

2. It was unnecessary to address plaintiff's argument on appeal that MCR 2.612(C)(1)(b) would allow a plaintiff to effect a change in venue when a defendant has obtained a transfer to an improper venue because plaintiff did not properly raise the argument below. Plaintiff argued on appeal that she was prevented from acting sooner to transfer venue back to Wayne County because defendant had concealed the fact that he was merely a member of an LLC that owned the resort in Mason County and not its owner. MCR 2.612(C)(1)(b) does permit a court to overturn a prior order on the basis of newly discovered evidence, but only if that evidence by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B), which must be done within 21 days. It was questionable whether plaintiff's evidence could have met this test, given that information regarding the corporate ownership of the lodge was publicly available on a state government website. Even if plaintiff's evidence had been new, her argument would have failed because neither her motion to transfer venue nor the accompanying brief mentioned MCR 2.612(C) or requested relief from the Wayne Circuit Court's prior order. Instead, plaintiff's request for a venue transfer was explicitly based on the premise that venue was improper in Mason County.

Court of Appeals judgment vacated; case remanded to the Mason Circuit Court for further proceedings.

Justice WILDER did not participate because he was on the Court of Appeals panel.

Justice CLEMENT took no part in the decision of this case.

VENUE — COURT RULES — MOTIONS FOR CHANGE OF VENUE.

A plaintiff may not request a change of venue under MCR 2.223(A).

Law Offices of David A. Priehs, PC (by *David A. Priehs*) for plaintiff.

Siemion Huckabay, PC (by *Raymond W. Morganti*) for defendant.

PER CURIAM. At issue is whether plaintiff, arguing that venue is improper, can avail herself of MCR 2.223(A), which permits a court to order a venue change "on timely motion of a defendant," MCR 2.223(A)(1), or on the court's "own initiative," MCR 2.223(A)(2). To ask the question is nearly to answer it. Because plaintiff's motion is neither a motion by defendant nor an action on the court's "own initiative," we hold that plaintiff cannot file a motion for a change of venue under MCR 2.223(A). Accordingly, we vacate the Court of Appeals' decision ordering transfer of venue.

This case arose out of a fatal automobile accident in Lake County between defendant Rodney W. Hall and decedent James Armour II. Plaintiff Joanne O. Dawley, Armour's spouse, sued Hall in Wayne County in August 2014. Defendant moved to transfer venue to Mason County or Lake County, alleging among other things that he conducted business in Mason County by owning and operating Barothy Lodge.[1] The Wayne Circuit Court granted the motion and transferred venue to Mason County in March 2015.

Ten months later, on January 8, 2016, plaintiff moved under MCR 2.223 to change venue back to Wayne County. She alleged that discovery had revealed that defendant did not, in fact, own the resort in

[1] In tort actions like the present case, MCL 600.1629(a), (b), and (c) provide three possible venue locations. The parties agree that none of the three is appropriate here. In such cases, MCL 600.1629(d) provides that venue is proper where the defendant resides or conducts business, MCL 600.1621, or in the county where the accident occurred, MCL 600.1627.

his name; he was merely a member of Hall Investments, LLC, which owned the resort. Therefore, according to plaintiff, venue in Mason County was improper because defendant did not conduct business there. The trial court disagreed, but the Court of Appeals reversed and remanded for transfer of venue to Wayne County.[2] Defendant now seeks leave to appeal in this Court, arguing among other things that MCR 2.223 does not permit a plaintiff to move for transfer of venue.

We review interpretation of court rules "de novo and under the same principles that govern the construction of statutes."[3] "Namely, the court rule is to be interpreted according to its plain language," giving each word and phrase its common, ordinary meaning.[4]

MCR 2.223(A) states in pertinent part:

> If the venue of a civil action is improper, the court
>
> (1) shall order a change of venue on timely motion of a defendant, or
>
> (2) may order a change of venue on its own initiative with notice to the parties and opportunity for them to be heard on the venue question.

The rule thus provides two avenues for changing venue: the defendant's timely motion or the court's order on its own initiative. Neither avenue contemplates a plaintiff's motion. That is likely because "[a] transfer under MCR 2.223 necessarily implies an erroneous choice of court by the plaintiff."[5] Similarly, the

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[2] *Dawley v Hall*, 319 Mich App 490; 902 NW2d 435 (2017).

[3] *Fraser Trebilcock Davis & Dunlap PC v Boyce Trust 2350*, 497 Mich 265, 271; 870 NW2d 494 (2015).

[4] *Id*.

[5] 2 Longhofer, Michigan Court Rules Practice, Text (6th ed), § 2223.6, p 190; but see 1 Longhofer, Michigan Court Rules Practice, Forms (3d ed),

relevant venue statute, MCL 600.1651, does not provide for a plaintiff's motion to change venue. It states, "An action brought in a county not designated as a proper county may nevertheless be tried therein, *unless a defendant moves* for a change of venue within the time and in the manner provided by court rule, in which case the court shall transfer the action to a proper county on such conditions relative to expense and costs as provided by court rule and [MCL 600.1653]."[6] The rule and statute, then, expressly designate who can bring about a change in venue. Under well-established interpretive principles, by expressly recognizing that the defendant and the court can effect a change in venue, but including no similar provision for the plaintiff, the rule and statute must be read to exclude the plaintiff.[7]

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§ 3:38, commentary, p 109 (recognizing that MCR 2.223 is "silent" on whether a plaintiff can file a motion and suggesting that "[a] logical resolution" is to permit the plaintiff to file a late, but not a timely, motion).

[6] Emphasis added. MCL 600.1653 is a cost-shifting provision involving motions for change of venue when venue is improper. It states that "[i]f a party brings a motion for a change of venue in an action based on tort alleging improper venue, the court shall award expenses and costs as follows . . . ." MCL 600.1653. The fees are to be paid by the losing party, after a hearing. MCL 600.1653(a) and (b). While this could be read to suggest that either party can file the motion, such an interpretation would contradict the clear language of MCL 600.1651 and MCR 2.223, which specifically provide that only a defendant can file the motion to change venue on the ground that present venue is improper.

[7] See *Bradley v Saranac Community Sch Bd of Ed*, 455 Mich 285, 298; 565 NW2d 650 (1997) ("This Court recognizes the maxim *expressio unius est exclusio alterius*; that the express mention in a statute of one thing implies the exclusion of other similar things.").

Plaintiff argues that "[i]f a court has authority to change venue without any motion, that the plaintiff filed a motion does not deprive the court of that authority." We do not reach this argument because there is no indication that the trial court acted on its own initiative in this case. We note, however, that the court rule gives the trial court broader discretion when it acts on its own initiative, even if such action may be

This conclusion becomes even clearer when these provisions are compared to MCR 2.222. That rule allows a court in a proper venue to nonetheless transfer the case "on motion of *a party*"[8] on the basis of, among other things, the convenience of the parties.[9] Unlike MCR 2.223, then, MCR 2.222 does not limit which party may initiate a change of venue. Other rules allowing the court to act on its "own initiative" also explicitly provide for the filing of "the motion of *a party*," further demonstrating that actions taken on the court's "own initiative" are distinct from actions prompted by motions of *any* party.[10] Considered to-

spurred by information provided by the parties. Compare MCR 2.223(A)(1) (stating that if venue is improper, the court "*shall* order a change of venue on timely motion of a defendant") (emphasis added) with MCR 2.223(A)(2) (stating that if venue is improper, the court "*may* order a change of venue on its own initiative") (emphasis added). And it is the latter provision that courts must follow to transfer venue on their own initiative.

[8] MCR 2.222(B) (emphasis added).

[9] MCR 2.222(A) ("The court may order a change of venue of a civil action, or of an appeal from an order or decision of a state board, commission, or agency authorized to promulgate rules or regulations, for the convenience of parties and witnesses or when an impartial trial cannot be had where the action is pending.").

[10] See, e.g., MCR 2.612(A)(1) ("Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party and after notice, if the court orders it."); MCR 2.402(B) ("A court may, on its own initiative or on the written request of a party, direct that communication equipment be used . . . ."); MCR 2.316(B)(3) ("On motion of a party, or on its own initiative after notice and hearing, the court may order discovery materials removed at any other time on a finding that the materials are no longer necessary."); MCR 2.115(B) ("On motion by a party or on the court's own initiative, the court may strike" certain matters from a pleading); MCR 2.114(E) ("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" reasonable expenses); MCR 2.207 ("Parties may be added or dropped by order of the court on motion of a party or on the court's own initiative . . . ."); see also MCR 2.509(A)(2)

gether, the court rules and the statute in this case demonstrate purposeful choices about which actors can seek to effect a change in venue. Accordingly, the decision not to include the plaintiff in MCR 2.223(A) must be interpreted as a meaningful choice to preclude plaintiffs from filing motions under that rule.[11]

Plaintiffs' inability to file a motion under MCR 2.223 does not leave them in the lurch. In this case, for example, plaintiff could have challenged the Wayne Circuit Court's order transferring venue if she had filed a motion for rehearing or reconsideration within 21 days pursuant to MCR 2.119(F)(1), or by filing an application for leave to appeal, MCR 7.205. Plaintiff bypassed these options and instead waited roughly 10 months to file a new motion to change venue.

Plaintiff also protests that defendant concealed the fact that he was merely a member of an LLC that owned the resort in Mason County by suggesting that he actually owned it himself. It was this chicanery, according to plaintiff, that prevented her from acting sooner to transfer venue back to Wayne County. Plaintiff argues that the concealment is legally significant because,

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(requiring the court to hold a jury trial unless "the court on motion or on its own initiative finds that there is no right to trial by jury").

[11] Plaintiff cites *Eigner v Eigner*, 79 Mich App 189; 261 NW2d 254 (1977), in support of her argument that MCR 2.223 does not preclude plaintiffs from bringing motions to change venue. In *Eigner*, the plaintiff successfully moved to transfer venue under GCR 1963, 404, a predecessor of MCR 2.223 that similarly stated, "[t]he venue of any civil action improperly laid shall be changed by order of the court on timely motion by any defendant, or may be changed by the court on its own motion." The Court of Appeals affirmed the trial court's transfer based on that rule. *Eigner*, 79 Mich App at 197. But much like the Court of Appeals in the instant case, *Eigner* offered no analysis of the rule's text and, indeed, it is unclear whether the defendant even challenged the plaintiff's authority to invoke the rule. To the extent that *Eigner* did hold that the court rule permitted plaintiffs to file a motion under this rule, we disagree with that holding.

under MCL 600.1651, the transferee court obtains "full jurisdiction of the action as though the action had been originally commenced therein." Therefore the transferee court, plaintiff contends, "acquires jurisdiction to do anything the transferor court could have done. . . . One of the things the Wayne Circuit Court could have done (had it not lost jurisdiction) was reverse itself based on newly discovered evidence. MCR 2.612(C)." Consequently, plaintiff concludes that the Mason Circuit Court had the authority to do the same thing.

MCR 2.612(C)(1)(b) does permit the court to overturn a prior order on the basis of "[n]ewly discovered evidence," but only if that evidence "by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B)," which must be done within 21 days. It is highly questionable whether plaintiff's "new evidence" could meet this test, given that the Department of Licensing and Regulatory Affairs (LARA) has publicly provided online documents, dating back to 2010, revealing that "Barothy Lodge" is an assumed name for an entity known as Hall Investments, LLC.[12] Even if plaintiff's evidence were new, her argument would still fail: she never made a motion under MCR 2.612(C). Instead, she simply observes that the Wayne and Mason Circuit Courts *could* have granted relief under that rule. However, the rule states that a court can grant relief "[o]n motion and on just terms[.]"[13] Plaintiff's motion to transfer venue and accompanying brief never mentioned MCR 2.612(C) or requested relief from the Wayne Circuit Court's prior order. Instead, she explic-

[12] See LARA, Corporations Online Filing System <https://cofs.lara.state.mi.us/CorpWeb/CorpSearch/CorpSummary.aspx?ID=801162077&SEARCH_TYPE=1> (accessed December 20, 2017) [https://perma.cc/CWL8-FX68].

[13] MCR 2.612(C).

itly requested a venue transfer on the basis that venue was improper in Mason County. Consequently, because plaintiff has not properly raised the argument, we do not decide here whether MCR 2.612(C)(1)(b) would allow, in certain cases, a plaintiff to effect a change in venue when a defendant has obtained a transfer to an improper venue.[14]

For the reasons above, plaintiff could not move for a change of venue under MCR 2.223(A). Accordingly, we vacate the Court of Appeals decision[15] and remand to the Mason Circuit Court for proceedings consistent with this opinion.

MARKMAN, C.J., and ZAHRA, MCCORMACK, VIVIANO, and BERNSTEIN, JJ., concurred.

WILDER, J., did not participate because he was on the Court of Appeals panel.

CLEMENT, J., took no part in the decision of this case.

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[14] We would note, however, that it is unclear whether MCR 2.612(C)(1)(b) even applies to motions to change venue in light of MCR 2.221(B), which is more specific and allows for the late filing of motions for change of venue "if the court is satisfied that the facts on which the motion is based were not and could not with reasonable diligence have been known to the moving party more than 14 days before the motion was filed." In this case, while no party has raised the issue, even if plaintiff had been permitted to file a motion to change venue under MCR 2.223, the motion would not have been timely under MCR 2.221(A) (requiring a motion for change of venue to be filed before or at the time the defendant files an answer), and, for the reasons discussed above, likely would not have satisfied the criteria for allowance of a late motion for change of venue under MCR 2.221(B).

[15] The Court of Appeals did not directly address defendant's argument that plaintiff could not utilize MCR 2.223, but it implicitly assumed that plaintiff could. Because we conclude that this argument is determinative, we need not reach the issues the Court of Appeals did address.

PEOPLE v ANDERSON

Docket No. 155172. Argued on application for leave to appeal January 10, 2018. Decided March 16, 2018.

Tremel Anderson was charged in the 36th District Court with assault with intent to commit murder, MCL 750.83; carrying a concealed weapon, MCL 750.227; felonious assault, MCL 750.82; and carrying a firearm during the commission of a felony, MCL 750.227b, following an incident that allegedly occurred between her and Michael Larkins, the father of her child. The only evidence presented at the preliminary examination was Larkins's testimony. According to Larkins, defendant was driving him home when they got into an argument. Larkins testified that defendant threatened to kill him, grabbed a gun from between her legs, and pointed it at him for about five minutes before pulling over to the side of the road near Larkins's home, where defendant and Larkins continued to argue while defendant kept the gun pointed at him. Defendant then demanded that Larkins return a spare set of keys to her car, while Larkins sought to negotiate a trade of the keys for Christmas gifts that were in defendant's car. When Larkins refused to give defendant the keys, defendant called the police, and Larkins yelled for help. Larkins testified that defendant then attempted to fire the gun at him, but the gun failed to discharge, and he jumped out of the car and ran away as defendant fired three more shots in his direction. Larkins stated that he reached a neighbor's home and called the police. The district court, Shannon A. Holmes, J., found Larkins's testimony not credible and therefore dismissed the complaint. The prosecutor appealed this decision in the Wayne Circuit Court, where the judge, Alexis A. Glendening, J., treated the claim of appeal as a motion and denied it without further explanation. The Court of Appeals, JANSEN and M. J. KELLY, JJ. (SAAD, P.J., dissenting), affirmed in a split decision. *People v Anderson*, unpublished per curiam opinion of the Court of Appeals, issued November 29, 2016 (Docket No. 327905). The prosecutor sought leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other peremptory action. 500 Mich 1011 (2017).

In a unanimous opinion by Chief Justice MARKMAN, the Supreme Court, in lieu of granting leave to appeal, *held*:

A magistrate's duty at a preliminary examination is to consider all the evidence presented, including the credibility of witnesses' testimony, and to determine on that basis whether there is probable cause to believe that the defendant committed a crime—in other words, whether the evidence presented is sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt. Because the magistrate in this case did not abuse her discretion by determining that Larkins's testimony was not credible and there was no other evidence presented during the preliminary examination, the district court's order dismissing the charges against defendant was affirmed.

1. In Michigan, a criminal defendant has a statutory right under MCL 766.1 to a prompt examination and determination by an examining magistrate. MCL 766.4(6) provides that at this preliminary examination, the magistrate shall examine the complainant and the witnesses in support of the prosecution on oath concerning the offense charged and in regard to any other matters connected with the charge that the magistrate considers pertinent. Under MCL 766.13, if the magistrate determines at the conclusion of the preliminary examination that a felony has not been committed or that there is not probable cause for charging the defendant with committing a felony, the magistrate shall either discharge the defendant or reduce the charge to an offense that is not a felony. If the magistrate determines at the conclusion of the preliminary examination that a felony has been committed and that there is probable cause for charging the defendant with committing a felony, the magistrate shall bind the defendant to appear within 14 days for arraignment before the circuit court of that county, or the magistrate may conduct the circuit court arraignment as provided by court rule. Thus, a magistrate is required to determine at the conclusion of the preliminary examination whether there is probable cause to believe that the defendant committed a crime. The use of the word "determine" communicates that the magistrate must exercise some judgment in analyzing the evidence at the preliminary examination when deciding whether there is probable cause to bind over a defendant. MCL 766.13 provides that a magistrate's determination regarding the existence of probable cause must be made at the conclusion of the preliminary examination. This strongly suggests that the magistrate must consider the totality of the evidence presented at that juncture even if evidence introduced at the outset of the preliminary examination

initially appears to have satisfied the elements of a criminal offense. In sum, MCL 766.13 requires a magistrate to consider all the evidence presented and on that basis to determine whether there is a quantum of evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt. During a preliminary examination, the magistrate has not only the right but also the duty to pass judgment on the weight and competency of the evidence and on the credibility of the witnesses. A magistrate may not decline to bind over a defendant when there is a conflict of evidence or when there is a reasonable doubt regarding the defendant's guilt, but must leave such questions for the jury at trial. Contrary to the prosecutor's argument, nothing in MCL 766.1 *et seq*. suggests that a magistrate's consideration of credibility at a preliminary examination should be limited to whether testimony was so far impeached that it was deprived of all probative value or contradicted indisputable physical facts or defied physical realities, and the adversarial nature of a preliminary examination would be largely meaningless if a magistrate were required to accept as true any testimony that met this standard. While this limitation makes sense in the context of a motion for a new trial because it is the jury's constitutional duty as the trier of fact to assess credibility and to render the ultimate factual findings necessary to convict a defendant, a preliminary examination is a statutory creation in which the magistrate is the trier of fact, thus making it the magistrate's duty to determine whether there is probable cause to bind over a defendant. A necessary corollary of this general duty is the duty to pass judgment not only on the weight and competency of the evidence, but also on the credibility of the witnesses.

2. The magistrate in this case articulated several reasons in particular for finding Larkins's testimony not credible, including the fact that he claimed to be negotiating for Christmas gifts while defendant was pointing a gun at him, that he freely entered the car with defendant despite allegedly having been threatened by defendant in the past and not having access to a cell phone to seek help, that he had never called the police to report defendant's earlier threats, and that his testimony was "all over the place everywhere." These reasons, considered in light of the magistrate's superior ability to observe Larkins's demeanor while testifying, afforded the magistrate a principled basis for concluding that Larkins's testimony was not credible, and therefore the magistrate's credibility determination was not outside the range of principled outcomes.

Affirmed.

CRIMINAL LAW — PRELIMINARY EXAMINATIONS — CREDIBILITY DETERMINATIONS.

A magistrate's duty at a preliminary examination is to consider all the evidence presented, including the credibility of witnesses' testimony, and to determine on that basis whether there is probable cause to believe that the defendant committed a crime; a magistrate's consideration of credibility at a preliminary examination is not limited to whether testimony was so far impeached that it was deprived of all probative value or contradicted indisputable physical facts or defied physical realities (MCL 766.1 *et seq*.).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Deborah K. Blair*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Kristin LaVoy*) for defendant.

Amicus Curiae:

Speaker Law Firm, PLLC (by *Liisa R. Speaker*) for the Michigan District Judges Association.

MARKMAN, C.J. The issue in this case concerns the manner in which a magistrate may consider the credibility of witnesses' testimony in determining whether to bind over a defendant. We hold that a magistrate's duty at a preliminary examination is to consider all the evidence presented, including the credibility of witnesses' testimony, and to determine on that basis whether there is probable cause to believe that the defendant committed a crime, i.e., whether the evidence presented is "sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003) (quotation marks and citation omitted). Because the

magistrate in this case did not abuse her discretion in determining that the complainant's testimony was not credible and there was no other evidence presented during the preliminary examination, we affirm the district court's order dismissing the charges against defendant.

I. FACTS AND HISTORY

Defendant, Tremel Anderson, was charged with assault with intent to commit murder, MCL 750.83; carrying a concealed weapon, MCL 750.227; felonious assault, MCL 750.82; and carrying a firearm during the commission of a felony, MCL 750.227b. At the preliminary examination, the complainant, Michael Larkins, testified as follows.

At approximately 11:30 p.m. on December 24, 2014, defendant was driving Larkins home when they got into an argument. Larkins and defendant had a newborn baby together, but they were not in a relationship. Defendant was angry because Larkins did not buy a swing for their infant son and because she believed that Larkins was in contact with his ex-girlfriend. During the argument, defendant threatened to kill Larkins, grabbed a gun from between her thighs, and pointed it at him. Defendant kept driving for five minutes with the gun pointed at Larkins but eventually pulled over to the side of the road approximately two blocks from Larkins's home. For five to seven minutes, defendant and Larkins continued to argue while defendant kept the gun pointed at Larkins. Defendant then demanded that Larkins return a spare set of keys to her car, while the latter sought to negotiate a trade of the keys for Christmas gifts that were in defendant's car. When Larkins refused to give

defendant the keys, defendant called the police.[1] Larkins believed that defendant called the police in order to create a diversion. While defendant was on the phone with the police, Larkins yelled for help. Defendant then attempted to fire the gun at Larkins, but the gun failed to discharge. Larkins jumped out of the car and ran away as defendant fired three more shots in his direction, but none of the shots hit Larkins. Finally, defendant threw Larkins's belongings out of her car and drove away. Larkins reached a neighbor's home and called the police.

Larkins's testimony constituted the only evidence presented at the preliminary examination. The magistrate found this testimony not credible and therefore dismissed the complaint:

> [W]ell, let me tell you what my issues are so that we can go straight to the point, huge issues with credibility. This young man wants me to believe that somebody had a gun on him; they pulled the car over; he asked to get out; but he wanted his Christmas gifts.
>
> He is afraid because this person had threatened to kill him and they're pointing a gun at him, but he wants to get his Christmas gifts for his family. I don't [sic] any testimony about a handgun. If I don't believe this witness, if I find him to not be credible, which in a preliminary examination, I have to determine the credibility of the witness.
>
> You've put on no witness to tell me that there was a handgun recovered. You've put on no witness to tell me that there was some spent casings, shell casings that were recovered.
>
> There's no witness, other than this young man, who is just all over the place everywhere and although he's claimed that this gun was pulled out, I'm just going to tell

[1] Larkins testified that he did not call the police because his phone's battery was dead.

> you, I am having a hard time believing that his life was at stake and we have no tape of the 911 call that supports that he felt that he was in danger.
>
> We have nothing else but his testimony that is, quite frankly, that is just incredible. He is not a credible witness.

The magistrate also noted that, despite having allegedly been threatened by defendant in the past, Larkins never called the police and that he entered the car with defendant even though he did not have a functioning cell phone with him to seek help. The prosecutor appealed the magistrate's decision in the circuit court, which treated the claim of appeal as a motion and denied it without further explanation,[2] and the Court of Appeals affirmed in a split decision. *People v Anderson*, unpublished per curiam opinion of the Court of Appeals, issued November 29, 2016 (Docket No. 327905).

II. STANDARD OF REVIEW

This Court recently described the standard of review applicable to a magistrate's determination as to whether to bind over a defendant:

> In order to bind a defendant over for trial in the circuit court, the district court must find probable cause that the defendant committed a felony. This standard requires evidence of each element of the crime charged or evidence

[2] As the Court of Appeals noted, the circuit court erred by treating the prosecutor's appeal as a "motion" and "denying" the "motion" without issuing an oral or written opinion. MCR 7.103(A)(1) (providing a circuit court jurisdiction over an appeal of a final judgment of a district court); MCR 7.114(B) (requiring a circuit court to decide such an appeal "by oral or written opinion and issue an order"). However, because the prosecutor does not seek any relief for this error, the issue must be deemed abandoned. *People v Bean*, 457 Mich 677, 685 n 13; 580 NW2d 390 (1998), citing *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

> from which the elements may be inferred. Absent an abuse of discretion, a reviewing court should not disturb the district court's bindover decision. An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. [*People v Seewald*, 499 Mich 111, 116; 879 NW2d 237 (2016) (quotation marks and citations omitted).]

Questions of statutory interpretation are reviewed de novo. *People v Calloway*, 500 Mich 180, 184; 895 NW2d 165 (2017).

III. ANALYSIS

A. PRELIMINARY EXAMINATIONS

While "the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention," *Gerstein v Pugh*, 420 US 103, 126; 95 S Ct 854; 43 L Ed 2d 54 (1975), a defendant has no constitutional right to an adversarial hearing to challenge the existence of probable cause, *id*. at 120. However, in Michigan, "[t]he state and the defendant" do have a statutory right "to a prompt examination and determination by the examining magistrate in all criminal causes . . . ." MCL 766.1. Therefore, the proper role of a magistrate during a preliminary examination constitutes a question of statutory interpretation, the resolution of which begins with an examination of the language of the statute. *People v Feeley*, 499 Mich 429, 435; 885 NW2d 223 (2016). When interpreting a statute, "[a]ll 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." MCL 8.3a. "When the lan-

guage of a statute is clear, it is presumed that the Legislature intended the meaning expressed therein." *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 529; 872 NW2d 412 (2015).

MCL 766.4(6) provides that "[a]t the preliminary examination, a magistrate shall examine the complainant and the witnesses in support of the prosecution, on oath . . . concerning the offense charged and in regard to any other matters connected with the charge that the magistrate considers pertinent." The rules of evidence apply (with limited exceptions) to the proceeding, MCL 766.11b(1), and a defendant may cross-examine the prosecutor's witnesses and present witnesses on his or her own behalf, MCL 766.12.

> *If the magistrate determines at the conclusion of the preliminary examination that a felony has not been committed or that there is not probable cause for charging the defendant with committing a felony, the magistrate shall either discharge the defendant or reduce the charge to an offense that is not a felony.* If the magistrate determines at the conclusion of the preliminary examination that a felony has been committed and that there is probable cause for charging the defendant with committing a felony, the magistrate shall forthwith bind the defendant to appear within 14 days for arraignment before the circuit court of that county, or the magistrate may conduct the circuit court arraignment as provided by court rule. [MCL 766.13 (emphasis added).]

Thus, a magistrate is required to "determine at the conclusion of the preliminary examination" whether there is "probable cause" that the defendant has committed a crime. "Probable cause requires a quantum of evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." *Yost*, 468 Mich at 126 (quotation marks and citations

omitted). The relevant definitions of "determine" are "to settle or decide by choice of alternatives or possibilities" and "to find out or come to a decision about by investigation, reasoning, or calculation[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed), defs 1c and 4. The use of the word "determine" communicates that the magistrate must exercise some judgment in analyzing the evidence at the preliminary examination when deciding whether there is probable cause to bind over a defendant. Finally, a magistrate's "determin[ation]" regarding the existence of probable cause must be made "at the conclusion of the preliminary examination . . . ." MCL 766.13. This strongly suggests that a magistrate must consider the totality of the evidence presented at that juncture, and that a magistrate must do so even if evidence introduced at the outset of the preliminary examination initially appears to have satisfied the elements of a criminal offense. See *People v King*, 412 Mich 145, 154; 312 NW2d 629 (1981) ("The magistrate is required to make his determination *after* an examination of the whole matter[.]") (quotation marks and citation omitted; emphasis added). In sum, MCL 766.13 requires a magistrate to consider *all* the evidence presented and on that basis to "determine" whether there is "a quantum of evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." *Yost*, 468 Mich at 126 (quotation marks and citation omitted).

This Court has held that during a preliminary examination, "the magistrate ha[s] not only the right but, also, the duty to pass judgment not only on the weight and competency of the evidence, but also [on] the credibility of the witnesses." *People v Paille #2*, 383 Mich 621, 627; 178 NW2d 465 (1970); see also

King, 412 Mich at 153 (quoting *Paille*). We have also held that a magistrate may not decline to bind over a defendant "where there is a conflict of evidence, or where there is a reasonable doubt as to his guilt; all such questions should be left for the jury upon the trial." *Yaner v People*, 34 Mich 286, 289 (1876); see also *People v Doss*, 406 Mich 90, 103; 276 NW2d 9 (1979). In *Yost*, we stated that "[t]here is some tension between" these two principles, but we declined "to clarify the interplay between" these principles in that case. *Yost*, 468 Mich at 128 n 8. The prosecutor argues that this Court should now resolve this "tension" by adopting the standard from *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998)—limiting a judge's authority to assess witnesses' credibility in ruling on a motion for a new trial—in the context of preliminary examinations. Specifically, the prosecutor argues that a magistrate must accept the veracity of testimony offered at a preliminary examination unless the "testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or [the testimony] contradicted indisputable physical facts or defied physical realities . . . ." *Id*. at 645-646 (quotation marks and citations omitted).

We respectfully decline the prosecutor's invitation to incorporate the *Lemmon* standard into preliminary examinations. Initially, we disagree with the prosecutor that a magistrate's "duty" to consider the credibility of witnesses' testimony is inconsistent with the proposition that a magistrate should bind over a defendant if "there is a conflict of evidence or where there is a reasonable doubt as to his guilt." *Yost*, 468 Mich at 128-129. Rather, we believe this proposition is essentially an alternative articulation of the probable-cause standard for binding over a defendant

in contrast to the standard for conviction at trial.[3] That is, "where there is a conflict of evidence or where there is a reasonable doubt as to [a defendant's] guilt," *Yaner*, 34 Mich at 289, there generally will be probable cause to bind over a defendant, even if "the magistrate may have had reasonable doubt that defendant committed the crime," *Yost*, 468 Mich at 133. Accordingly, while there may indeed be "some tension" between these two principles, there is no actual conflict that requires resolution by this Court, but rather only clarification.

Nothing in MCL 766.1 *et seq*. suggests that a magistrate's consideration of credibility should be limited to whether "testimony was so far impeached that it was deprived of all probative value . . . or contradicted indisputable physical facts or defied physical realities . . . ." *Lemmon*, 456 Mich at 645-646 (quotation marks and citations omitted). To the contrary, the adversarial nature of a preliminary examination would be largely meaningless if a magistrate were required to accept as true any testimony that is not patently incredible or that does not defy physical reality. See *People v Richardson*, 469 Mich 923, 938 (MARKMAN, J.,

[3] *Yaner*, 34 Mich at 289 ("We do not desire to be understood that the magistrate must nicely weigh evidence as a petit jury would, or that he must discharge the accused where there is a conflict of evidence, or where there is a reasonable doubt as to his guilt; all such questions should be left for the jury upon the trial."); *People v Medley*, 339 Mich 486, 492; 64 NW2d 708 (1954) ("The object of the examination is not to determine guilt or innocence, and it is not as necessary to make strict proof as on the trial. The magistrate . . . is not required to nicely weigh the evidence as a petit jury, or to discharge the accused where there is a conflict of evidence, or where there is a reasonable doubt as to his guilt, as all such questions should be left to the jury upon the trial. It is not necessary to establish the respondent's guilt beyond a reasonable doubt before the examining magistrate, but only to offer proof that an offense . . . has been committed, and there is probable cause to believe the defendant guilty thereof.").

dissenting) ("[I]f a magistrate is obligated to accept at face value *any* testimony, there would be little reason to allow for cross-examination or for a defense presentation at all at the preliminary examination. . . . Because MCL 766.12 specifically provides for the operation of the adversarial process at the preliminary examination, it is reasonable to conclude that the magistrate is not precluded altogether from assessing witness credibility."). Moreover, the *Lemmon* standard is designed in particular to prevent a court from acting as a "thirteenth juror and overrul[ing] the credibility determinations of the jury . . . ." *Lemmon*, 456 Mich at 637. This limitation makes sense in the context of a motion for a new trial because it is the *jury's* constitutional duty as the trier of fact to assess credibility and to render the ultimate factual findings necessary to convict a defendant. *Id*. at 637-638, 642-643; Const 1963, art 1, § 14. By contrast, a preliminary examination is a statutory creation in which the magistrate is the trier of fact; it is thus the magistrate's duty to "determine" whether there is probable cause to bind over a defendant. MCL 766.13.[4] A necessary corollary of this general duty is "the duty to pass judgment not only on the weight and competency of the evidence, but also [on] the credibility of the witnesses." *Paille*, 383 Mich at 627. We therefore conclude that the *Lemmon*

[4] In addition, where a magistrate declines to bind over a defendant for trial, the prosecutor may simply recharge the defendant and provide additional evidence at a subsequent preliminary examination. See MCR 6.110(F). By contrast, when a judge grants a motion for a new trial, the prosecutor must retry the defendant. Conducting two jury trials requires the expenditure of significantly more time and resources than conducting two preliminary examinations. These widely disparate consequences arguably justify providing a magistrate with greater authority to examine credibility during a preliminary examination than a judge has in entertaining a motion for a new trial.

standard is inapplicable to a magistrate's review of the evidence presented during a preliminary examination.

None of this is to suggest that a magistrate may weigh witnesses' credibility in the same manner as a jury. While a jury must find a defendant guilty *beyond a reasonable doubt*, a magistrate must only determine that there is *probable cause* to believe that the defendant has committed a crime. "[T]he gap between probable cause and guilt beyond a reasonable doubt is broad," *Yost*, 468 Mich at 126, and therefore, unlike a jury, "a magistrate may legitimately find probable cause while personally entertaining some reservations regarding guilt," *id*. at 133-134. Accordingly, in considering the credibility of witnesses, a magistrate may only decline to bind over a defendant if a witness's lack of credibility, when considered together with the other evidence presented during the examination, would preclude "a person of ordinary prudence and caution [from] conscientiously entertain[ing] a reasonable belief of the accused's guilt." *Id*. at 126 (quotation marks and citation omitted).

In sum, we decline to adopt the *Lemmon* standard in the context of preliminary examinations. Instead, we clarify that a magistrate's duty at a preliminary examination is to consider all the evidence presented, including the credibility of both the prosecution and defense witnesses' testimony, and to determine on that basis whether there is probable cause to believe that the defendant has committed a crime, i.e., whether the evidence presented is "sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief in the accused's guilt." *Id*. (quotation marks and citation omitted). If a witness's lack of credibility, when considered together with the other evidence presented during the examination, is so

lacking that "a person of ordinary prudence and caution [would not] conscientiously entertain a reasonable belief of the accused's guilt," a magistrate may not bind over the defendant for trial. *Id*. (quotation marks and citation omitted); see also MCL 766.13.

B. APPLICATION

The magistrate in this case determined that the complainant's testimony was not credible and, absent any other evidence implicating defendant, declined to bind her over. This determination is reviewed for an abuse of discretion. *Seewald*, 499 Mich at 116. "At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003) (quotation marks and citations omitted). Moreover, in reviewing a magistrate's credibility determination, an appellate court must remain mindful that "the judge who hears the testimony has the distinct advantage over the appellate judge, who must form judgment solely from the printed words." *Paille*, 383 Mich at 627; see also *Lemmon*, 456 Mich at 646 ("The credibility of a witness is determined by more than words and includes tonal quality, volume, speech patterns, and demeanor, all giving clues to the factfinder regarding whether a witness is telling the truth.").

The magistrate here articulated several reasons in particular for finding the complainant's testimony not credible. Specifically, she noted that: (1) the complain-

ant had a gun pointed at him, yet he wanted his Christmas gifts and sat in the car negotiating for those gifts; (2) despite allegedly having been threatened by defendant in the past and not having access to a cell phone to seek help, the complainant freely entered the car with defendant; (3) the complainant never called the police to report defendant's earlier threats; and (4) the complainant's testimony was "all over the place everywhere." These reasons, considered in light of the magistrate's superior ability to observe the demeanor of the complainant while testifying, afforded the magistrate a "principled" basis for concluding that the complainant's testimony was not credible, and therefore her credibility determination was not "outside the range of principled outcomes." Because there was no other evidence upon which the magistrate could find probable cause to bind over defendant, the magistrate did not abuse her discretion by dismissing the complaint.

IV. CONCLUSION

We reaffirm and clarify that a magistrate possesses a duty to consider the credibility of witnesses' testimony, in conjunction with all the other evidence presented at a preliminary examination, in determining whether there is probable cause to bind over a defendant, i.e., whether the evidence presented is "sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." *Yost*, 468 Mich at 126 (quotation marks and citation omitted). We further hold that the magistrate in this case did not abuse her discretion in determining that the complainant's testimony was not credible and, in the absence of any other evidence,

declining to bind over defendant. Accordingly, we affirm the district court's order dismissing the charges against defendant.

ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, WILDER, and CLEMENT, JJ., concurred with MARKMAN, C.J.

MARLETTE AUTO WASH, LLC v VAN DYKE SC PROPERTIES, LLC

Docket No. 153979. Argued November 8, 2017 (Calendar No. 2). Decided March 19, 2018.

Plaintiff, Marlette Auto Wash, LLC, brought an action in the Sanilac Circuit Court, claiming that it had an easement through a parking lot owned by defendant, Van Dyke SC Properties, LLC, for customers to access a car wash that plaintiff had purchased in 2007. Defendant brought a counterclaim, seeking to quiet title and obtain monetary damages for expenses relating to maintenance of the parking lot. The parties' parcels were originally owned by Bernard and Evelyn Zyrowski as a single unimproved tract of land at the corner of a highway and a village street. In 1988, the Zyrowskis conveyed the land to B & J Investment Company, which was owned by Bernard and his son James Zyrowski, and the land was split into two parcels. B & J opened a car wash on the corner parcel in 1989. Although the car wash was initially accessible from both the highway and the street, car wash customers generally used the parking lot of the adjoining parcel to get to and from the car wash. This adjoining parcel was sold to Marlette Development Corporation in 1988, which opened a shopping center in 1990. When Marlette Development's deed was recorded, no easement was reserved for the benefit of the car wash property, and car wash customers continued to use the parking lot for access. In 2000, the village of Marlette closed the street entrance to the car wash, leaving an inconvenient turn from the highway as the only access apart from the parking lot. Car wash customers continued to use the parking lot for access without incident until Marlette Development sold its property to defendant in 2013. At this point, defendant's sole owner—James Zyrowski, former co-owner of B & J Investment, which had sold the car wash in 2005—informed plaintiff that unless it contributed $1,500 a month to maintain the parking lot, Zyrowski would park trailers at the property line, closing off access to the car wash through the parking lot. Plaintiff refused, and this lawsuit followed. The court, Donald A. Teeple, J., ruled that a prescriptive easement benefiting the car wash had vested in 2005, and it rejected defendant's counterclaim for parking lot expenses because the evidence supporting the claim had not been disclosed to

plaintiff before trial. In an unpublished per curiam opinion, the Court of Appeals, MURPHY, P.J., and CAVANAGH and RONAYNE KRAUSE, JJ., affirmed the trial court's decision excluding defendant's counterclaim evidence but reversed concerning the easement claim on the grounds that plaintiff had failed to establish privity of estate with the previous owner and no previous owner of the car wash had asserted a claim of prescriptive easement with regard to defendant's property. *Marlette Auto Wash, LLC v Van Dyke SC Props, LLC*, unpublished opinion of the Court of Appeals, issued May 10, 2016 (Docket No. 326486). The Supreme Court granted plaintiff's application for leave to appeal. 500 Mich 950 (2017).

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

Michigan caselaw establishes that the open, notorious, adverse, and continuous use of property for the relevant statutory period creates a prescriptive easement that is appurtenant, without the need for the claimant to show privity of estate with the prior owner. Moreover, the prior owner of the dominant estate is not required to take legal action to claim the easement in order for a vested prescriptive easement to exist. Because the Court of Appeals erred by concluding otherwise, the judgment of the Court of Appeals was reversed in part and the case was remanded to that Court for consideration of any remaining appellate issues.

1. A party claiming adverse possession must show clear and cogent proof of possession that is actual, continuous, open, notorious, exclusive, hostile, and uninterrupted for the relevant statutory period. When the elements of adverse possession have been met, the law presumes that the true owner, by acquiescence, has granted the land, or interest to the land, so held adversely. The elements necessary to give rise to a prescriptive right are the same as those of title by adverse possession, with the exception that possession does not have to be exclusive. If no single period of adverse use amounts to the 15-year statutory period, a party claiming a prescriptive interest may tack the possessory periods of their predecessors in interest to aggregate the 15-year period of prescription if the claimant can show privity of estate. Privity of estate may only be established if the deed includes a description of the disputed property, there was an actual transfer or conveyance of the disputed property by parol statements made at the time of conveyance, or a property owner is well-acquainted with the previous property owner and had visited and used the disputed property for many years before acquiring title. It was not necessary for plaintiff to have used defendant's property for

15 years or to establish privity of estate because Michigan caselaw makes clear that a claimant seeking to prove the existence of a prescriptive easement may establish that the requisite elements were met by the claimant's predecessor in interest. When a prescriptive easement vests with the claimant's predecessors in interest, the easement is appurtenant and transfers to subsequent owners in the property's chain of title without the need for the subsequent owner to establish privity of estate. The fact that property has been used in excess of the prescriptive period for many years is not pertinent to whether the requirements of a prescriptive easement have been met, nor is it germane to whether the proponent of the easement is required to establish privity of estate with a predecessor in the proponent's chain of title under whose ownership a prescriptive easement had vested. Rather, when the parties seek a judicial determination conclusively settling their respective property interests, and the proponent of the alleged easement provides evidence that the easement has been used in excess of the 15-year prescriptive period by many years, the burden of production is then shifted to the opponent of the easement to establish that the use was merely permissive.

2. The Court of Appeals erred by concluding that plaintiff's claim failed because no previous owner of the car wash asserted a claim of prescriptive easement over defendant's property. If a prior property owner had successfully asserted a prescriptive easement claim, marketable title of record as a result of the previous judicial decree would already exist for the property, and the current property owner would have no reason to file a lawsuit seeking to establish record title to the property by prescriptive easement. Moreover, one gains title by adverse possession when the period of limitations expires, not when an action regarding the title to the property is brought. Defendant's concern that a contrary holding would recognize the existence of secret easements not apparent to the purchaser of the servient estate was unfounded given that, in order to successfully establish a prescriptive easement, a plaintiff must show clear and cogent proof of possession that is so open, visible, and notorious as to raise the presumption of notice to the world that the right of the true owner is invaded intentionally in such a way that if the true owner remains in ignorance it is that person's own fault. In addition, a prescriptive easement is extinguished after 15 years of nonuse by the owner of the dominant estate, and a purchaser who did not know about the existence of a claim of title will be regarded as a bona fide purchaser without notice if the land is not adversely held by a party in possession at the time of purchase.

Reversed in part and remanded to the Court of Appeals.

Justice CLEMENT took no part in the decision of this case.

EASEMENTS — PRESCRIPTIVE EASEMENTS — ELEMENTS.

The open, notorious, adverse, and continuous use of property for the relevant statutory period creates a prescriptive easement that is appurtenant, without the need for the claimant to show privity of estate with the prior owner; the prior owner of the dominant estate is not required to take legal action to claim the easement in order for a vested prescriptive easement to exist (MCL 600.5801).

Warner Norcross & Judd LLP (by *Gaëtan Gerville-Réache*) for plaintiff.

Bursch Law PLLC (by *John J. Bursch*) and *Kelly Law Firm* (by *David A. Keyes*) for defendant.

Amici Curiae:

Couzens, Lansky, Fealk, Ellis, Roeder & Lazar, PC (by *Ronn S. Nadis* and *Sarah Heisler Gidley*) for the Real Property Law Section of the State Bar of Michigan.

Foster, Swift, Collins & Smith, PC (by *Richard C. Kraus*) for the Michigan Bankers Association and the Michigan Credit Union League.

WILDER, J. In this case, plaintiff claims a prescriptive easement for ingress and egress over defendant's property on the basis of open, notorious, adverse, and continuous use of that property by a predecessor of plaintiff for at least 15 years. The question presented here is whether such use creates a prescriptive easement that is appurtenant, without regard to whether the previous owner of the dominant estate took legal action to claim the easement. The answer to that inquiry is yes.

MCL 600.5801(4), which provides for a 15-year period of limitations, is not contingent on whether the

prior owner of the dominant estate took legal action to claim the prescriptive easement. Moreover, our caselaw establishes that one seeking to obtain record title of a prescriptive easement may establish that the elements were met by a prior owner in the claimant's chain of title. When a prescriptive easement has vested under a previous property owner's possession, the easement is appurtenant and is conveyed to subsequent owners in the chain of title without the need to show privity of estate. *Wortman v Stafford*, 217 Mich 554; 187 NW 326 (1922); *Haab v Moorman*, 332 Mich 126; 50 NW2d 856 (1952).

The Court of Appeals erred by requiring plaintiff to establish privity of estate with the previous owner, regardless of whether plaintiff could establish that the elements of a prescriptive easement were satisfactorily met by that prior owner. Moreover, the Court of Appeals erred by holding that the previous owner of the dominant estate must have taken legal action to claim the prescriptive easement in order for plaintiff to prove that a prescriptive easement had vested during the preceding property owner's tenure. Title by adverse possession is gained when the period of limitations expires, not when legal action quieting title to the property is brought. See *Gardner v Gardner*, 257 Mich 172, 176; 241 NW 179 (1932); *Matthews v Natural Resources Dep't*, 288 Mich App 23, 37; 92 NW2d 40 (2010). We reverse the Court of Appeals judgment in part and remand to that Court for consideration of any outstanding appellate issues in this case.

I. FACTS AND PROCEEDINGS

In early 1988, Bernard and Evelyn Zyrowski owned a single unimproved tract of land at the corner of M-53 and Enterprise Drive (which later came to be

known as Euclid Street) in Marlette, Michigan. The land was conveyed to B & J Investment Company, which was owned by Bernard Zyrowski and his son James Zyrowski. The land was split into two parcels.

In the summer of 1988, B & J Investment began construction of a car wash on one of the two parcels. The remaining parcel was sold to Marlette Development Corporation by land contract on October 5, 1988. The car wash began operating in 1989, and from that date onward customers of the car wash used the parking lot of the other parcel as one means of ingress to and egress from the car wash. In March 1990, Marlette Development's land contract was paid off and the deed recorded. No easement was reserved for the benefit of the car wash property. Several months later, Marlette Development Corporation opened a shopping center on their property.

In March 2000, the village of Marlette closed the north entrance to the car wash from Euclid Street. After the entrance was closed, B & J Investment expanded the car wash, adding four additional car wash bays across that newly closed entrance. Closing the north entrance left two ways to access the car wash: (1) from M-53, and (2) through the shopping center parking lot. The M-53 access was problematic, however, because it required customers to drive through a (sometimes occupied) semi-truck car wash bay in order to access the western portion of the car wash property. Access to this portion of the property was necessary for all those customers wishing to use the automatic car wash bays or the four newly built self-service car wash bays. Local residents testified that they never saw anyone access the car wash by the M-53 entrance because it was a dangerous turn.

In April 2005, B & J Investment sold the car wash to Lipka Investments. At closing, Gary Lipka inquired how customers were to access the western portion of the car wash property. He was informed by Zyrowski that the car wash had been accessed through the shopping center parking lot since the car wash opened and that the parking lot was owned by the "Marlette Business Group." After talking to Zyrowski, Lipka believed that there would be no issue with the continued use of the parking lot because it had "been used for so long and never been blocked off . . . ."

Approximately one year later, Lipka Investments defaulted on its loan with Tri-County Bank. Lipka Investments conveyed the car wash property to the bank in lieu of foreclosure on July 14, 2006. Shortly thereafter, the bank conveyed the property to GLCW, LLC, the property-holding entity of the bank. On September 28, 2006, GLCW entered into a lease and purchase agreement with plaintiff Marlette Auto Wash, LLC.

Six months later, Marlette Auto Wash purchased the property from GLCW. The purchase agreement did not include an easement, and Marlette does not allege that any statements were made regarding vehicular access at the time of purchase. Customers continued without interference to access the car wash by driving through the shopping center parking lot.

On May 22, 2013, defendant, Van Dyke SC Properties, LLC, purchased the shopping center property from Marlette Development Corporation. James Zyrowski, former co-owner of B & J Investment, is the sole owner of Van Dyke Properties. After undergoing renovations, the shopping center opened in November 2013. Shortly after opening the shopping center, defendant made clear that unless plaintiff contributed $1,500 per month to

support the overall maintenance of the parking lot, defendant would park trailers at the property line, closing off access to the car wash. Plaintiff refused.

The following month, the village of Marlette encountered heavy snowfalls. After plaintiff plowed snow from its property onto defendant's property, defendant blocked the western entrance to the car wash with snow, rendering the car wash property inaccessible for a day and a half. After that incident, plaintiff filed the present lawsuit, claiming an easement for ingress and egress through defendant's parking lot. Defendant filed a counterclaim, seeking to quiet title and seeking monetary damages for parking lot maintenance, upkeep, and insurance.

A bench trial was conducted. At trial, James Zyrowski testified that he believed that B & J Investment had permission to use the parking lot for ingress to and egress from the car wash during the period that he and his father owned the car wash. This belief was based on a conversation that Zyrowski had with his father. Zyrowski did not recall when the conversation with the elder Zyrowski took place. Zyrowski was not present when the permission was allegedly given to his father, did not recall the year permission was given to his father, and did not recall any details regarding the scope of the permission. He acknowledged that B & J Investment never contributed any money toward the upkeep and maintenance of the parking lot.

In a written opinion, the trial court held that plaintiff had established a prescriptive easement for ingress and egress over defendant's property. The court found, among other things, that a prescriptive easement benefiting the car wash had vested in 2005. The court further concluded, given its authority as a court of equity, that the person now trying to preclude the

current owners of the car wash from using the parking lot access was the same person who used this same parking lot for access to *his* car wash when he owned the car wash property. The trial court excluded defendant's evidence in support of its counterclaim seeking "amounts claimed for contributions for parking lot expenses," because the evidence was not disclosed to plaintiff before trial.

In an unpublished per curiam opinion, the Court of Appeals affirmed in part, vacated in part, and remanded for entry of judgment in defendant's favor on the prescriptive easement issue. The Court of Appeals affirmed the trial court's decision regarding defendant's counterclaim, concluding that the trial court had not erred by excluding defendant's evidence as a discovery sanction.

Concerning the easement claim, the Court of Appeals reversed, holding that the trial court had erred by granting a prescriptive easement because plaintiff had failed to establish privity of estate with the previous owner. Plaintiff argued that privity need not be established because the 15-year period elapsed during the time that Zyrowski owned the car wash, and a prescriptive easement vested to the benefit of all subsequent property owners. While the Court of Appeals acknowledged that a property interest acquired through adverse possession vests when the statutory period expires and not when the action was brought, the Court of Appeals held that plaintiff's claim failed because "no previous owner of the car wash asserted a claim of prescriptive easement with regard to defendant's property." *Marlette Auto Wash, LLC v Van Dyke SC Props, LLC*, unpublished per curiam opinion of the Court of Appeals, issued May 10, 2016 (Docket No. 326486), p 3. The panel, being of the view that plaintiff

had failed to support its assertion that privity of estate need not be established after the 15-year period is met by a previous owner with any legal authority, cited *Reed v Soltys*, 106 Mich App 341, 346; 308 NW2d 201 (1981), for the proposition that a presumption of a prescriptive easement arises only when the property has been used in excess of the statutory period by "many years," and concluded that because the shopping center parking lot had not been used adversely for "many years" more than 15, no such presumption arose in this case. *Marlette*, unpub op at 3.

We granted plaintiff's application for leave to appeal, asking the parties to address "whether open, notorious, adverse, and continuous use of property for at least fifteen years creates a prescriptive easement that is an easement appurtenant, without regard to whether the owner of the dominant estate took legal action to claim the easement." *Marlette Auto Wash, LLC v Van Dyke SC Props, LLC*, 500 Mich 950 (2017).

II. ANALYSIS

Whether a predecessor in title to a dominant estate is required to take legal action to claim a prescriptive easement in order to create an easement appurtenant is a question of law, which we review de novo. See *Beach v Lima Twp*, 489 Mich 99, 106; 802 NW2d 1 (2011). Moreover, an action to quiet title is an equitable action that we also review de novo. *Id*.

The adverse-possession statute, first codified in 1846, has a long pedigree in Michigan law.[1] MCL 600.5801 provides in relevant part:

[1] Initially, the period of limitations was 20 years. See 1846 RS, ch 139, § 1; 1857 CL 5350. The 15-year period of limitations was first adopted in 1863. See 1863 PA 227, § 1.

> No person may bring or maintain any action for the recovery or possession of any lands or make any entry upon any lands unless, after the claim or right to make the entry first accrued to himself or to someone through whom he claims, he commences the action or makes the entry within the periods of time prescribed by this section.
>
> * * *
>
> (4) In all other cases under this section, the period of limitation is 15 years.

The elements of adverse possession are also well established. A party claiming adverse possession must show clear and cogent proof of possession that is actual, continuous, open, notorious, exclusive, hostile, and uninterrupted for the relevant statutory period. *Yelverton v Steele*, 40 Mich 538, 542 (1879); *Vanden Berg v De Vries*, 220 Mich 484, 486; 190 NW 226 (1922); *Beach*, 489 Mich at 106. When the elements of adverse possession have been met, " 'the law presumes that the true owner, by his acquiescence, has granted the land, or interest to the land, so held adversely.' " *Marr v Hemenny*, 297 Mich 311, 314; 297 NW 504 (1941), quoting *Turner v Hart*, 71 Mich 128, 138; 38 NW 890 (1888). See also *Smith v Dennedy*, 224 Mich 378, 384; 194 NW 998 (1923) (concluding that, after 17 years of use, "[t]he statutory period having run, the prescriptive right ripened").

Just as ownership of land may be acquired through adverse possession, so too may an easement be acquired through prescription. *Outhwaite v Foote*, 240 Mich 327, 330-331; 215 NW 331 (1927). "The elements necessary to give rise to a prescriptive right are the same as those of title by adverse possession, with the exception that it does not have to be exclusive." *St Cecelia Society v Universal Car & Serv Co*, 213 Mich

569, 576; 182 NW 161 (1921); see also *Barbaresos v Casaszar*, 325 Mich 1, 8; 37 NW2d 689 (1949); *Matthews*, 288 Mich App at 37.

If "no single period" of adverse use amounts to the 15-year statutory period, a party claiming a prescriptive interest may tack the possessory periods of their predecessors in interest "to aggregate the 15-year period of prescription" if the claimant can show privity of estate. *Stewart v Hunt*, 303 Mich 161, 164; 5 NW2d 737 (1942); see also *von Meding v Strahl*, 319 Mich 598, 614; 30 NW2d 363 (1948). Privity of estate may only be established in very limited circumstances. The first is when the deed includes a description of the disputed property. *Arduino v Detroit*, 249 Mich 382, 384; 228 NW 694 (1930). The second circumstance occurs when there is an actual transfer or conveyance of the disputed property by parol statements made at the time of conveyance. *Sheldon v Mich C R Co*, 161 Mich 503, 509-510; 126 NW 1056 (1910); *Gregory v Thorrez*, 277 Mich 197, 201; 269 NW 142 (1936). Lastly, a parol transfer may occur if a property owner is "well-acquainted" with the previous property owner and had visited and used the disputed property "for many years" before acquiring title. Under those circumstances, "the parties must have understood that an easement was appurtenant to the land[.]" *von Meding v Strahl*, 319 Mich at 615.

Defendant contends that plaintiff's prescriptive easement claim fails because plaintiff has not used defendant's property for 15 years and cannot establish privity of estate. However, Michigan caselaw makes clear that a claimant seeking to prove the existence of a prescriptive easement may establish that the requisite elements were met by the claimant's predecessor in interest. When a prescriptive easement vests with

the claimant's predecessors in interest, the easement is appurtenant and transfers to subsequent owners in the property's chain of title without the need for the subsequent owner to establish privity of estate.

In *Wortman*, 217 Mich 554, La Vern Wortman and George Stafford each owned adjoining 40-acre parcels. The defendant's property had previously belonged to his father, Jonathan Stafford, and for 40 years or so Jonathan Stafford crossed the plaintiff's property in order to access the highway. Jonathan Stafford paid the previous owner $50 for a right of passage, but no writing existed to establish the nature of the right. The plaintiff filed suit to quiet title to the property, claiming that the use was "a life lease or mere license," which could not ripen into a prescriptive easement. *Id*. at 557. The defendant, on the other hand, claimed that the use was a contractually secured right of way "perfected by prescription" that passed with the property. *Id*. at 556.

The *Wortman* Court held that the facts indicated "an easement rather than a lease or a license." *Id*. at 559. Quoting *Berkey & Gay Furniture Co v Valley City Milling Co*, 194 Mich 234, 242; 160 NW 648 (1916), the Court stated that " 'the open, notorious, continuous[,] and adverse use across the land of another' " for the requisite period of limitations " 'afford[ed] a conclusive presumption of a written grant of such way . . . .' " *Wortman*, 217 Mich at 559. Moreover, " 'when the passway has been used for something like a half century, it is unnecessary to show by positive testimony that the use was claimed as a matter of right, but that after such use[] the burden is on the plaintiff to show that the use was only permissive.' " *Id*., quoting *Berkey*, 194 Mich at 242. The *Wortman* Court agreed with the trial court that the plaintiff failed to show that the defendant's use was merely permissive.

The plaintiff next argued that the defendant could not tack the defendant's period of use to that of his predecessor in interest, Jonathan Stafford. The Court rejected the claim that the defendant was required to establish privity of estate, holding:

> The question of the continuity of possession and use[] by successive holders in privity to sustain title by prescription is not involved here. *The statute of limitations had run its course in his favor long before the elder Stafford died.* Like peaceable possession and use[] continued thereafter by his successors *as of right*, and not of suffrance was but confirmatory of his established easement. [*Wortman*, 217 Mich at 560 (emphasis added).]

In *Haab*, 332 Mich 126, four property owners filed suit to prevent the defendants from blocking an alley that ran behind the plaintiffs' properties. The trial court denied injunctive relief. On appeal, this Court reversed the trial court, concluding that the plaintiffs had easements in the alley. Regarding three of the property owners, the Court held that the defendants were estopped from denying a right of way appurtenant to their properties in the alley, given that the deeds of the property owners indicated that their land was bounded by a private alley or passageway.

Concerning the fourth property owner, Peter Karson, the Court held that he possessed a prescriptive easement in the alley, explaining:

> The trial court in its opinion refers to the case of *Zemon v Netzorg*, 247 Mich 563 [226 NW 242 (1929)] which held that one might not tack his adverse holdings for less than the prescriptive period of 15 years, even if the predecessor's holdings are shown to be adverse, if there is no conveyance to him or in his chain of title purporting to convey such an easement. One Adam Schaner, however, held the Karson parcels for more than 30 years *and so established in his own name a valid easement without*

> *tacking*. Once established, the right-of-way was an easement appurtenant and therefore passed by the deed of the dominant estate although not expressly mentioned in the instrument of transfer, and even without the word "appurtenances." [*Haab*, 332 Mich at 143-144 (emphasis added).]

The Court noted that the testimony of elderly witnesses established that the alley had been used by the dominant estates "the entire time they were owned by Schaner, as well as continuously up to the present time." *Id*. at 144. Citing *Berkey & Gay Furniture Co*, the Court held that because the alley had been "used openly and notoriously for over a quarter of a century," the plaintiff was not required to prove that that the use was claimed as a matter of right. *Id*. Rather, "the burden would be on the [defendants] to show that the use was only permissive." *Id*. Because "the alley had been used continuously, openly, and notoriously," the alley "became an appurtenant easement to the Schaner properties," and the alley was "used by Karson and his predecessors in title *as a matter of right*, not by permissive use . . . ." *Id*. at 145 (emphasis added).

It is evident that, under both *Wortman* and *Haab*, when a claimant can demonstrate that a predecessor-in-interest met the requirements for the establishment of a prescriptive easement, the vested easement transfers to subsequent property owners in the chain of title without the obligation to show privity of estate. *Wortman* and *Haab* also hold that, when the property has been adversely used in excess of the prescriptive period for a substantial period of time, the burden shifts to the servient estate owner to show that the use was merely permissive. We reaffirm these principles in this case.

The Court of Appeals purported to rely on *Reed*, 106 Mich App 341, as support for its holding that plaintiff was required to show privity of estate because "a pre-

sumption of a prescriptive easement" may arise when property has been used in excess of the prescriptive period by " 'many years.' " *Marlette*, unpub op at 3, quoting *Reed*, 106 Mich App at 346. Not only is this conclusion inconsistent with the plain language of MCL 600.5801(4), *Reed* simply does not stand for that proposition. *Reed*, citing *Haab*, articulated the same burden shifting that was expressed in both *Haab* and *Wortman*:

> Mutual or permissive use of an area will not mature into a prescriptive easement unless the period of mutuality ends and adverse use continues for the statutory period. However, when use has been in excess of the prescriptive period by many years, a presumption of a grant arises and the burden shifts to the servient estate owner to show that use was merely permissive. [*Reed*, 106 Mich App at 346 (citations omitted).]

As noted in both *Wortman* and *Haab*, the fact that property has been used in excess of the prescriptive period for "many years" is not pertinent to whether the requirements of a prescriptive easement have been met; nor is it germane to whether the proponent of the easement is required to establish privity of estate with a predecessor in the proponent's chain of title under whose ownership a prescriptive easement had vested. Rather, when the parties seek a judicial determination conclusively settling their respective property interests, and the proponent of the alleged easement provides evidence that the easement has been used in excess of the 15-year prescriptive period by "many years," the burden of production is then shifted to the opponent of the easement to establish that the use was merely permissive. See *Berkey & Gay Furniture Co*, 194 Mich 234; *Wortman*, 217 Mich 554; *Engleman v Kalamazoo*, 229 Mich 603; 201 NW 880 (1925); *Outhwaite*, 240 Mich 327; *Beechler v Byerly*, 302 Mich 79; 4 NW2d 475 (1942); *Haab*, 332 Mich 126; *Myer v Franklin Hotel Co*, 354

Mich 552; 93 NW2d 224 (1958); *Loehr v Cochran*, 14 Mich App 345, 347; 165 NW2d 485 (1968) ("The essence of this presumption is that long-standing use of another's property, e.g., over 50 years, shifts the burden to the defendant-owner, to show the use was permissive."); *Widmayer v Leonard*, 422 Mich 280, 290; 373 NW2d 538 (1985) (holding that the burden of persuasion concerning a prescriptive easement remains with the claimant throughout trial; however, after many years of use, the burden of producing evidence shifts to the opponents of the easement to establish that the claimant's use was merely permissive).

The Court of Appeals' alternative rationale for rejecting plaintiff's claim is equally without merit. Quoting *Gorte v Dep't of Transp*, 202 Mich App 161; 507 NW2d 797 (1993), the Court of Appeals held that the person claiming a prescriptive easement must "act on the purported acquired right" because " 'the expiration of the period of limitation terminates the title of those who slept on their rights and vests title in *the party* claiming adverse possession.' " *Marlette*, unpub op at 3, quoting *Gorte*, 202 Mich App at 168. In the Court of Appeals' view, plaintiff's claim failed because "[i]t is undisputed that no *previous* owner of the car wash asserted a claim of prescriptive easement with regard to defendant's property." *Id*. (emphasis added).

It is not clear why the Court of Appeals believes a prior property owner must have previously asserted a prescriptive easement claim in order for a prescriptive easement to vest, because, if a prior property owner had successfully asserted a prescriptive easement claim, marketable title of record as a result of the previous judicial decree would already exist for the property, and the current property owner would have no reason to file a lawsuit seeking to establish record

title to the property by prescriptive easement. See *Escher v Bender*, 338 Mich 1, 8; 61 NW2d 143 (1953). Moreover, nothing in *Gorte* requires that a prior property owner assert a legal claim in order for a prescriptive easement to vest. In *Gorte*, the defendant argued that the plaintiffs' title to the land did not vest upon the expiration of the period of limitations but, instead, plaintiffs' possession of the property simply gave the plaintiffs the ability "to raise the expiration of the period of limitation as a defense to defendant's assertion of title." *Gorte*, 202 Mich App at 168. The *Gorte* panel concluded:

> Contrary to defendant's arguments, however, Michigan courts have followed the general rule that the expiration of the period of limitation terminates the title of those who slept on their rights and vests title in the party claiming adverse possession. Thus, assuming all other elements have been established, one gains title by adverse possession when the period of limitation expires, not when an action regarding the title to the property is brought. [*Id*. at 168-169 (citations omitted).]

Therefore, that portion of *Gorte* quoted by the Court of Appeals simply describes the general effect of an adverse-possession claim, assuming that all the other elements have been established. It does not stand for the proposition that a party must file a legal claim for title to vest by adverse possession. The final sentence of the quoted *Gorte* language specifically provides otherwise: one gains title by adverse possession when the period of limitations expires, not when an action regarding the title to the property is brought.[2] Further-

[2] The panel also cited *Siegel v Renkiewicz Estate*, 373 Mich 421, 425; 129 NW2d 876 (1964), to support its holding that tacking cannot occur without privity of estate. While it is certainly true that tacking cannot occur without privity of estate, *Siegel* has no application to the present case. In *Siegel*, the Court held that plaintiff's prescriptive-easement

more, as this Court has explained, an adverse possessor acquires legal title to property when the statutory period ends, but that title is neither recorded nor marketable until the property interest is established by judicial decree:

> This Court has long recognized the common law doctrine of adverse possession, which the Legislature has since codified. To establish adverse possession, the party claiming it must show "clear and cogent proof of possession that is actual, visible, open, notorious, exclusive, continuous and uninterrupted for the statutory period of 15 years, hostile and under cover of claim of right." After the statutory period ends, the record owner's title is extinguished and the adverse possessor acquires "legal title" to the property. Acquisition of title in this manner includes "the right to defend the possession and to protect the property against the trespass of all others." *However, the title acquired by adverse possession is neither record title nor marketable title until the adverse possessor files a lawsuit and obtains a judicial decree*. Thus, until an adverse possessor obtains the necessary judicial decree, there is no record of the adverse possessor's ownership interest to verify whether the possessor actually satisfied the elements of adverse possession. [*Beach*, 489 Mich at 106-107 (emphasis added; citations omitted).]

In urging the correctness of the Court of Appeals opinion, defendant argues that, if this Court does not require a prior property owner to take legal action to claim a prescriptive easement, the law would recognize the existence of "secret" easements not apparent to the purchaser of the servient estate. Defendant, having enjoyed the beneficial use of the parking lot access to

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claim failed because "neither plaintiff nor any of his predecessors in title enjoyed possession or use[] of the parcels in question for the necessary 15-year period," and no proof was offered regarding privity of estate. *Id*. at 425-426. *Siegel* did not hold that privity of estate was required in a case like this, where it is claimed that a prescriptive easement vested under a claimant's predecessors in interest.

the car wash, certainly has no legitimate argument that the claimed easement was in any way "secret." Moreover, in order for plaintiff to successfully establish a prescriptive easement, plaintiff must show clear and cogent proof of possession that is actual, continuous, open, notorious, hostile, and uninterrupted for the relevant statutory period. " 'The possession must be so open, visible, and notorious as to raise the presumption of notice to the world that the right of the true owner is invaded intentionally, and with the purpose to assert a claim of title adversely to his, *so that if the true owner remains in ignorance it is his own fault*.' " *Ennis v Stanley*, 346 Mich 296, 301; 78 NW2d 114 (1956), quoting *McVannel v Pure Oil Co*, 262 Mich 518, 525-526; 247 NW 735 (1933) (emphasis added). See also *Doctor v Turner*, 251 Mich 175, 186; 231 NW 115 (1930).

Thus, the very claim that plaintiff is required to prove by clear and cogent proof militates against ancient prescriptive easements arising under clandestine circumstances. Moreover, defendant's specter of secret prescriptive easements that "spring to life" many decades after their purported creation are allayed by existing legal principles. A prescriptive easement is extinguished after 15 years of nonuse by the owner of the dominant estate, without the servient estate being required to prove that its possession was hostile or adverse. *McDonald v Sargent*, 308 Mich 341, 344; 13 NW2d 843 (1944). Furthermore, a purchaser who did not know about the existence of a claim of title will be regarded as a bona fide purchaser without notice if the land is not adversely held by a party in possession at the time of purchase. See *Russell v Sweezey*, 22 Mich 235, 238-239 (1871). A bona fide purchaser "takes the property free from, and not sub-

ject to," the rights or interests of a third party. 1 Cameron, Michigan Real Property Law (3d ed) § 11.21, p 396.

III. CONCLUSION

Michigan caselaw establishes that the open, notorious, adverse, and continuous use of property for the relevant statutory period creates a prescriptive easement that is appurtenant, without the need for the claimant to show privity of estate with the prior owner. *Wortman*, 217 Mich 554; *Haab*, 332 Mich 126. Moreover, the prior owner of the dominant estate is not required to take legal action to claim the easement in order for a vested prescriptive easement to exist. Because the Court of Appeals erred by concluding otherwise, we reverse the judgment of Court of Appeals in part and remand to that Court for consideration of any remaining appellate issues.

MARKMAN, C.J., and ZAHRA, MCCORMACK, VIVIANO, and BERNSTEIN, JJ., concurred with WILDER, J.

CLEMENT, J., took no part in the decision of this case.

SAFDAR v AZIZ

Docket No. 156611. Decided March 27, 2018.

Zaid Safdar filed an action in the Oakland Circuit Court, Family Division, seeking a divorce from Donya Aziz. The court granted a judgment of divorce, which provided that the parties would share joint legal custody of their minor child and that defendant would have sole physical custody of the child. Defendant appealed the court's denial of her motion for attorney fees in relation to the judgment. While that appeal was pending in the Court of Appeals, defendant moved in the trial court for a change of domicile. The court, Lisa Langton, J., denied defendant's motion, reasoning that under MCR 7.208(A), it lacked the authority to modify the custody order while defendant's appeal of the attorney-fee award was pending in the Court of Appeals. The court rejected defendant's reliance on *Lemmen v Lemmen*, 481 Mich 164 (2008)—which held that under MCL 552.17(1) and MCR 7.208(A)(4), a trial court may modify an order or judgment concerning child support or spousal support after a claim of appeal is filed or leave to appeal is granted—reasoning that *Lemmen* was limited to when a party sought to alter child and spousal support awards while an appeal was pending and did not apply to changes in domicile. The court also denied defendant's motion for reconsideration. Defendant applied for leave to appeal in the Court of Appeals, which granted the application. The Court of Appeals, O'BRIEN, P.J., and JANSEN and MURRAY, JJ., reversed in a per curiam opinion, holding that *Lemmen* also applied to judgments concerning the care and custody of children. 321 Mich App 219 (2017). Plaintiff sought leave to appeal in the Supreme Court.

In a unanimous per curiam opinion, the Supreme Court, in lieu of granting leave to appeal and without hearing oral argument, *held*:

A circuit court has jurisdiction to consider a motion to change the domicile of a minor child established by a custody award in a divorce judgment while that underlying judgment is pending on appeal. MCL 722.27(1)(c)—a provision of the Child Custody Act (CCA), MCL 722.21 *et seq*., governing circuit courts' powers to resolve custody disputes—is an exception otherwise provided by

law to the rule in MCR 7.208(A) that a trial court may not amend a final judgment after a claim of appeal has been filed or leave to appeal has been granted.

1. MCR 7.208(A) states that a trial court may not set aside or amend a final judgment after a claim of appeal has been filed or leave to appeal has been granted except in certain situations, including, under MCR 7.208(A)(4), as otherwise provided by law. *Lemmen* held that the Legislature's grant of continuing jurisdiction to modify child and spousal support orders in divorce proceedings in MCL 552.17(1) and MCL 552.28 satisfies the "otherwise provided by law" requirement of MCR 7.208(A)(4). In so holding, *Lemmen* made clear that another law need not grant jurisdiction specifically for judgments pending on appeal to qualify as an exception under MCR 7.208(A)(4). Rather, a statute satisfies MCR 7.208(A)(4) when the Legislature has authorized continuing jurisdiction to amend or modify a final judgment. As *Lemmen* explained, the authorization in MCL 552.17(1) to amend or modify a judgment "as the circumstances of the parents and the benefit of the children require" suggested that the purpose of allowing modification of a final judgment regarding child support was to ensure the welfare of the children when the circumstances of the parents or the needs of the children have changed, and therefore requiring the trial court to wait to make modifications until after an appeal was completed would be contrary to the plain language of the statutes and would defeat their purpose.

2. The Court of Appeals erred to the extent it concluded that a circuit court may derive continuing jurisdiction over a motion for change in domicile only from MCL 552.17(1) rather than directly from MCL 722.27(1), and that portion of the decision was vacated. While *Lemmen*'s reasoning applies to the Legislature's broad grant of authority in the CCA, the circuit court's jurisdiction to modify a final judgment with respect to the child custody dispute may be derived exclusively from MCL 722.27(1) of the CCA, which applies more specifically to this situation than MCL 552.17 and is therefore favored. A motion for change of domicile brought under MCL 722.31(4) falls within the scope of a "child custody dispute" as the term is used in MCL 722.27(1). MCL 722.27(1) reflects the Legislature's intent to protect the interests of children in the face of changing circumstances by authorizing jurisdiction in the circuit court until the child reaches adulthood. MCL 722.27(1)(c) specifically permits the circuit court to modify or amend its orders when proper cause is shown or when there has been a change of circumstances. Its sole limiting principle is that the modification be in the best interests of the child. As in

Lemmen, it would be contrary to the plain language of the CCA to require a court to wait for the conclusion of an appeal to address a change in circumstances that would affect the interests of the child. Accordingly, MCL 722.27(1) authorizes the continuing jurisdiction of a circuit court to modify or amend its previous judgments or orders and is an exception to MCR 7.208(A) otherwise provided by law.

Affirmed in part and vacated in part; case remanded to the Oakland Circuit Court for further proceedings.

DIVORCE — APPEAL — MODIFICATION OF JUDGMENTS AFTER APPEAL — JURISDICTION.

A circuit court has jurisdiction to consider a motion to change the domicile of a minor child established by a custody award in a divorce judgment while that underlying judgment is pending on appeal under MCL 722.27(1)(c), which is an exception otherwise provided by law to the rule in MCR 7.208(A) that a trial court may not amend a final judgment after a claim of appeal has been filed or leave to appeal has been granted (MCR 7.208(A)(4)).

Williams, Williams, Rattner & Plunkett, PC (by *James P. Cunningham*) for plaintiff.

Clark Hill PLC (by *Randi P. Glanz* and *Cynthia M. Filipovich*) for defendant.

PER CURIAM. At issue in this case is whether a circuit court has jurisdiction to consider a motion to change the domicile of a minor child established by a custody award in a divorce judgment while that underlying judgment is pending on appeal. To answer that question, we must determine whether MCL 722.27(1)(c)—a provision of the Child Custody Act (CCA), MCL 722.21 *et seq*., governing circuit courts' powers to resolve custody disputes—falls under an exception to the rule in MCR 7.208(A) that a trial court may not amend a final judgment after a claim of appeal has been filed or leave to appeal has been granted. In lieu of granting leave to appeal, we affirm the result reached by the

Court of Appeals and hold that MCL 722.27(1) is an exception "otherwise provided by law" under MCR 7.208(A)(4).

MCR 7.208(A) provides:

> Limitations. After a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order appealed from except
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> (1) by order of the Court of Appeals,
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> (2) by stipulation of the parties,
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> (3) after a decision on the merits in an action in which a preliminary injunction was granted, or
>
> (4) as otherwise provided by law.

MCL 722.27(1) states, in relevant part:

> If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
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> * * *
>
> (c) . . . modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age and, subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b, until the child reaches 19 years and 6 months of age. The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort.

This Court reviews de novo both a trial court's jurisdictional rulings, *Jeffrey v Rapid American Corp*, 448 Mich 178, 184; 529 NW2d 644 (1995), and the proper interpretation and application of statutes and court rules, *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). De novo review means we review this issue independently, without any required deference to the trial court. See *Fletcher v Fletcher*, 447 Mich 871, 882; 526 NW2d 889 (1994) (discussing the nature of de novo review).

We have answered a question closely related to the one presented here. In *Lemmen v Lemmen*, 481 Mich 164, 167; 749 NW2d 255 (2008), we held that the Legislature's grant of continuing jurisdiction to modify child and spousal support orders in divorce proceedings in MCL 552.17(1) and MCL 552.28 satisfies the "otherwise provided by law" requirement of MCR 7.208(A)(4). In so holding, we made clear that another law need not grant jurisdiction specifically for judgments pending on appeal to qualify as an exception under MCR 7.208(A)(4). Rather, a statute satisfies MCR 7.208(A)(4) when the Legislature has authorized continuing jurisdiction to amend or modify a final judgment. In *Lemmen*, we examined the language of MCL 552.17(1) and found that its authorization to amend or modify a judgment "as the circumstances of the parents and the benefit of the children require" suggested "that the purpose of allowing modification of a final judgment regarding child support is to ensure the welfare of the children when the circumstances of the parents or the needs of the children have changed." *Lemmen*, 481 Mich at 167. "[T]o require the trial court to wait to make modifications until after an appeal is completed is contrary to the plain language of the statutes and would defeat their purpose . . . ." *Id*.

In this case, the Court of Appeals found *Lemmen*'s reasoning equally applicable to situations involving custody. But the court reasoned that because a motion for change in domicile is brought under MCL 722.31(4) of the CCA, rather than under MCL 552.17, an additional interpretive step was necessary to connect *Lemmen*'s statement about child support modification to the dispute over domicile at issue here. It reasoned that MCL 552.17(1) must be read *in pari materia* with the CCA because both "relate to the same person or thing, or the same class of persons or things." *Safdar v Aziz*, 321 Mich App 219, 226; 909 NW2d 831 (2017) (quotation marks and citations omitted). Thus, it concluded that a circuit court may derive continuing jurisdiction over a motion for change in domicile from MCL 552.17(1) and that such jurisdiction attaches whenever a parent's motion concerns custody. See *id*. at 227.

We mostly agree. *Lemmen*'s reasoning applies to the Legislature's broad grant of authority in the CCA, but the circuit court's jurisdiction to modify a final judgment with respect to the child custody dispute may be derived exclusively from MCL 722.27(1) of the CCA, without resort to MCL 552.17. As between two applicable provisions, we favor the more specific. See *RadLAX Gateway Hotel, LLC v Amalgamated Bank*, 566 US 639, 648; 132 S Ct 2065; 182 L Ed 2d 967 (2012) ("When the conduct at issue falls within the scope of *both* provisions, the specific presumptively governs, whether or not the specific provision also applies to some conduct that falls outside the general."). A motion for change of domicile brought under MCL 722.31(4) falls within the scope of a "child custody dispute" as the term is used in MCL 722.27(1). See *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 511; 835 NW2d 363 (2013) (concluding that "the custody order controls the

determination of a minor child's domicile" under both the common law and the CCA). MCL 722.27(1) reflects the Legislature's intent to protect the interests of children in the face of changing circumstances by authorizing jurisdiction in the circuit court until the child reaches adulthood.

MCL 722.27(1)(c) specifically permits the circuit court to modify or amend its orders when proper cause is shown or when there has been a change of circumstances. Its sole limiting principle is that the modification be in the best interests of the child. As in *Lemmen*, it would be contrary to the plain language of the CCA to require a court to wait for the conclusion of an appeal to address a change in circumstances that would affect the interests of the child. Therefore, we hold that MCL 722.27(1) authorizes the continuing jurisdiction of a circuit court to modify or amend its previous judgments or orders and is an exception to MCR 7.208(A) "otherwise provided by law." Accordingly, we vacate the Court of Appeals decision to the extent it derived jurisdiction from MCL 552.17, affirm the result reached, and remand to the Oakland Circuit Court for proceedings consistent with this opinion. We do not retain jurisdiction.

MARKMAN, C.J., and ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, WILDER, and CLEMENT, JJ., concurred.

PEOPLE v BRUNER

Docket No. 154779. Argued on application for leave to appeal January 10, 2018. Decided March 28, 2018.

Carl R. Bruner II was convicted following a jury trial in the Wayne Circuit Court of first-degree premeditated murder, MCL 750.316(1)(a); assault with intent to commit murder, MCL 750.83; being a felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b, in connection with the shooting of two security guards outside a Detroit nightclub in June 2012. No eyewitnesses saw the shooter. Bruner was tried jointly before a single jury with codefendant Michael Lawson. The prosecution argued that Bruner was the shooter and that he was aided or abetted by Lawson. Bruner's defense was that he was not present and was not the shooter. Lawson's defense was that he was merely present at the scene and was not otherwise involved in the shooting. The prosecution planned to call as a witness Westley Webb, who did not testify at Bruner's preliminary examination but did testify at Lawson's preliminary examination about statements he claimed Lawson had made to him a few days after the shooting regarding Bruner's actions on the night at issue. At trial, the prosecutor emphasized in his opening statement that Webb was a key witness who would testify that Bruner had a gun; however, at the close of the prosecution's case in chief, the prosecutor informed the court that Webb could not be located and asked to read Webb's prior testimony to the jury. The trial court declared Webb unavailable. The prosecutor conceded that the prior testimony could not be admitted against Bruner and offered to remove mention of Bruner from the transcript of Webb's testimony. The trial court determined, over defense counsel's objection, that Webb's testimony was admissible against Lawson and that a limiting instruction would be adequate to ensure that the jury would not consider the redacted testimony against Bruner. When the testimony was read into the record, each mention of Bruner's name was replaced with the word "Blank," and the court instructed the jury to consider the testimony only against Lawson. The Court of Appeals, METER, P.J., and O'BRIEN, J. (SHAPIRO, J., concurring), affirmed both defendants' convictions in an unpublished per curiam opinion, issued October 11, 2016

(Docket Nos. 325730 and 326542), holding that Bruner's right to confront the witnesses against him under the Sixth Amendment of the United States Constitution was not implicated by the admission of Webb's preliminary examination testimony because Lawson's statements to Webb were not testimonial and Webb's testimony was neither offered nor admitted against Bruner. Bruner applied for leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other peremptory action. 500 Mich 1031 (2017).

In a unanimous opinion by Justice MCCORMACK, the Supreme Court, in lieu of granting leave to appeal, *held*:

The admission at a joint trial with a single jury of an unavailable witness's prior testimony about a codefendant's confession violated Bruner's constitutional right to confrontation, notwithstanding the redaction of Bruner's name and the reading of a limiting instruction to the jury. Bruner had no opportunity to cross-examine the witness, and because the substance of the witness's testimony—the codefendant's confession that implicated the defendant—was so powerfully incriminating, the limiting instruction and redaction were ineffective to cure the Confrontation Clause violation. The judgment of the Court of Appeals was reversed, and the case was remanded for that Court to consider whether the prosecution established that the error was harmless beyond a reasonable doubt.

1. The Confrontation Clause, set forth in the Sixth Amendment of the United States Constitution, provides that in all criminal prosecutions, the accused has the right to be confronted with the witnesses against him or her. Because the right is implicated only for testimonial evidence, the threshold question for any Confrontation Clause challenge is whether the proffered evidence was testimonial. "Testimony" is a solemn declaration or affirmation made for the purpose of establishing or proving some fact. Although there may be ambiguity at the margins, some statements qualify as testimonial under any definition, including ex parte testimony at a preliminary hearing. Testimonial statements of witnesses absent from trial may be admitted only if the declarant is unavailable and the defendant had a prior opportunity to cross-examine the witness. When more than one defendant is being tried before a single jury, some evidence may be admissible as to one defendant but violate a codefendant's confrontation right. When that is the case, a court must either exclude the testimony or take measures to eliminate the confrontation problem. What measures are sufficient depends on the context and content of the evidence. If a witness's testimony can

be redacted to eliminate reference to the codefendant's existence, that witness will not have borne testimony against the codefendant in any Sixth Amendment sense. Sometimes the court can eliminate the confrontation problem by instructing the jury to consider testimony against one defendant, but not the other. Because juries are presumed to follow their instructions, the result of a limiting instruction can often be as effective as excluding or redacting the testimony. However, sometimes evidence is too compelling for a jury to ignore even with a limiting instruction. Under *Bruton v United States*, 391 US 123 (1968), limiting instructions are categorically inadequate to protect against evidence that a nontestifying defendant confessed and implicated a codefendant in that confession.

2. Webb's preliminary examination testimony was testimonial in nature. The Court of Appeals erred in holding that there was no Confrontation Clause violation (and therefore no *Bruton* violation) by ascribing significance to the nontestimonial nature of the statements Webb attributed to Lawson. Although Lawson's nontestimonial hearsay statements would not have implicated the Confrontation Clause if Webb had testified at trial, because Bruner's confrontation right would have been vindicated by cross-examining Webb, Bruner never got to cross-examine Webb. Because Webb's prior testimony was testimonial, the admission of that testimony implicated Bruner's confrontation right.

3. Neither the court's instruction that the jury should consider Webb's testimony only with respect to Lawson nor the redaction of Bruner's name from Webb's testimony remedied the violation of Bruner's confrontation right. Webb was a witness against Bruner for Confrontation Clause purposes in spite of the remedial steps taken by the court to attempt to limit the jury's consideration of Webb's testimony as only against Lawson. The United States Supreme Court held in *Bruton* that when one codefendant implicates another at their joint trial, that evidence is so powerfully incriminating that allowing it to go uncross-examined deprives the nonconfessing defendant of a fair trial. In such circumstances, a limiting instruction cannot be trusted to eliminate the risk of prejudice and is not an adequate remedy for a confrontation violation. The redaction of Bruner's name was also not an adequate remedy. A codefendant's confession may be admissible if it is redacted to eliminate not only the defendant's name, but any reference to his or her existence. However, the obvious redaction used here—inserting the word "Blank" in place of Bruner's name—did not achieve that result, given that "Blank's" conduct was identical to what the prosecutor told the

jury Bruner had done and that, because Bruner and Lawson were the only people charged, there was no other person to whom "Blank" might have referred. Because the limiting instruction and crude redaction were inadequate to protect Bruner, he was deprived of his right to confront Webb, a witness against him. Accordingly, the Court of Appeals judgment was reversed and the case remanded to the Court of Appeals to consider whether the prosecution established that the preserved constitutional error was harmless beyond a reasonable doubt.

Court of Appeals judgment reversed in part; circuit court order vacated; case remanded to the Court of Appeals for further proceedings.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Toni Odette*, Assistant Prosecuting Attorney, for the people.

Law Offices of David L. Moffitt & Associates (by *David L. Moffitt*) for defendant.

MCCORMACK, J. In this case we consider whether the admission at a joint trial with a single jury of an unavailable witness's prior testimony about a codefendant's confession violated the defendant's constitutional right to confrontation, notwithstanding the redaction of the defendant's name and the reading of a limiting instruction to the jury. It did. The defendant had no opportunity to cross-examine the witness, and because the substance of the witness's testimony—the codefendant's confession that implicated the defendant—was so powerfully incriminating, the limiting instruction and redaction were ineffective to cure the Confrontation Clause violation. Accordingly, we reverse the judgment of the Court of Appeals and remand for that Court to consider whether the prosecution established that the error was harmless beyond a reason-

able doubt. *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994).

I. FACTS AND PROCEDURAL BACKGROUND

The defendant, Carl Rene Bruner II, was convicted of first-degree premeditated murder, MCL 750.316(1)(a); assault with intent to commit murder, MCL 750.83; being a felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. Bruner's convictions arose from the shooting of two security guards outside a Detroit nightclub in June 2012. One guard was struck in the back, but he was wearing a bulletproof vest and was not harmed. A second guard was killed. No eyewitnesses saw the shooter.

Bruner was tried jointly with codefendant Michael Lawson before a single jury. The prosecution argued that Bruner was the shooter and that he was aided or abetted by Lawson. Bruner's defense was that he was not present and was not the shooter. Lawson's defense was that he was merely present at the scene and was not otherwise involved in the shooting. The prosecution planned to call Westley Webb as a witness. Importantly, Webb had testified at Lawson's preliminary examination about statements he claimed Lawson had made to him a few days after the shooting; Webb did not testify at Bruner's preliminary examination.

At Lawson's preliminary examination, Webb testified that Lawson told him that the police were investigating Lawson because of an incident at a nightclub. Webb testified that Lawson said the bouncers threw Bruner out for fighting and therefore Lawson left the club with Bruner and they drove around the area in Bruner's car. Webb further testified that Lawson said that the two men parked down the block from the

nightclub, Bruner walked off, and Lawson stepped out of the car for a cigarette. Webb testified that Lawson went on to say that he got back into the car and drove away because he heard gunshots. Although Webb did not offer the fact that Lawson described Bruner having a gun or committing a shooting, Webb was impeached with his police statement, in which he said Lawson described Bruner coming back with a gun.

The prosecutor understandably viewed Webb as a critical witness against Bruner. At trial, the prosecutor emphasized in his opening statement that Webb would be the key witness whose testimony would place the gun in Bruner's hands. But things do not always go as planned. And at the close of the prosecution's case in chief, the prosecutor informed the court that Webb could not be located and asked to read Webb's prior testimony to the jury. The trial court declared Webb unavailable. The prosecutor conceded that the prior testimony could not be admitted against Bruner and offered to remove mention of Bruner from the transcript of Webb's testimony. The trial court determined, over defense counsel's objection, that a limiting instruction would be adequate to ensure that the jury would not consider the redacted testimony against Bruner. But the trial court found the testimony admissible against Lawson and it was read into the record. Each mention of Bruner's name was replaced with the word "Blank" and the court instructed the jury to consider the testimony only against Lawson.

The Court of Appeals affirmed Bruner's convictions, holding that the Confrontation Clause was not implicated by the admission of Webb's preliminary-examination testimony because Lawson's statements to Webb were not testimonial and Webb's testimony was neither offered nor admitted against

Bruner.[1] Bruner filed for leave to appeal in this Court. We ordered oral argument on the application, instructing the parties to address whether the admission of Webb's preliminary-examination testimony at Bruner's joint trial with Lawson violated Bruner's constitutional right to confrontation, despite the trial court's redaction of that testimony and limiting instruction to the jury, see *Gray v Maryland*, 523 US 185; 118 S Ct 1151; 140 L Ed 2d 294 (1998); *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968); and, if there was a Confrontation Clause violation, whether the error of admitting the testimony was harmless, see *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

II. DISCUSSION

Whether a defendant's Sixth Amendment right of confrontation has been violated is a question of constitutional law that this Court reviews de novo. *People v Fackelman*, 489 Mich 515, 524; 802 NW2d 552 (2011). De novo review means we review this issue independently, without any required deference to the courts below. *People v Barrera*, 451 Mich 261, 268; 547 NW2d 280 (1996).

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[1] Judge SHAPIRO concurred in the judgment but wrote separately to disagree with the majority's conclusion that the limiting instruction was curative. He reasoned: "[I]t would be erroneous to conclude that the jury could ignore the significance of the statement as to Bruner because it was the only evidence that put a gun in his hand at the time of the shooting. Expecting jurors to compartmentalize the relevancy of this very significant evidence so as to apply it only to one defendant is simply unrealistic." *People v Bruner*, unpublished per curiam opinion of the Court of Appeals, issued October 11, 2016 (Docket Nos. 325730 and 326542) (SHAPIRO, J., concurring), p 1. Judge SHAPIRO agreed with the majority, however, that no confrontation issue arose because Lawson's statements were nontestimonial and, finding that no other rule of evidence barred admission of the testimony, he felt bound to affirm. *Id*. at 1-2.

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" US Const, Am VI. The confrontation right is incorporated to apply to states through the Due Process Clause of the Fourteenth Amendment. *Pointer v Texas*, 380 US 400, 406; 85 S Ct 1065; 13 L Ed 2d 923 (1965). The right is implicated only for "testimonial" evidence, because the Confrontation Clause applies to "witnesses" against the accused—in other words, those who "bear testimony." *Crawford v Washington*, 541 US 36, 51; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The threshold question for any Confrontation Clause challenge, therefore, is whether the proffered evidence is testimonial. "Testimony" is "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id*. (quotation marks and citation omitted). Although there may be ambiguity at the margins, "some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing." *Id*. at 52. "Testimonial statements of witnesses absent from trial" may be admitted "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Id*. at 59.

Joint trials with a single jury present a special problem. Some evidence may be admissible as to one defendant but violate a codefendant's confrontation right. When that is the case, a court must either exclude the testimony or take measures to eliminate the confrontation problem. See *Richardson v Marsh*, 481 US 200, 209-212; 107 S Ct 1702; 95 L Ed 2d 176 (1987). What measures are sufficient depends on the context and content of the evidence. If, for example, a witness's testimony can be redacted to eliminate refer-

ence to the codefendant's existence,[2] that witness will not have borne testimony against the codefendant in any Sixth Amendment sense. *Id*. at 211. Sometimes the court can accomplish the same by instructing the jury to consider testimony against one defendant, but not the other. *Cruz v New York*, 481 US 186, 190; 107 S Ct 1714; 95 L Ed 2d 162 (1987) ("[A] witness whose testimony is introduced in a joint trial with the limiting instruction that it be used only to assess the guilt of one of the defendants will not be considered to be a witness 'against' the other defendants.").

Since we presume juries follow their instructions, the result of a limiting instruction can often be as effective as excluding or redacting the testimony. But other times evidence is too compelling for a jury to ignore even with a limiting instruction. Especially relevant here, limiting instructions are categorically inadequate to protect against evidence that a nontestifying defendant confessed and implicated a codefendant in that confession. *Bruton*, 391 US 123. In such a case, the confrontation problem persists as if no instruction had been given at all. *Id*. at 137.

III. APPLICATION

Finally, to the issues here, of which there are two. First we must consider the threshold question whether Webb's preliminary-examination testimony is "testimonial." That question answers itself. It is *Webb's* testimony that presents a straightforward confrontation problem. And the content of Webb's prior testimony

[2] The codefendant must be truly erased from the testimony, and in such a way that does not raise suspicion. See *Richardson*, 481 US at 211. Thus, blank spaces, blackouts, code names, or even grammatical structures that tip the jury off to the defendant's erasure may not be enough to cure the confrontation problem. See, e.g., *Gray*, 523 US 185.

places it squarely in the category governed by *Bruton*. The pitfall that must be avoided in this case—and that which the Court of Appeals landed in—is ascribing significance to the nontestimonial nature of the statements Webb attributed to Lawson. To be sure, Lawson's nontestimonial hearsay statements would not have implicated the Confrontation Clause if Webb had testified at trial—Bruner's confrontation right would have been vindicated by cross-examining Webb. But Bruner never got to cross-examine Webb.[3] Because Webb's prior *testimony* was, of course, *testimonial*, the admission of that testimony implicates Bruner's confrontation right.

The second question we must answer is whether Webb was "a witness against" Bruner, in spite of the remedial steps taken by the court to attempt to limit the jury's consideration of Webb's testimony as only against Lawson. US Const, Am VI. Specifically, did the court's limiting instruction to the jury and redaction of Bruner's name cure the confrontation problem? To answer that question, we consider the content these measures purported to limit. And here, the Supreme Court's decisions in *Bruton* and *Gray* provide meaningful rules.

The *Bruton* Court held that a jury cannot be expected to wholly disregard a confession in which one codefendant implicates another at their joint trial. *Bruton*, 391 US at 124. It reasoned that an accused admitting both his and his codefendant's guilt is such powerfully incriminating evidence that allowing it to

[3] That *Lawson*'s counsel cross-examined Webb does not mitigate the confrontation problem. In fact, as a result, the jury heard an account of Lawson's alleged statements that had been shaped by Lawson's cross-examination to benefit Lawson's defense that he was merely present and Bruner alone was to blame, and correspondingly, therefore, even more damaging to Bruner.

go uncross-examined deprives the nonconfessing defendant of a fair trial. In such a case, we cannot trust a limiting instruction to eliminate the risk of prejudice. While generally we presume juries follow their instructions, *Richardson*, 481 US at 211, a presumption is just that—and *Bruton* held the presumption rebutted when one nontestifying codefendant implicates another. And, importantly for our purposes, a cautionary instruction does not eliminate this particular confrontation problem: "The effect is the same as if there had been no instruction at all." *Bruton*, 391 US at 137.

Webb's testimony presented such a problem. Because Bruner did not cross-examine Webb, and the substance of Webb's statement placed it in a category "in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored," *id*. at 135, the limiting instruction was not an adequate remedy for the Confrontation Clause violation.

Nor was the redaction. There are measures a court can take that permit the admission of a codefendant's confession that would otherwise violate *Bruton* without the need for separate trials or juries, including, in some cases, redaction. A codefendant's confession may escape *Bruton*'s protective rule if it is "redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Richardson*, 481 US at 211. The obvious redaction used here (inserting the word "Blank" in place of Bruner's name), however, did not achieve that result and specifically ran afoul of *Gray v Maryland*, 523 US 185. In *Gray*, blank spaces or the word "delete" were substituted for the defendant's name to attempt to avoid the *Bruton* problem. The

United States Supreme Court held that "[r]edactions that simply replace a name with an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration, however, leave statements that, considered as a class, so closely resemble *Bruton*'s unredacted statements that, in our view, the law must require the same result." *Gray*, 523 US at 192.[4]

Far from eliminating any reference to Bruner's existence, the jury instead got a wink and a nod about an unnamed person, "Blank." Blank's conduct was not just uncannily similar to what the prosecutor told the jury Bruner had done. No, it was the same. And the prosecutor's opening statement had stressed that Webb's testimony would be the linchpin of the case against Bruner:

> And [the evidence] is going to corroborate directly with what Mr. Webb is telling you that Mr. Bruner came back with a gun involving got involved [sic] in a shooting and tie it up directly with where these shots came from.
>
> * * *
>
> I think the statement from Mr. Webb is very clear. He knew that Mr. Bruner had a gun . . . .

Bruner and Lawson were the only people charged; there was no other person to whom "Blank" might have referred. The prosecutor told the jury that two people were involved in the murders, to expect Webb to incriminate Bruner, and that Webb's testimony would

[4] Obvious deletion may in fact *aggravate* the testimony's prejudicial effect. The *Gray* Court, quoting Judge Learned Hand, noted that even if there had been "the slightest doubt as to whose names had been blacked out," blatant redaction "would have not only laid the doubt, but underscored the answer." *Gray*, 523 US at 194 (cleaned up).

place the gun in Bruner's hand. In such circumstances, any juror who "wonders to whom the blank might refer need only lift his eyes to [the codefendant], sitting at counsel table, to find what will seem the obvious answer . . . ." *Gray*, 523 US at 193.

Because Bruner never had the chance to cross-examine Webb, Webb's testimony was inadmissible against Bruner under a straightforward application of the Confrontation Clause, as the prosecutor conceded and the trial court held. But while the testimony was technically admitted only against Lawson, the limiting instruction and crude redaction were inadequate to protect Bruner. Bruner was thus deprived of his right to confront Webb, a witness against him. Accordingly, we reverse the judgment of the Court of Appeals and remand to the Court of Appeals to consider whether the prosecution has established the preserved constitutional error was harmless beyond a reasonable doubt.[5] *Anderson (After Remand)*, 446 Mich at 406.

MARKMAN, C.J., and ZAHRA, VIVIANO, BERNSTEIN, WILDER, and CLEMENT, JJ., concurred with MCCORMACK, J.

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[5] The defendant's motion to remand for consideration of the issues raised in his Standard 4 brief (per Administrative Order 2004-6) is denied.

MILLAR v CONSTRUCTION CODE AUTHORITY

Docket No. 154437. Argued on application for leave to appeal November 8, 2017. Decided March 29, 2018.

On June 26, 2014, Bruce Millar brought an action in the Lapeer Circuit Court against the Construction Code Authority (CCA), Elba Township, and Imlay City, alleging violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*.; wrongful termination in violation of public policy; and conspiracy to effectuate wrongful termination and violate the WPA. Millar had performed mechanical and plumbing inspection services for the CCA, an inspection and development control agency, which had contracts with Imlay City and Elba Township to provide licensed inspections. On March 11 and March 20, 2014, Imlay City and Elba Township each wrote letters to the CCA directing it to terminate Millar's inspection services within their communities. On March 27, the CCA drafted a letter to Millar stating that he would no longer perform inspections in those communities, but it was not until Millar arrived at work on March 31 that he was given a copy of the CCA's letter. That same day, he was prevented from working in Imlay City. The Lapeer Circuit Court, Nick O. Holowka, J., granted summary disposition on all counts to defendants, ruling that the WPA claim was time-barred because the WPA violation occurred, at the latest, on March 27, when the CCA drafted its letter, and therefore Millar had filed his claim one day after the 90-day limitations period in MCL 15.363(1) had run. The court also concluded that the WPA preempted Millar's public-policy claim. The Court of Appeals, OWENS, P.J., and BORRELLO and STEPHENS, JJ., affirmed in an unpublished per curiam opinion issued August 4, 2016 (Docket No. 326544). Millar applied for leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other peremptory action. 500 Mich 992 (2017).

In a unanimous opinion by Justice MCCORMACK, the Supreme Court, in lieu of granting leave to appeal, *held*:

The running of the limitations period in MCL 15.363(1) is triggered by an employer's action to implement the decision that is alleged to violate the WPA. Accordingly, the running of the

limitations period in this case began when the CCA took an adverse employment action to alter Millar's employment on March 31, 2014. The Court of Appeals erred by relying on *Joliet v Pitoniak*, 475 Mich 30 (2006), to conclude that the alleged wrong occurred either when the city and township wrote letters to the CCA directing it to revoke Millar's authority to work in their jurisdictions or when the CCA in turn drafted its letter to Millar carrying out those directions. Because defendants took no action to curtail Millar's employment responsibilities before March 31, 2014, Millar had no actionable WPA claim until that date, which is when the allegedly discriminatory action occurred. Therefore, Millar's WPA claim was timely filed, and the Court of Appeals erred by affirming the trial court's grant of summary disposition to defendants.

Court of Appeals judgment reversed in part; circuit court order granting summary disposition to defendants vacated; case remanded to the circuit court for further proceedings.

Justice CLEMENT took no part in the decision of this case.

Rebecca C. Klipfel for Bruce Millar.

McGraw Morris PC (by *Thomas J. McGraw* and *Stacy J. Belisle*) for the Construction Code Authority.

Landry, Mazzeo & Dembinski, PC (by *Nancy Vayda Dembinski*) for Elba Township.

Plunkett Cooney (by *Mary Massaron*, *Audrey J. Forbush*, *Hilary A. Ballentine*, and *Josephine A. DeLorenzo*) for Imlay City.

MCCORMACK, J. At issue in this case is when the limitations period in the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., begins running. The defendant Construction Code Authority (CCA) told the plaintiff, one of its inspectors, that he had been terminated by the defendants Imlay City and Elba Township when he showed up for work on March 31, 2014. It was the CCA's action on that day that triggered the running of the limitations period, not the defendants'

earlier decisions to terminate him, as no action was taken by any defendant to effectuate those decisions. We therefore reverse the Court of Appeals' holding that the alleged wrong triggering the running of the limitations period "occurred when the City and Township wrote the letters to the CCA directing the CCA to terminate plaintiff . . . ." *Millar v Constr Code Auth*, unpublished per curiam opinion of the Court of Appeals, issued August 4, 2016 (Docket No. 326544), p 6. We further reverse the Court of Appeals to the extent that it held the plaintiff's WPA claim untimely "even if we were to assume that CCA's conduct was the allegedly wrongful conduct that commenced the 90-day clock," citing as the CCA's alleged wrongful act its "termination of plaintiff's assignments in the City and the Township on March 27, 2014." *Id*. On March 27, 2014, the CCA drafted its own letter to the plaintiff communicating the bad news from the city and township defendants, but as noted it did nothing to effectuate that decision until March 31. *Id*.

The statutory limitations period on the plaintiff's WPA claim therefore did not begin running until the CCA took action to alter the plaintiff's employment on March 31, 2014. Because his complaint was filed 87 days later, it was timely filed under MCL 15.363(1). We reverse the Court of Appeals' judgment in part, vacate the Lapeer Circuit Court's March 19, 2015 order granting summary disposition to the defendants, and remand this case to the Lapeer Circuit Court for further proceedings consistent with this opinion.[1]

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[1] The plaintiff also argues that his wrongful termination violated public policy and, for the first time in this Court, that the lower courts abused their discretion by denying him an opportunity to amend his complaint. We deny leave to appeal with respect to those arguments because we are not persuaded that they should be reviewed by this Court.

I. FACTS AND PROCEDURAL HISTORY

The plaintiff performed mechanical and plumbing inspection services for the defendant CCA, an inspection and development control agency. The CCA had contracts with, among others, the defendants Imlay City and Elba Township to provide licensed inspections, and the plaintiff had performed numerous inspections within those jurisdictions. On March 11 and March 20, 2014, the defendant city and the defendant township respectively wrote letters to the CCA directing it to terminate the plaintiff's inspection services within their communities. On March 27, the CCA drafted a letter to the plaintiff to do just that; the letter stated that the plaintiff would no longer perform inspections in those communities.[2] But it was not until the plaintiff arrived at work on March 31 that he was given a copy of the CCA's letter notifying him of the decision to terminate his services in the defendant communities.[3] As a result, that same day he was prevented from working in Imlay City.

The plaintiff filed a three-count complaint alleging violation of the WPA,[4] wrongful termination in violation of public policy, and conspiracy to effectuate

[2] The letter indicated that the plaintiff would still be retained to perform inspections in other municipalities. Because the plaintiff's workload directly affected his level of compensation, the defendants' actions negatively affected the plaintiff's terms of employment.

[3] The plaintiff initially alleged that he received the letter "no sooner than March 28, 2014, and likelier the following Monday, March 31, 2014," but subsequently clarified that he received it on March 31. Even if this point was disputed, the discrepancy would not alter our legal analysis because the plaintiff's suit was filed 90 days after March 28, so it still would be timely filed if that were the relevant date.

[4] The plaintiff's WPA claim alleged that he was "terminated" because of "and in retaliation for his pattern of fairly and honestly indicating his intentions to report and/or reporting violations of building codes, regulations, rules and statutes in accordance with his responsibilities as an

wrongful termination and violate the WPA. The trial court granted summary disposition on all counts to all the defendants. The court reasoned in relevant part that the WPA claim was time-barred because the WPA violation occurred, at the latest, on March 27, when the CCA drafted its letter, and therefore the plaintiff had filed his claim one day after the 90-day limitations period in MCL 15.363(1) had run. The trial court also concluded that the WPA preempted the plaintiff's public-policy claim.[5] The Court of Appeals affirmed. The plaintiff appealed here, asserting his WPA and public-policy claims but dropping the civil-conspiracy claim. We ordered oral argument on the application and directed the parties to brief "whether the plaintiff's claim under the Whistleblowers' Protection Act was barred by the 90-day limitation period set forth in MCL 15.363(1)." *Millar v Constr Code Auth*, 500 Mich 992 (2017).

II. LEGAL BACKGROUND AND ANALYSIS

This case involves an issue of statutory interpretation, which we review de novo. *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). This means that we review the issue independently, without any required deference to the trial court.

The Whistleblowers' Protection Act, MCL 15.362, provides:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privi-

employee and as a licensed Mechanical Inspector, Plumbing Inspector, Plan Reviewer, Certified Fire Inspector and Journey [sic] Plumber."

[5] The court dismissed the plaintiff's conspiracy claim because his WPA and public-policy claims had been dismissed and civil conspiracy is not an independently actionable tort.

> leges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

MCL 15.363(1), the statute of limitations governing WPA actions, provides that "[a] person who alleges a violation of this act may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act."

The question in this case is what constitutes "the occurrence of the alleged violation of this act" that triggers the running of the statutory limitations period. In *Collins v Comerica Bank*, 468 Mich 628; 664 NW2d 713 (2003), this Court held that the limitations period applicable to claims under the Civil Rights Act (CRA), MCL 37.2101 *et seq*.,[6] did not begin running until the date the plaintiff was terminated. We rejected the Court of Appeals' contrary conclusion that the plaintiff's cause of action accrued on the last day the plaintiff worked, a date that preceded her termination.

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[6] CRA claims are subject to the three-year period of limitations in MCL 600.5805(10), and the accrual of that limitations period is governed by MCL 600.5827, which provides, in relevant part, that a "claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." Because both MCL 600.5827 and MCL 15.363(1) tie the running of the statutory limitations period to the actionable wrong, CRA cases interpreting when the limitations period commences running are instructive in resolving the same issue in the WPA context.

By contrast, in *Magee v DaimlerChrysler Corp*, 472 Mich 108; 693 NW2d 166 (2005), and *Joliet v Pitoniak*, 475 Mich 30; 715 NW2d 60 (2006), also CRA cases, this Court distinguished *Collins* and held that the plaintiffs' discrimination claims were untimely because the last date of the alleged discriminatory treatment, and not the employee's separation from employment, started the limitations period.[7] Critical to our rulings in both of those decisions was the fact that neither plaintiff asserted a claim of discriminatory discharge. *Magee*, 472 Mich at 112 (distinguishing *Collins* because it involved a claim of discriminatory discharge); *Joliet*, 475 Mich at 36-37 (same).

In this case, the Court of Appeals erred by relying on *Joliet* to conclude that the alleged wrong occurred either when the city and township wrote letters to the CCA directing it to revoke the plaintiff's authority to work in their jurisdictions or when the CCA in turn drafted its letter to the plaintiff carrying out those directions. At the time each letter was written, the plaintiff had no actionable WPA claim because no allegedly discriminatory action had occurred; the defendants *intended* to curtail the plaintiff's employment responsibilities, but had not taken any action to implement that intent. It was not until that intent was effectuated on March 31, 2014, that the actionable "wrong" occurred and trig-

[7] In *Magee*, the plaintiff alleged sexual harassment ending on September 12, 1998, when she went on medical leave; the plaintiff resigned on February 2, 1999. *Magee*, 472 Mich at 110. This Court rejected the latter date as the accrual date for her discrimination claims and concluded that September 12, 1998 (the last date of the alleged harassment) was the accrual date. *Id*. at 112-113. In *Joliet*, a constructive-discharge case, the plaintiff alleged harassment and discrimination occurring before her resignation on November 30, 1998. *Joliet*, 475 Mich at 33. This Court held that the plaintiff's November 30, 2001 complaint was not timely filed because her claims all accrued when the alleged harassment and discrimination occurred—before November 30, 1998. *Id*. at 45.

gered the running of the 90-day limitations period in MCL 15.363(1). See *Collins*, 468 Mich at 633 ("[I]f a discharge has yet to occur, it cannot be said that the last day worked represents the discharge date. Simply put, a claim for discriminatory discharge cannot arise until a claimant has been discharged."). While the plaintiff was not *discharged* from his employment on March 31 (his employment responsibilities were merely reduced), that fact does not change the conclusion that this case is more analogous to *Collins* than to *Magee* and *Joliet*. The plaintiff showed up for work on March 31 prepared to go perform inspections in Imlay City, in accordance with his typical employment responsibilities, but he was prevented from doing that when the CCA presented him with its March 27 letter.[8] Nothing prevented the plaintiff from working up until that action, and the defendants do not argue that they did anything to implement the termination decision before March 31.

In other words, in order for an actionable wrong under the WPA to have occurred, an employer must have done more than simply make a decision to discriminate against an employee. Instead, the employer must have taken an adverse employment action against the plaintiff.[9] It is the employer's *action* to

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[8] Because the writing of the letters did not trigger the running of the limitations period, and the defendants do not allege that any other alleged act committed before March 31 started it running, we need not decide what specific act by the defendants on March 31 was the trigger. Specifically, we need not address whether the communication of the adverse decision to the plaintiff, the CCA's preventing the plaintiff from working in Imlay City on March 31, or some other action constituted the triggering act.

[9] See *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013) ("Under the WPA, a plaintiff may establish a prima facie case by showing that (1) the plaintiff was engaged in protected activity as defined by the act, (2) the defendant *took an adverse employment action against the plaintiff*, and (3) a causal connection exists between the

implement the decision that triggers the running of the limitations period; not the decision itself. In this case, the CCA took no action to implement its decision to reduce the plaintiff's duties until it gave the plaintiff the letter instructing him to discontinue working in Imlay City and Elba Township.

The flaw in the Court of Appeals' reliance on *Joliet* is made plain with a simple illustration. The Court of Appeals held that the limitations period began running as to Imlay City on March 11, when it drafted its letter to the CCA directing the agency to terminate the plaintiff. But the plaintiff continued working in Imlay City until March 27. Plainly, no allegedly discriminatory action had "occurr[ed]" as of March 11, because the defendants had not altered the plaintiff's employment in any way. Under the Court of Appeals' view, the plaintiff could have brought suit against Imlay City on March 12 on the basis of the city's letter to the CCA, even though nothing whatsoever changed in the plaintiff's employment. We rejected such an approach in *Collins*.

Because "the occurrence of the alleged violation" of the WPA did not occur until the CCA allegedly discriminated against the plaintiff with respect to his terms of employment on March 31, 2014, the plaintiff timely filed his WPA claim. Accordingly, the lower courts erred by dismissing it.

III. CONCLUSION

We hold that the Court of Appeals erred by relying on our decision in *Joliet* to conclude that the statutory limitations period began running before March 31,

protected activity and the adverse employment action.") (emphasis added; quotation marks and citations omitted).

2014, the day of the "occurrence of the alleged violation of the act." Rather, the rule from *Collins* applies. We therefore reverse the Court of Appeals judgment in part, vacate the Lapeer Circuit Court's March 19, 2015 order granting summary disposition to the defendants, and remand to the circuit court for further proceedings consistent with this opinion.

MARKMAN, C.J., and ZAHRA, VIVIANO, BERNSTEIN, and WILDER, JJ., concurred with MCCORMACK, J.

CLEMENT, J., took no part in the decision of this case.

PEOPLE v SHAMI

Docket No. 155273. Argued on application for leave to appeal January 11, 2018. Decided April 26, 2018.

Defendant Samer A. Shami was charged in the 19th District Court with violating the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq*., for possessing, acquiring, transporting, or offering for sale tobacco products with an aggregate wholesale price of $250 or more as a manufacturer without a license in violation of MCL 205.423(1) and MCL 205.428(3). Defendant was the manager of Sam Molasses, a retail tobacco store owned by Sam Molasses, LLC. With the assistance of the Michigan State Police, officials from the Michigan Department of Treasury conducted an inspection of Sam Molasses on May 1, 2013. When the investigation revealed that the labels on several plastic tubs of tobacco in the store's inventory did not match those listed on the invoices from tobacco distributors, defendant explained that he had mixed two or more flavors of tobacco to create a new "special blend," which was then placed in the plastic tubs and relabeled. Defendant also explained that he repackaged bulk tobacco from a particular distributor by taking the packets of tobacco out of the boxes, inserting them into metal tins, and placing his own label on the tins, which were then sold at the store. Following a preliminary examination, the district court, Sam A. Salamey, J., bound defendant over to the Wayne Circuit Court for trial, ruling that there was probable cause to believe that defendant was a manufacturer of a tobacco product because, by blending different types of tobacco together, he had created a new and distinctive product. Defendant thereafter filed a motion to quash, which the circuit court, Alexis A. Glendening, J., granted after concluding that blending two types of tobacco does not constitute manufacturing under the TPTA. The Court of Appeals, GADOLA, P.J., and WILDER and METER, JJ., reversed and remanded, holding that defendant had manufactured or produced tobacco for purposes of the TPTA when he mixed different flavors of tobacco and repackaged tobacco in tins with his own label before offering it for sale. 318 Mich App 316 (2016). Defendant applied for leave to appeal in

the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other peremptory action. 500 Mich 1017 (2017).

In a unanimous opinion by Justice ZAHRA, the Supreme Court, in lieu of granting leave to appeal, *held*:

The Court of Appeals correctly held that an individual who combines two different tobacco products to create a blended product, relabels that new mixture, and makes it available for sale to the public is a manufacturer of a tobacco product for purposes of the TPTA. Because there was sufficient evidence for a person of ordinary prudence and caution to conscientiously entertain a reasonable belief that defendant was a manufacturer under MCL 205.422(m)(*i*) because he produced a tobacco product, the district court did not abuse its discretion by binding him over for trial for alleged violations of MCL 205.423(1) and MCL 205.428(3). However, the Court of Appeals erred by concluding that merely repackaging bulk tobacco into smaller containers renders an individual a manufacturer under the TPTA. Accordingly, the judgment of the Court of Appeals was affirmed in part and reversed in part.

1. MCL 205.423(1) provides, in part, that a person shall not purchase, possess, acquire for resale, or sell a tobacco product as a manufacturer in this state unless licensed to do so. Under MCL 205.428(3), a person is guilty of a felony if he or she possesses, acquires, transports, or offers for sale contrary to the TPTA tobacco products other than cigarettes with an aggregate wholesale price of $250 or more. Taken together, these provisions subject a manufacturer of a tobacco product to criminal liability for possessing, acquiring, transporting, or selling a certain wholesale value of a tobacco product in this state without a license. The TPTA defines a "manufacturer" as a person who "manufactures or produces a tobacco product," but it does not define the terms "manufacture" or "produce." Accordingly, a person can become a manufacturer under the TPTA by either manufacturing or producing a tobacco product under the plain and ordinary meaning of those terms. Defendant's blending of tobacco products did not fall under the relevant dictionary definitions of "manufacture," which include "to make into a product suitable for use" and "to make from raw materials by hand or by machinery," because the unblended tobacco products were not raw materials and they were already suitable for use. However, considering the statutory context in which the term "produce" appeared, the relevant definition of that term was "to give being, form, or shape to." Because a person cannot give being, form, or shape to something

that already existed in the same form or shape, the product produced must take a different form or shape than any of its constituent parts. Therefore, an individual "produces" a tobacco product when he or she combines two or more different tobaccos "to give being, form, or shape to" a single, custom tobacco blend that differs from the ingredient tobaccos. Consequently, that individual is a "manufacturer" of a tobacco product under MCL 205.422(m)(*i*), and he or she must have a license before purchasing, possessing, acquiring for resale, or selling a tobacco product under MCL 205.423(1).

2. There was sufficient evidence for a person of ordinary prudence and caution to conscientiously entertain a reasonable belief that defendant was a manufacturer under MCL 205.422(m)(*i*) because he produced a tobacco product. According to testimony at the preliminary examination, defendant admitted that he mixed two or more different tobaccos to create a new "special blend." He then relabeled that combination and made it available for sale to the public. Having produced a new tobacco product, defendant was required to be licensed as a manufacturer, and there was no dispute that defendant had no such license. Therefore, the district court did not abuse its discretion by binding defendant over for trial in the Wayne Circuit Court for alleged violations of MCL 205.423(1) and MCL 205.428(3). Because the Court of Appeals reached the same conclusion, albeit for different reasons, this portion of its judgment was affirmed.

3. The Court of Appeals erred by concluding that defendant's repackaging packets of tobacco into tins and relabeling it before offering it for sale amounted to the manufacturing of a new tobacco product. Taking packets of tobacco out of a box from a distributor and placing those packets into tins with new labels did not constitute the manufacture of a tobacco product, because the tobacco product itself remained completely unaltered and was suitable for use before being placed in the tins. Defendant also did not produce a tobacco product by repackaging and relabeling the tobacco because, given that the tobacco product was completely unchanged after being placed in the tins, the repackaging and relabeling did not give being, form, or shape to a new tobacco product. In going beyond the dictionary definitions of "manufactures" and "produces," the Court of Appeals fashioned an overly expansive definition that encompassed conduct not supported by the plain and ordinary meaning of those words. That Court's definition also failed to appreciate that the focus of the inquiry should have been on the tobacco product itself, not the precise manner or mechanism in which that product was displayed or

offered to the public. Accordingly, this portion of the Court of Appeals judgment was reversed.

Court of Appeals judgment affirmed in part and reversed in part; case remanded to the Wayne Circuit Court for further proceedings.

Justice WILDER did not participate because he was on the Court of Appeals panel.

1. TAXATION — TOBACCO PRODUCTS TAX ACT — WORDS AND PHRASES — "MANUFACTURER."

The Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq*., provides that a person shall not purchase, possess, acquire for resale, or sell a tobacco product as a manufacturer in this state unless licensed to do so; the TPTA defines "manufacturer" as a person who "manufactures or produces a tobacco product"; "manufacture" in this context means "to make into a product suitable for use" and "to make from raw materials by hand or by machinery"; "produce" in this context means "to give being, form, or shape to" (MCL 205.422(m)(*i*)).

2. TAXATION — TOBACCO PRODUCTS TAX ACT — WORDS AND PHRASES — "MANUFACTURER" — COMBINING TOBACCO PRODUCTS — REPACKAGING TOBACCO PRODUCTS.

A person who combines two different tobacco products to create a blended product, relabels that new mixture, and makes it available for sale to the public is a manufacturer of a tobacco product for purposes of the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq*., and therefore must have a license before purchasing, possessing, acquiring for resale, or selling a tobacco product under MCL 205.423(1); the act of repackaging bulk tobacco into smaller containers and labeling them for sale does not render a person a manufacturer under the TPTA (MCL 205.422(m)(*i*)).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *Daniel C. Grano* and *Daniel J. Magee*, Assistant Attorneys General, for the people.

Varnum LLP (by *Thomas J. Kenny*) and *Hammoud, Dakhlallah & Associates* (by *Ali K. Hammoud*) for defendant.

ZAHRA, J. The Tobacco Products Tax Act (TPTA)[1] requires a manufacturer of a tobacco product to be licensed with the Michigan Department of Treasury before purchasing, possessing, acquiring for resale, or selling that product in Michigan.[2] Criminal liability may arise from the failure to comply with the licensing requirement.[3] The issue presented in this case is whether an individual who combines two different tobacco products to create a new blended product or repackages bulk tobacco into smaller containers with a new label is considered to be a manufacturer of a tobacco product and must have the requisite license.

The Court of Appeals held that, in either instance, such a person is a manufacturer. According to that Court, manufacturing simply requires a change from the original state of an object or material into a state that makes it more suitable for its intended use, and a person who changes either the form or delivery method of tobacco constitutes a manufacturer for purposes of the TPTA.

Although we agree with the Court of Appeals' conclusion that an individual combining two different tobacco products to create a blended product, relabeling that new mixture, and making it available for sale to the public is a manufacturer of a tobacco product, we disagree with the Court of Appeals that merely repackaging bulk tobacco into smaller containers renders an individual a manufacturer under the TPTA. Therefore, we affirm in part and reverse in part the judgment of the Court of Appeals. This case is remanded to the Wayne Circuit Court for further proceedings consistent with this opinion.

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[1] MCL 205.421 *et seq.*

[2] MCL 205.423(1).

[3] See, e.g., MCL 205.428(3).

I. FACTS AND PROCEEDINGS

Defendant Samer A. Shami managed the day-to-day operations of Sam Molasses, a hookah-tobacco retail store located in Dearborn, Michigan, which was owned by Sam Molasses, LLC. Although Sam Molasses, LLC, was licensed with the Michigan Department of Treasury as a secondary wholesaler[4] and an unclassified acquirer[5] of other tobacco products, it is undisputed that neither Sam Molasses, LLC, nor Shami was licensed as a manufacturer of tobacco products during the relevant time.

With the assistance of the Michigan State Police, treasury officials conducted an administrative tobacco tax inspection of Sam Molasses on May 1, 2013, during which Shami produced several invoices from various tobacco distributors. When Alisha Nordman, an employee of the treasury's Tobacco Tax Enforcement Unit, discovered that the labels on several plastic tubs of hookah tobacco in the store's inventory did not match those listed on the invoices, Shami informed Nordman

[4] See MCL 205.422(s) (defining "secondary wholesaler" as "a person who sells a tobacco product for resale, who purchases a tobacco product from a wholesaler or unclassified acquirer licensed under this act, and who maintains an established place of business in this state where a substantial portion of the business is the sale of tobacco products and related merchandise at wholesale, and where at all times a substantial stock of tobacco products and related merchandise is available to retailers for resale").

[5] See MCL 250.422(z) (defining "unclassified acquirer" as "a person, except a transportation company or a purchaser at retail from a retailer licensed under the general sales tax act, 1933 PA 167, MCL 205.51 to 205.78, who imports or acquires a tobacco product from a source other than a wholesaler or secondary wholesaler licensed under this act for use, sale, or distribution," as well as "a person who receives cigars, noncigarette smoking tobacco, or smokeless tobacco directly from a manufacturer licensed under this act or from another source outside this state, which source is not licensed under this act").

that he had mixed two or more flavors of hookah tobacco to create a new "special blend," which was then placed in the plastic tubs and affixed with new labels to reflect the blended product. Michigan State Police Sergeant Stephanie Cleland also observed that labels on plastic tubs describing the flavor of hookah tobacco found inside did not correspond to invoices from the distributors.

Sergeant Cleland further questioned Shami about tobacco in the store's inventory that did not match the labels on certain containers. In response, Shami told her that he repackaged bulk hookah tobacco from a particular distributor by taking the clear packets of tobacco out of the boxes, inserting them into silver metal tins, and placing a "360" label on the tins. These tobacco-filled tins were then sold at the store.

Shami was subsequently charged with violating the TPTA by possessing, acquiring, transporting, or offering for sale tobacco products with an aggregate wholesale price of $250.00 or more as a manufacturer without a license in violation of MCL 205.423(1) and MCL 205.428(3).[6]

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[6] Shami was also charged with violating the TPTA by possessing tobacco products without proper invoices in violation of MCL 205.426(1) and by filing false tobacco-tax returns in violation of MCL 205.427(2). The district court dismissed the tax-returns charge but bound Shami over on the improper-invoices charge. The circuit court subsequently granted Shami's motion to quash that charge. The Court of Appeals reversed the circuit court's decision, concluding that the district court did not abuse its discretion in binding Shami over on the improper-invoices charge. In its order scheduling oral argument on Shami's application for leave to appeal, this Court directed the parties to address only issues pertaining to the manufacturing charge. See *People v Shami*, 500 Mich 1017 (2017). Because we deny Shami's application for leave to appeal in all other respects, the relevant factual background and analysis in this Court's opinion are limited to the manufacturing charge.

Following a preliminary examination, the 19th District Court bound Shami over to the Wayne Circuit Court for trial, ruling that there was probable cause to believe that Shami was a manufacturer of a tobacco product insofar as he transformed "certain articles by blending those articles together to create a distinctive product or new character."[7] Shami thereafter filed a motion to quash, which the circuit court granted. According to the circuit court, "blending two types of hookah tobacco does not constitute manufacturing . . . ."[8] The Court of Appeals reversed, concluding that Shami was a manufacturer of tobacco products because he manufactured or produced tobacco for purposes of the TPTA when he mixed different flavors of tobacco and repackaged tobacco in tins with his own "360" label before offering it for sale.[9]

Shami applied for leave to appeal in this Court. This Court directed the Clerk to schedule oral argument on whether to grant the application or take other action.[10]

II. STANDARD OF REVIEW

To bind a criminal defendant over for trial in the circuit court, the district court must find probable cause to believe that the defendant committed a felony,[11] which requires sufficient evidence of each

[7] The district court expressed no opinion as to whether Shami was a manufacturer by repackaging hookah tobacco into tins.

[8] Like the district court, the circuit court expressed no opinion as to whether Shami was a manufacturer by repackaging hookah tobacco into tins.

[9] *People v Shami*, 318 Mich App 316, 329; 897 NW2d 761 (2016).

[10] *Shami*, 500 Mich 1017.

[11] See MCL 766.13 ("If the magistrate determines at the conclusion of the preliminary examination that a felony has been committed and that there is probable cause for charging the defendant with committing a

element of the crime charged, or from which the elements may be inferred,[12] to " 'cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief' " of the defendant's guilt.[13] This Court generally reviews a district court's bindover decision for an abuse of discretion.[14] A district court abuses its discretion if its decision " 'falls outside the range of principled outcomes.' "[15] Insofar as the district court based its ruling on questions of law, however, its ruling is reviewed de novo.[16] Questions of statutory interpretation are similarly reviewed de novo.[17]

III. ANALYSIS

The Legislature enacted the TPTA in 1993 to, among other things, regulate and license manufacturers of tobacco products, as well as provide penalties for

felony, the magistrate shall forthwith bind the defendant to appear within 14 days for arraignment before the circuit court of that county, or the magistrate may conduct the circuit court arraignment as provided by court rule."); see also MCR 6.110(E) ("If, after considering the evidence, the court determines that probable cause exists to believe both that an offense not cognizable by the district court has been committed and that the defendant committed it, the court must bind the defendant over for trial.").

[12] *People v Seewald*, 499 Mich 111, 116; 879 NW2d 237 (2016), citing *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989).

[13] *People v Anderson*, 501 Mich 175, 183; 912 NW2d 503 (2018), quoting *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003).

[14] *Seewald*, 499 Mich at 116, citing *People v Stone*, 463 Mich 558, 561; 621 NW2d 702 (2001).

[15] *Seewald*, 499 Mich at 116, quoting *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 528; 872 NW2d 412 (2015).

[16] *People v Hall*, 499 Mich 446, 451-452; 884 NW2d 561 (2016), citing *People v Schaefer*, 473 Mich 418, 427; 703 NW2d 774 (2005).

[17] *Hall*, 499 Mich at 452, citing *UAW v Green*, 498 Mich 282, 286; 870 NW2d 867 (2015).

violations of the act.[18] Relevant to the instant matter is MCL 205.423(1), which provides, in part, that "a person shall not purchase, possess, acquire for resale, or sell a tobacco product as a manufacturer . . . in this state unless licensed to do so." And under MCL 205.428(3), a person is guilty of a felony if he or she "possesses, acquires, transports, or offers for sale contrary to this act . . . tobacco products other than cigarettes with an aggregate wholesale price of $250.00 or more . . . ."[19] Taken together, these two statutory provisions subject a manufacturer of a tobacco product to criminal liability for possessing, acquiring, transporting, or selling a certain wholesale value of a tobacco product in this state without a license. This, in turn, raises the principal question in this case: who is considered a manufacturer of a tobacco product?

The TPTA defines a "manufacturer" as a person who "manufactures or produces a tobacco product."[20] Although the Legislature defines "tobacco product" as "cigarettes, cigars, noncigarette smoking tobacco, or

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[18] 1993 PA 327.

[19] MCL 205.428(3) provides, in full, "A person who possesses, acquires, transports, or offers for sale contrary to this act 3,000 or more cigarettes, tobacco products other than cigarettes with an aggregate wholesale price of $250.00 or more, 3,000 or more counterfeit cigarettes, 3,000 or more counterfeit cigarette papers, 3,000 or more gray market cigarettes, or 3,000 or more gray market cigarette papers is guilty of a felony, punishable by a fine of not more than $50,000.00 or imprisonment for not more than 5 years, or both."

[20] MCL 205.422(m)(*i*). The TPTA also defines a manufacturer as someone "who operates or who permits any other person to operate a cigarette making machine in this state for the purpose of producing, filling, rolling, dispensing, or otherwise generating cigarettes." MCL 205.422(m)(*ii*). Because the government is not alleging that Shami's conduct involved a cigarette making machine, at stake in this case is only whether Shami manufactured or produced a tobacco product.

smokeless tobacco,"[21] it did not provide a definition for either "manufactures" or "produces."

When interpreting a statute, this Court's primary goal is to " 'ascertain the legislative intent that may reasonably be inferred from the words in [the] statute.' "[22] Because the language of a statute provides the most reliable manifestation of the Legislature's intent, this Court begins its interpretation by reviewing the words and phrases of the statute itself.[23] If a statutory word or phrase is not defined in the statute, it must be accorded its plain and ordinary meaning, unless the undefined word or phrase is a legal term of art.[24] This Court has consistently consulted dictionary definitions to give words and phrases their plain and ordinary meaning.[25]

A person can become a "manufacturer" under the TPTA by either "manufactur[ing]" or "produc[ing]" a tobacco product.[26] *Merriam-Webster's Collegiate Dictionary* provides several definitions for the verb form of "manufacture," including "to make into a product suitable for use" and "to make from raw materials by hand

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[21] MCL 205.422(w). "Noncigarette smoking tobacco" is defined as "tobacco sold in loose or bulk form that is intended for consumption by smoking and includes roll-your-own cigarette tobacco." MCL 205.422(n).

[22] *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 199; 895 NW2d 490 (2017), quoting *People v Couzens*, 480 Mich 240, 249; 747 NW2d 849 (2008).

[23] *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012), citing *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011).

[24] *Hannay v Dep't of Transp*, 497 Mich 45, 57; 860 NW2d 67 (2014), citing *In re Bradley Estate*, 494 Mich 367, 377; 835 NW2d 545 (2013). Shami does not contend that either "manufactures" or "produces" is a legal term of art that must be construed in accordance with its peculiar and appropriate legal meaning.

[25] *Spectrum Health*, 492 Mich at 515.

[26] MCL 205.422(m)(i).

or by machinery."[27] We agree with Shami that these definitions do not describe the conduct charged here regarding Shami's blending of the tobacco products.[28] The unblended tobacco products were not raw materials, and they were already suitable for use.

But a person who "produces" a tobacco product is also a "manufacturer" under MCL 205.422(m)(*i*). *Merriam-Webster's Collegiate Dictionary* defines the verb form of "produce" in several different ways. Our selection of the proper definition must be guided by the statutory context in which the term appears.[29] Here, the term "produce" defines the statutory term "manufacturer," and thus the relevant definition is one that corresponds to "manufacturer." Only one definition reflects this context: "to give being, form, or shape to[.]"[30] Because a person cannot give "being, form, or

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[27] *Merriam-Webster's Collegiate Dictionary* (11th ed).

[28] Shami contends that he is not a manufacturer of a tobacco product under the TPTA because the word "manufactures" necessarily requires a transformation of a raw material into a new and different article. Simply blending two identical products into a single product does not fall within the definition of manufacturing, says Shami, because the ingredients of the product have not changed and the final product remains essentially the same. Notably, Shami advances no argument regarding whether an individual "produces" a tobacco product under the TPTA by blending different tobacco products to create a new, custom blend.

[29] *Spectrum Health*, 492 Mich at 515 (" 'Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used.' ") (citation omitted).

[30] *Merriam-Webster's Collegiate Dictionary*, def 5b. Another seemingly related definition provides that "produce" means "to cause to have existence or to happen," with "bring about" listed as a synonym. *Id*., def 5a. However, there are several other definitions for "produce" that do not seem to apply in this context. See, e.g., *id*., def 4 (defining "produce" as "to make available for public exhibition or dissemination: as [(a):] to provide funding for . . . [or (b):] to oversee the making of" in the context of films or music albums). Because the particular definition of "to give

shape" to something that already existed in the same "form or shape," the product produced must take a different form or shape than any of its constituent parts. Thus, an individual "produces" a tobacco product when he or she combines two or more different tobaccos "to give being, form, or shape to" a single, custom tobacco blend that differs from the ingredient tobaccos. Consequently, that individual is a "manufacturer" of a tobacco product under MCL 205.422(m)(*i*), and he or she must have a license before purchasing, possessing, acquiring for resale, or selling a tobacco product under MCL 205.423(1).

In this case, there is sufficient evidence for a person of ordinary prudence and caution to conscientiously entertain a reasonable belief that Shami was a manufacturer under MCL 205.422(m)(*i*) because he produced a tobacco product. According to Nordman's testimony at the preliminary examination, Shami admitted that he mixed two or more different hookah tobaccos to create a new "special blend." He then relabeled that combination and made it available for sale to the public at Sam Molasses. Having produced a new tobacco product, Shami was required to be licensed as a manufacturer; there is no dispute that Shami had no such license. Therefore, the district court did not abuse its discretion in binding Shami over for trial in the Wayne Circuit Court for alleged violations of MCL 205.423(1) and MCL 205.428(3).

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being, form, or shape to" is synonymous with "make" and, especially, "manufacture," we believe it serves as the most appropriate definition for determining the plain and ordinary meaning of the word "produce" in the TPTA. Of course, we must also strive to avoid rendering surplusage the statutory term "manufactures" in MCL 205.422(m)(*i*). See *Seewald*, 499 Mich at 123. But aside from the obvious differences in these definitions, the present case does not require us to address any further differentiation between the terms "manufactures" and "produces," and so we leave that task for another day.

Because it reached the same conclusion, albeit for different reasons, this portion of the Court of Appeals' judgment is affirmed.

Neither the district court nor the circuit court addressed whether Shami was a manufacturer because he had allegedly repackaged packets of bulk tobacco into tin containers. Nevertheless, the Court of Appeals opined that Shami was a manufacturer of a tobacco product on the basis of this conduct, too.

Given the same dictionary definitions of "manufacture" and "produce" discussed earlier, the Court of Appeals held that manufacturing "simply requires a change from the original state of an object or material to a state that makes it more suitable for its intended use."[31] Furthermore, given the context of the statute, including the provision concerning the use of a cigarette making machine, the Court of Appeals concluded that "any change in the form or delivery method of tobacco, rather than a specific type or method of change, constitutes manufacturing under the TPTA."[32] Thus, the Court of Appeals held that Shami's repackaging of tobacco into tins and labeling it "360" before offering it for sale amounted to the manufacturing of a new tobacco product.[33] We do not agree.

By taking packets of hookah tobacco out of a box from a distributor and placing those packets into tins with new labels, Shami did not manufacture a tobacco product, because the tobacco product itself remained completely unaltered and was suitable for use before being placed in the tins. Nor did Shami produce a tobacco product, because he did not give being, form, or

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[31] *Shami*, 318 Mich App at 328.

[32] *Id*. at 329.

[33] *Id*.

shape to a new tobacco product. Again, the tobacco product was completely unchanged after being placed in the tins.

In going beyond the dictionary definitions of "manufactures" and "produces," the Court of Appeals fashioned an overly expansive definition that encompasses conduct not supported by the plain and ordinary meaning of those words. That Court's definition also fails to appreciate that the focus of the inquiry is on the tobacco product itself, not the precise manner or mechanism in which that product is displayed or offered to the public. Accordingly, this portion of the Court of Appeals' judgment is reversed.[34]

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[34] We address two final points. First, Shami argues that the TPTA is unconstitutionally vague because it does not provide fair notice of the conduct proscribed, thereby requiring an average person to guess at what activity falls within the scope of manufacturing tobacco. Because it was cursorily raised for the first time in his application for leave to appeal in this Court, Shami waived this argument. See, e.g., *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994) ("[T]he courts of this state have long recognized the importance of preserving issues for the purpose of appellate review. As a general rule, issues that are not properly raised before a trial court cannot be raised on appeal . . . ."). Second, in the event we determine that his conduct falls within the definition of "manufacturer" under the TPTA, Shami argues that our decision should be applied prospectively rather than retroactively. We disagree. This Court's decisions are generally given full retroactive effect absent "exigent circumstances" that would justify the "extreme measure" of prospective-only application. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 400; 738 NW2d 664 (2007) (quotation marks and citation omitted); see also *Lincoln v Gen Motors Corp*, 461 Mich 483, 491; 607 NW2d 73 (2000) (" 'Complete prospective application has generally been limited to decisions which *overrule clear and uncontradicted case law*.' "), quoting *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986) (brackets omitted; emphasis added). Because this Court's present decision does not even satisfy the threshold criterion for prospective-only application—namely, that it "clearly establishes a new principle of law," *Trentadue*, 479 Mich at 401—and because this case does not present "exigent circumstances" of the sort warranting the "extreme measure" of prospective-only application, our decision has full retroactive effect.

IV. CONCLUSION

For the reasons stated in this opinion, the district court did not abuse its discretion by finding that there was probable cause that Shami unlawfully possessed, acquired, transported, or offered for sale tobacco products as a manufacturer without a license in violation of MCL 205.423(1) and MCL 205.428(3). Accordingly, we affirm in part and reverse in part the judgment of the Court of Appeals. This case is remanded to the Wayne Circuit Court for it to reinstate the bindover decision of the 19th District Court and for further proceedings consistent with this opinion. In all other respects, Shami's application for leave to appeal is denied because we are not persuaded that the questions should be reviewed by this Court. We do not retain jurisdiction.

MARKMAN, C.J., and MCCORMACK, VIVIANO, BERNSTEIN, and CLEMENT, JJ., concurred with ZAHRA, J.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v PINKNEY

Docket No. 154374. Argued on application for leave to appeal November 7, 2017. Decided May 1, 2018.

Edward Pinkney was charged in Berrien County with five felony counts of election forgery under MCL 168.937 and six misdemeanor counts of making a false statement in a certificate-of-recall petition under MCL 168.957 for having submitted petitions with falsified dates in connection with an effort to recall the mayor of Benton Harbor. After defendant was bound over to the Berrien Circuit Court for trial, he moved to quash the charges, arguing that MCL 168.937 was a penalty provision and not a substantive, chargeable offense. The court, Sterling R. Schrock, J., denied the motion. Defendant was convicted following a jury trial in the Berrien Circuit Court of all five counts of election forgery but acquitted of all six counts of making a false statement in a certificate-of-recall petition. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 30 to 120 months. The Court of Appeals, O'BRIEN, P.J., and K. F. KELLY and FORT HOOD, JJ., upheld defendant's convictions, holding that MCL 168.937 created the substantive offense of election-law forgery. 316 Mich App 450 (2016). Defendant applied for leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other peremptory action. 500 Mich 990 (2017).

In a unanimous opinion by Justice VIVIANO, the Supreme Court, in lieu of granting leave to appeal, *held*:

MCL 168.937, by its plain language, is only a penalty provision; it does not set forth a substantive offense. As a result, defendant was not properly charged under that provision with the substantive offense of election-law forgery. Therefore, his convictions must be vacated and the charges dismissed.

1. MCL 168.937 provides that any person found guilty of forgery under the provisions of the Election Law, MCL 168.1 *et seq*., shall, unless otherwise provided, be punished by a fine not exceeding $1,000, or by imprisonment in the state prison for a term not exceeding 5 years, or by both such fine and imprisonment in the discretion of the court. Nothing in the plain language

of § 937 suggests that the Legislature intended it to be a chargeable offense; instead, the language indicates that it provides the penalty for the crime of forgery enumerated elsewhere in the Election Law. Section 937 does not set forth or describe any conduct that is prohibited, and the Legislature's use of the past tense verb "found" presupposes that an individual has already been convicted of the crime of forgery under the Election Law. Consequently, by its clear terms, the provision does nothing more than provide the punishment for that already-committed offense. A review of the surrounding provisions further indicates that § 937 does not create a chargeable offense but is instead one of a series of penalty provisions for offenses delineated elsewhere in the Election Law.

2. The statutory text of MCL 168.937 contains no evidence that the Legislature intended to incorporate the common-law definition of forgery when the previous version of § 937 was first enacted or when it was recodified. The term "forgery" is not used to describe a type of conduct that is prohibited. Instead, it describes the punishment for someone who has already committed the crime of forgery. In other statutes that have been found to codify a common-law crime, the commission of the common-law crime itself is the subject of the statute, which generally expressly criminalizes the crime; the common-law term is simply a shorthand for how the crime is committed. By contrast, the subject of MCL 168.937 is an individual found guilty of a crime, and § 937 itself merely prescribes the punishment for such an individual; it does not mention the commission of forgery or state that a person who forges is guilty of a crime. Simply plugging the common-law definition of "forgery" into § 937 does not transform the provision into a substantive offense. While the common law can provide the definition of "forgery," the common law cannot supply the elements of "forgery under the provisions of this act"; rather, a reasonable person would believe that "forgery under the provisions of this act" suggests that one could only be found guilty of a forgery crime defined elsewhere under the Election Law.

3. The statutory history of the Election Law provides further support for the conclusion that MCL 168.937 is a penalty provision. For more than 80 years, the only statute in Michigan criminalizing election-related forgery was narrowly drawn to prohibit falsification of a "register of electors" (later called a "registration book"). In this statute, the Legislature confusingly combined two offenses in one statute: the first was labeled "larceny," and the second was labeled "forgery." The penalty for these crimes was included at the end of the section, making both

crimes felonies. Notably, the statute was designed to protect a document that was in the custody of election officials. In 1917, the Legislature made two changes to this statute that are of note: it dropped the "larceny" label from the first grouping of prohibited conduct and instead provided that a person who violated that clause "shall be deemed guilty of a felony," and it deleted the penalty provision from the statute defining these substantive offenses and created a separate penalty provision for the crime of election-related forgery. The latter provision was nearly identical to § 937, the present-day penalty provision at issue in this case. In 1948, these provisions were recodified as 1948 CL 195.8 and 1948 CL 198.3, respectively. During a rewrite of the Election Law in 1954, the Legislature enacted MCL 168.932(c), which essentially combined the two offenses from 1948 CL 195.8 into one. But MCL 168.932(c) explicitly focused on the actions of election officials and those who have custody of election records. In addition, instead of applying only to a registration book or copy thereof filed for preservation like its predecessor, the new offense was expanded to cover any record, election list of voters, affidavit, return, statement of votes, certificates, poll book, or of any paper, document, or vote of any description, which pursuant to the Election Law is directed to be made, filed, or preserved. Finally, the new statute dropped the reference to "forgery," presumably because the newly combined statute also included some of the former so-called "larceny" activities. The statute also made it clear that a person who violates § 932(c) is guilty of a felony. This obviated the need for § 937, given that the general felony penalty provision, § 935, applies as the penalty provision. Despite these changes, however, the 1954 amendments recodified 1948 CL 198.3 as MCL 168.937. Thus, in 1954 the Legislature retained the forgery penalty as the new § 937, but the Legislature omitted the only provision in the Election Law to which that penalty pertained. At the same time, the Legislature enacted yet another statute, MCL 168.957, with potential applicability to the conduct at issue in this case. The Legislature also recodified a provision making it unlawful to affix a forged name to an initiative or referendum petition, MCL 168.484. Finally, in 1995, the Legislature added another narrow forgery offense to the Election Law, MCL 168.759(8), which provides that a person who forges a signature on an absent voter ballot application is guilty of a felony. It would be unreasonable to conclude that the Legislature would have made these changes if it considered § 937 an omnibus forgery offense covering all election-related documents, and it would also be unreasonable to conclude that the Legislature would have chosen to create such a

vast and far-reaching offense out of an existing penalty provision by making no substantive changes to its language.

4. Generally, courts must give effect to every word, phrase, and clause of a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory. However, the canon against surplusage is not an absolute rule. Rather, it assists only when a competing interpretation gives effect to every clause and word of a statute. In this case, construing MCL 168.937 as creating the separate offense of forgery would appear to render all or part of two other statutory provisions surplusage. Both MCL 168.932(c) and MCL 168.759(8) prohibit forgery of certain Election Law documents. Section 932(c), in particular, prohibits forgery of an expansive list of documents by certain election officials or other persons having custody of such documents. Had the Legislature intended § 937 to be a general forgery provision prohibiting forgery of any document in the Election Law, there would have been no need to include two other forgery provisions describing how forgery is committed. Therefore, reading § 937 as creating a substantive offense of forgery renders all or part of §§ 932(c) and 759(8) surplusage. Furthermore, using the surplusage canon—or any rule of construction—to create a criminal offense is impermissible.

Court of Appeals' judgment reversed; case remanded to the trial court for further proceedings.

Justice CLEMENT took no part in the decision of this case.

ELECTIONS — OFFENSES AND PENALTIES — FORGERY — PENALTY PROVISIONS.

MCL 168.937 provides that any person found guilty of forgery under the provisions of the Election Law, MCL 168.1 *et seq*., shall, unless otherwise provided, be punished by a fine not exceeding $1,000, or by imprisonment in the state prison for a term not exceeding 5 years, or by both such fine and imprisonment in the discretion of the court; a person may not be charged with forgery under MCL 168.937 because it does not set forth a substantive offense.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Michael J. Sepic*, Prosecuting Attorney, and *Aaron J. Mead*, Assistant Prosecuting Attorney, for the people.

Timothy M. Holloway for defendant.

Amicus Curiae:

Richard D. Friedman, *Mark P. Fancher*, and *Michael J. Steinberg* for the American Civil Liberties Union of Michigan.

VIVIANO, J. The issue in this case is whether defendant can be convicted of election-law forgery under MCL 168.937. The Court of Appeals upheld defendant's convictions under that provision, holding that MCL 168.937 creates the substantive offense of election-law forgery. We disagree and hold that MCL 168.937 is nothing more than a penalty provision—it does not create a substantive offense. Because defendant cannot be convicted under a statute that does not set forth a crime, we reverse and remand for further proceedings not inconsistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Between November 2013 and January 2014, Edward Pinkney participated in a recall effort against the mayor of Benton Harbor, James Hightower. In order to force a recall election, defendant Pinkney needed to obtain 393 signatures on petitions supporting the recall. Defendant had a 60-day window within which to collect the required number of signatures.[1] On January 8, 2014, defendant presented the Berrien County Clerk's office with 62 petitions containing 728 signatures supporting the recall election. The clerk's office certified 402 of these signatures and scheduled the recall election.

[1] Under MCL 168.961(2)(d), signatures on a recall petition are not valid if obtained "more than 60 days before the filing of the recall petition."

Prior to the election, the clerk's office transferred the petitions to the Berrien County Sheriff's Department for examination of perceived irregularities in the signatures on the petitions. After reviewing the petitions, the sheriff's department identified several signatures for which the dates appeared to have been altered. The Michigan State Police Crime Laboratory also examined the petitions and confirmed that five of the petitions contained signatures with altered dates. In each case, the dates had been altered so as to fall within the 60-day window for valid signatures.

Defendant was charged with five counts of election-law forgery under MCL 168.937 and six counts of making a false statement in a certificate-of-recall petition under MCL 168.957. After being bound over to the Berrien Circuit Court on these charges, defendant filed a motion to quash arguing, *inter alia*, that § 937 is a penalty provision, not a substantive, chargeable offense. The circuit court denied the motion to quash, and the case proceeded to trial. After an eight-day trial, the jury returned verdicts of guilty on the five felony counts and not guilty on the six misdemeanor counts. In a motion for a directed verdict, defendant again argued that § 937 is a penalty provision and not a substantive offense. The circuit court denied the motion and sentenced defendant to concurrent prison terms of 30 to 120 months.

On appeal, defendant argued, among other things, that § 937 does not create a substantive offense and that the admission of certain evidence under MRE 404(b) was improper and requires reversal.[2] The Court of Appeals unanimously upheld defendant's convictions.[3] Regarding § 937, the Court of Appeals held that

[2] *People v Pinkney*, 316 Mich App 450, 461; 891 NW2d 891 (2016).

[3] *Id*. at 462.

the statute does create the substantive offense of election-law forgery.[4] In reaching this conclusion, the panel relied heavily on the reasoning of *People v Hall*,[5] which considered the same issue.

The Court of Appeals in *Hall* concluded that § 937 created a substantive offense for two reasons. First, the Court explained that interpreting § 937 as a penalty provision would render it surplusage because another provision, MCL 168.935,[6] already sets forth an identical penalty for felonies under the Michigan Election Law, MCL 168.1 *et seq*.[7] Second, the Court reasoned that interpreting § 937 as a penalty provision would contravene the Legislature's intent in enacting the Election Law, which the Court described as "ensur-[ing] the fairness and purity of the election process in part by proscribing misconduct that would foster such unfairness and impurity."[8] Based on this reasoning, the *Hall* Court determined that § 937 creates a substantive offense and is not merely a penalty provision.[9]

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[4] *Id*. at 462-465.

[5] *People v Hall*, unpublished per curiam opinion of the Court of Appeals, issued October 23, 2014 (Docket No. 321045).

[6] "Any person found guilty of a felony under the provisions of this act shall, unless herein otherwise provided, be punished by a fine not exceeding $1,000.00, or by imprisonment in the state prison for a term not exceeding 5 years, or by both such fine and imprisonment in the discretion of the court." MCL 168.935.

[7] *Hall*, unpub op at 6. The Legislature has directed that the act containing our election laws "shall be known and may be cited as the 'Michigan election law.' " MCL 168.1.

[8] *Id*. at 7.

[9] Following this decision, the *Hall* prosecutor appealed a separate, unfavorable ruling in our Court. In response, the defendant did not challenge the Court of Appeals' holding that § 937 created a substantive offense, but instead argued that the Court of Appeals correctly held that the prosecution could only charge him with violating MCL 168.544c (falsifying electoral nominating petitions) and not MCL 168.937. Accordingly, in deciding the case, we declined to reach this question and

The Court of Appeals in the present case adopted the *Hall* panel's reasoning and again held that § 937 constitutes a substantive offense.[10] The Court further noted that interpreting § 937 solely as a penalty provision would create an absurd result.[11] The Court explained:

> [U]nder defendant's interpretation of MCL 168.937, only "[a]n inspector of election, clerk, or other officer or person having custody of any record, election list of voters, affidavit, return, statement of votes, certificates, poll book, or of any paper, document, or vote of any description," MCL 168.932(c), or "[a] person who is not involved in the counting of ballots as provided by law and who has possession of an absent voter ballot mailed or delivered to another person," MCL 168.932(e), could be guilty of election forgery. There is simply nothing—express, implied, or otherwise—in the Michigan Election Law to support the idea that the Legislature intended such a peculiar result. *People v Stephan*, 241 Mich App 482, 503; 616 NW2d 188 (2000) (explaining that this Court will not read anything into a statute that is "not plainly expressed" by the Legislature). Furthermore, interpreting MCL 168.937 in that manner, that is, as only a penalty provision, would create an absurd result by permitting individuals who do not meet the definitions set forth in MCL 168.932 to commit common-law forgery in the election process without recourse under the Michigan Election Law. *People v Lewis*, 302 Mich App 338, 341-342; 839 NW2d 37 (2013), quoting *People v Tennyson*, 487 Mich 730, 741; 790 NW2d 354 (2010) (" 'Statutes must be construed to prevent absurd results.' ").[12]

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instead presumed, for purposes of the appeal, that § 937 did create a substantive offense. See *People v Hall*, 499 Mich 446, 449 n 2, 453, 456, 461; 884 NW2d 561 (2016). Then, we reversed the Court of Appeals, holding that the prosecutor had discretion to charge the defendant under both § 937 and § 544c. *Id*. at 449.

[10] *Pinkney*, 316 Mich App at 463-465.

[11] *Id*. at 464.

[12] *Id*.

The Court concluded that it could not interpret § 937 in a way that would render the provision surplusage and create such an absurd result.[13]

The panel went on to reject defendant's arguments that § 937 violates the vagueness doctrine and the rule of lenity.[14] The statute is not unconstitutionally vague, the panel explained, because it can be clearly understood by reference to the common-law definition of forgery. Similarly, the panel concluded that the statute does not implicate the rule of lenity because it is not ambiguous.[15]

Defendant has now sought leave to appeal in this Court. We scheduled oral argument on the application, directing the parties to address:

> (1) whether the trial court abused its discretion when it admitted evidence under MRE 404(b) that related to the defendant's political and community activities other than the mayoral recall effort for the purpose of showing the defendant's motive to commit the instant crimes, and (2) whether the Court of Appeals erred in determining that MCL 168.937 creates the substantive offense of election forgery and is not merely a penalty provision for the specific forgery offenses set forth in other provisions of the Michigan election law.[16]

II. STANDARD OF REVIEW

This Court reviews questions of statutory interpretation de novo.[17]

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[13] *Id*. at 465.

[14] *Id*. at 466.

[15] *Id*. We need not address defendant's vagueness and rule-of-lenity arguments in light of our holding that MCL 168.937 does not create a substantive offense; however, we will discuss whether the statute may be understood as incorporating the common-law definition of forgery because we believe that is important to determine its meaning.

[16] *People v Pinkney*, 500 Mich 990, 990-991 (2017).

[17] *People v Miller*, 498 Mich 13, 16-17; 869 NW2d 204 (2015).

III. ANALYSIS

It has long been our rule that "[a] criminal statute ought to be so plain and unambiguous that 'he who runs' may read, and understand whether his conduct is in violation of its provisions."[18] In this case, after reviewing the plain language of § 937, together with its context and history, we are convinced that § 937 does not create a substantive crime. Instead, it is an inoperative penalty provision. We reach this unusual conclusion for the reasons that follow.

A. ANALYSIS OF MCL 168.937

When interpreting a statute, "our goal is to give effect to the Legislature's intent, focusing first on the statute's plain language."[19] "In so doing, we examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme."[20] "When a statute's language is unambiguous, . . . the statute must be enforced as written. No further judicial construction is required or permitted."[21]

The prosecution charged defendant with six counts of violating § 937, which reads:

> Any person found guilty of forgery under the provisions of this act shall, unless herein otherwise provided, be

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[18] *People v Ellis*, 204 Mich 157, 161; 169 NW 930 (1918). The phrase "he who runs may read" is derived from the Bible, *Habakkuk* 2:2, and has been interpreted by a leading scholar of the early 20th century to mean "[w]rite plainly . . . that it may be read runningly, *i.e.* without pause and hesitation." Brief Communications, *He Who Runs May Read*, 40 J Biblical Lit 166, 181 (1921).

[19] *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014) (quotation marks and citations omitted).

[20] *Id*.

[21] *Id*. (quotation marks and citations omitted).

> punished by a fine not exceeding $1,000.00, or by imprisonment in the state prison for a term not exceeding 5 years, or by both such fine and imprisonment in the discretion of the court.

Contrary to the Court of Appeals' conclusion that § 937 clearly sets forth the offense of forgery under the Election Law, nothing in the plain language of § 937 suggests that the Legislature intended it to be a chargeable offense. Instead, as defendant argued below, it reads like a penalty provision—i.e., a provision providing the penalty for the crime of forgery enumerated elsewhere in the Election Law. Section 937 does not set forth or describe any conduct that is prohibited. Instead, the Legislature's use of the past tense verb "found" (in the phrase "found guilty of forgery under the provisions of this act") presupposes that an individual has already been convicted of the crime of forgery under the Election Law. Consequently, by its clear terms, the provision does nothing more than provide the punishment for that already-committed offense.[22]

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[22] This accords both with logic and the Legislature's usual practice—when the Legislature uses the phrase "found guilty" in a statute that does not describe the prohibited conduct, the statute typically prescribes penalties or consequences for conduct that is criminalized or made punishable elsewhere. For example, MCL 600.3830(2) states, "Any person found guilty of maintaining a nuisance under the provisions of this chapter shall forfeit the benefit of all property exemptions . . . ." Nothing in that provision could reasonably be construed as suggesting that it creates a general crime of nuisance. Instead, an individual trying to determine how to commit a nuisance "under the provisions of this chapter" would have to look elsewhere in the chapter. Unsurprisingly, MCL 600.3801 specifically provides what conduct constitutes a nuisance, and further explains that "[a] person . . . who owns, leases, conducts, or maintains a building, vehicle, or place described in subsection (1) is guilty of a nuisance." Thus, based on its plain language, MCL 600.3830(2) is exactly what § 937 appears to be—a penalty provision. See also, e.g., MCL 28.468 (criminalizing conduct in Subsection 1 and

A review of its surrounding provisions further indicates that § 937 does not create a chargeable offense, but is instead one of a series of penalty provisions for offenses delineated elsewhere in the Election Law. The three sections of the Election Law immediately preceding § 937 provide as follows:

> Any person who shall be found guilty of a misdemeanor under the provisions of this act shall, unless herein otherwise provided, be punished by a fine of not exceeding $500.00, or by imprisonment in the county jail for a term not exceeding 90 days, or both such fine and imprisonment in the discretion of the court.[23]
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> Any person found guilty of a felony under the provisions of this act shall, unless herein otherwise provided, be punished by a fine not exceeding $1,000.00, or by imprisonment in the state prison for a term not exceeding 5 years, or by both such fine and imprisonment in the discretion of the court.[24]
>
> Any person found guilty of perjury under the provisions of this act shall, unless herein otherwise provided, be punished by a fine not exceeding $1,000.00, or by impris-

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providing, in Subsection 2, that "a person that is found guilty of a violation of this act shall be required to reimburse the appropriate governmental agency"); MCL 28.723a(1) ("If an individual pleads guilty to or is found guilty of a listed offense . . . ."); MCL 32.1085 (describing the offense of "desertion" and then providing, in a separate subsection, that "[a] person found guilty of desertion shall be punished as a court-martial directs"); MCL 752.102 ("Any person . . . who shall be found guilty of a violation of the provisions of section 1 of this act, shall be deemed guilty of a misdemeanor . . . ."). According to at least one commentator, this is a preferred practice. See 1A Singer & Singer, Sutherland Statutory Construction (7th ed), § 20:18, p 147 ("The better practice [when drafting criminal penalties] is to place a general penalty section at the end or near the end of the act and provide that any violation of the provisions of the act is punishable according to the terms of the penalty section.").

[23] MCL 168.934.

[24] MCL 168.935.

> onment in the state prison for a term not exceeding 5 years, or by both such fine and imprisonment in the discretion of the court.[25]

One treatise describes these provisions, along with § 937, as "penalties for offenses where no other penalty is provided by the Act[.]"[26]

Certainly, no one would suggest that § 934 and § 935 create chargeable offenses for misdemeanors and felonies under the Election Law. Instead, they merely define the punishment for misdemeanor and felony offenses under the Election Law, where no penalty is "otherwise provided." Section 937 is nearly identical to §§ 934 and 935, except for the use of the word "forgery" in place of "misdemeanor" and "felony," respectively, thereby leaving no room to distinguish the provisions.

Section 936 is most akin to § 937, in that it specifies a penalty for a recognized type of crime—"perjury" rather than "forgery." Yet the Legislature described how an individual commits "perjury" in MCL 168.933, which reads:

> A person who makes a false affidavit or swears falsely while under oath under section 848 or for the purpose of securing registration, for the purpose of voting at an election, or for the purpose of qualifying as a candidate for elective office under section 558 is guilty of perjury.

The only reasonable reading of these two provisions is that the Legislature intended § 933 to be the substantive offense of perjury and § 936 to set forth the punishment for a conviction of perjury under the Election Law. And, since it contains language nearly identical to § 936, it would be exceedingly odd to assume that the

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[25] MCL 168.936.

[26] 3 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 71:18, p 555.

Legislature intended § 937 to operate not as a penalty provision like § 936, but as a provision creating the substantive offense of forgery under the Election Law. In short, the plain language of § 937, in context with its surrounding provisions in the Election Law, strongly indicates that it is only a penalty provision.

In reaching the contrary conclusion, the Court of Appeals erred by first looking to the purpose of the Election Law instead of focusing on its plain language.[27] After noting that the purpose of the Election Law is "to regulate primaries and elections, provide for the 'purity' of the election process, and guard against abuse," the Court summarily concluded that interpreting § 937 as a substantive offense would further that purpose.[28] The Court then made the rather remarkable assertion that it would be "peculiar" or "absurd" if someone could only be found guilty of election-related forgery if they engaged in conduct specifically prohibited by two other statutory subsections, MCL 168.932(c) and (e).[29] However, "[t]he Court of Appeals' reliance on the perceived purpose of the statute runs counter to the rule of statutory construction directing us to discern legislative intent from plain statutory language."[30] We determine the scope of a statute based on its plain language—here, the words of § 937 give no indication that it was intended to cover all possible election-related forgery crimes.[31]

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[27] See *Madugula*, 496 Mich at 696 ("As with any statutory interpretation, our goal 'is to give effect to the Legislature's intent, focusing first on the statute's plain language.' ") (quotation marks and citation omitted).

[28] *Pinkney*, 316 Mich App at 463-464.

[29] *Id*. at 464.

[30] *Perkovic v Zurich American Ins Co*, 500 Mich 44, 53; 893 NW2d 322 (2017).

[31] Cf. *People v Boscgalia*, 419 Mich 556, 563-564; 357 NW2d 658 (1984) ("There is no indication that the present statute was intended to cover all

B. INCORPORATING THE COMMON-LAW DEFINITION OF FORGERY

Our statutory interpretation would not be complete without consideration of whether it is possible to interpret the plain language of § 937 as creating a substantive crime by reference to the common law.[32] The rule is well established that "[w]ords and phrases that have acquired a unique meaning at common law are interpreted as having the same meaning when used in statutes dealing with the same subject matter as that with which they were associated at the common law."[33] Therefore, "[w]here the statutory provision describes by name, but does not clearly and explicitly state the definition of a criminal offense, courts will construe the statutory crime by resorting to the common-law definition."[34]

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the possible crimes dealing with transfer of title or theft of automobile parts. To the contrary, this statute is only one part of an overall statutory scheme dealing with automobiles and stolen goods in general.").

[32] In its opinion, the Court of Appeals did state that "the meaning of [§ 937] can be fairly ascertained by reference to the common law." *Pinkney*, 316 Mich App at 466. See generally 2B Singer & Singer, Sutherland Statutory Construction (7th ed), § 50:1, p 143 ("All legislation is interpreted in the light of the common law . . . ."). However, as noted above, the Court of Appeals made this observation only after concluding that § 937 created a substantive offense. See note 15 of this opinion.

[33] *People v Reeves*, 448 Mich 1, 8; 528 NW2d 160 (1995), superseded by statute on other grounds by 1996 PA 20. See also MCL 8.3a (instructing that while statutory terms generally are accorded their ordinary meaning, "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"); and *People v Covelesky*, 217 Mich 90, 100; 185 NW 770 (1921) ("A well recognized rule for construction of statutes is that when words are adopted having a settled, definite and well known meaning at common law it is to be assumed they are used with the sense and meaning which they had at common law unless a contrary intent is plainly shown."), superseded by statute on other grounds as recognized by *People v Williams*, 491 Mich 164, 171-173; 814 NW2d 270 (2013).

[34] *Reeves*, 448 Mich at 8.

In this case, however, the statutory text contains no evidence that the Legislature intended to incorporate the common-law definition of forgery when the previous version of § 937 was first enacted or when it was recodified.[35] As noted above, the statutory text does not use the term "forgery" to describe a type of conduct that is prohibited. Instead, it describes the punishment for someone who has already committed the crime of forgery.[36] In other statutes that we have found to codify

[35] The statutory history of this provision is discussed in detail below.

[36] By comparison, the general forgery statute, MCL 750.248(1), clearly sets forth the conduct (i.e., "a person who . . . forges") and enumerates documents that, if forged, can result in a conviction under MCL 750.248(1). Likewise, every other forgery statute contains a description of what is necessary to commit forgery under those acts—and what documents are covered. For example, MCL 432.30(1) of Michigan's Lottery Act, MCL 432.1 *et seq*., provides, "A person, with the intent to defraud, shall not falsely make, alter, forge, utter, pass, or counterfeit a state lottery ticket or share." And, not surprisingly, the provision is followed by a penalty provision akin to § 937—"A person convicted of violating this section is guilty of a felony punishable by imprisonment for not more than 5 years or by a fine of not more than $1,000.00, or both." MCL 432.30(3). See also MCL 205.428(7) ("A person who falsely makes, counterfeits, or alters a license, vending machine disc, or marker . . . is guilty of a felony punishable by a fine of not more than $5,000.00 or imprisonment for not more than 5 years, or both."); MCL 257.310(7) (subjecting to punishment "a person who intentionally reproduces, alters, counterfeits, forges, or duplicates a license photograph, the negative of the photograph, image, license, or electronic data contained on a license . . . ."); MCL 257.905 ("Any person who shall forge, or without authority, sign any evidence of ability to respond in damages as required by the secretary of state . . . shall be guilty of a misdemeanor . . . ."); MCL 257.222(6) ("A person who intentionally reproduces, alters, counterfeits, forges, or duplicates a certificate of title . . . shall be punished as follows . . . ."); MCL 259.176a(a) (allowing the punishment of an individual under the act who "[k]nowingly forges, counterfeits, alters, or falsely makes a certificate authorized to be issued under this act or the rules promulgated under this act"); MCL 324.52908(5) ("A person who forges a bill of sale or other evidence of title prescribed by the department or the federal agency that has jurisdiction is guilty of a misdemeanor, punishable by imprisonment for not more than 90 days, or a fine of not more than $100.00, or both.");

a common-law crime, the commission of the common-law crime itself is the subject of the statute, which generally expressly criminalizes the crime; the common-law term is simply a shorthand for how the crime is committed.[37] Here, by contrast, the statute's subject is an individual "found guilty" of a crime, and

MCL 324.80319(1)(a) ("A person shall not . . . [a]lter or forge a certificate of title . . . ."); MCL 324.81112(4) (subjecting to punishment "[a] person who intentionally reproduces, alters, counterfeits, forges, or duplicates an [off-road vehicle] certificate of title"); MCL 333.7407(1)(c) ("A person shall not knowingly or intentionally . . . [a]cquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge."); MCL 333.17766(c) (stating that a person is guilty of a misdemeanor if he or she "[f]alsely makes, utters, publishes, passes, alters, or forges a prescription"); MCL 436.1919 ("A person who falsely or fraudulently makes, simulates, forges, alters, or counterfeits a document, label, or stamp prescribed by the commission under this act . . . is guilty of a felony . . . ."); MCL 168.759(8) ("A person who forges a signature on an absent voter ballot application is guilty of a felony."); MCL 28.422(14) ("A person who forges any matter on an application for a license under this section is guilty of a felony . . . ."); MCL 28.295(1) (subjecting to punishment "[a] person who intentionally reproduces, alters, counterfeits, forges, or duplicates an official state personal identification card photograph"); MCL 324.43558(1)(f) ("A person is guilty of a misdemeanor if the person . . . [f]alsely makes, alters, forges, or counterfeits a sportcard or a hunting, fishing or fur harvester's license . . . .").

[37] An example is the manslaughter statute, MCL 750.321, which provides, "Any person who shall commit the crime of manslaughter shall be guilty of a felony punishable by imprisonment in the state prison, not more than 15 years or by fine of not more than 7,500 dollars, or both, at the discretion of the court." Because the term "manslaughter" is not statutorily defined, this Court found it appropriate to incorporate its common-law meaning into the statute. See *People v Couch*, 436 Mich 414, 419-420; 461 NW2d 683 (1990). The focus of that statute is criminalizing the commission of certain conduct. Another example is MCL 750.356(1), which states that "[a] person who commits larceny by stealing any of the following property of another person is guilty of a crime as provided in this section . . . ." The statute makes the commission of larceny a crime, i.e., an individual who commits larceny "is guilty of a crime." Because there is no full statutory definition, the common-law definition is used to help describe how an individual commits larceny. See *People v March*, 499 Mich 389, 399-400; 886 NW2d 396 (2016).

the statute itself merely prescribes the punishment for such an individual; it does not mention the commission of forgery or state that a person who forges "is guilty" of a crime.

Simply plugging the common-law definition of "forgery" into § 937 does not transform the provision into a substantive offense.[38] While the common law can provide the definition of "forgery," the common law cannot supply the elements of "forgery *under the provisions of this act*."[39] In other words, a reader of the statute who sees "forgery under the provisions of this act" would not assume that "forgery" means common-law forgery. Instead, a reasonable person would believe that "forgery *under the provisions of this act*" suggests that he or she could only be found guilty of a forgery crime defined elsewhere in the Election Law.[40]

A review of the statutory history of the Election Law provides further support for our conclusion that § 937 is a penalty provision.[41] For more than 80 years, the only statute in Michigan criminalizing election-related

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[38] As we noted in *Hall*, " '[t]he common-law definition of forgery is a false making, or a making *malo animo* of any written instrument with intent to defraud.' " *Hall*, 499 Mich at 456, quoting *People v Warner*, 104 Mich 337, 340; 62 NW 405 (1895).

[39] Emphasis added.

[40] The Court of Appeals in *Hall*, unpub op at 9, interpreted "forgery under the provisions of this act" to mean forgery of documents "required to be submitted under the Michigan election law." Even assuming the statutory text could bear this meaning, it would not be a reasonable interpretation, for the reader would first need to incorporate the common-law definition of "forgery" and then canvass the entire Election Law to determine what conduct could potentially result in a felony conviction. This construction is far from the clear and concise delineation of the elements of a crime that the Legislature is required to provide. *People v Goulding*, 275 Mich 353, 359; 266 NW 378 (1936).

[41] Unlike legislative history, statutory history—the narrative of the "statutes repealed or amended by the statute under consideration"—

forgery was narrowly drawn to prohibit falsification of a "register of electors" (later called a "registration book").[42] In this statute, the Legislature confusingly combined two offenses in one statute: the first was labeled "larceny," and the second was labeled "forgery." The penalty for these crimes was included at the end of the section, making both crimes felonies. Notably, the statute was designed to protect a document that was in the custody of election officials.[43]

In 1917, the Legislature made two changes to this statute that are of note.[44] It dropped the "larceny" label

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properly "form[s] part of the context of the statute . . . ." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 256.

[42] That statute, 1859 PA 177, § 20, provided as follows:

> Whoever shall willfully cut, burn, mutilate or destroy any such register of electors, or copy thereof filed for preservation, or shall unlawfully take and carry away the same, or unlawfully conceal or refuse or neglect to surrender the same, with intent to prevent its being used as authorized by law, shall be deemed guilty of larceny; and whoever shall falsify any such register or copy, by unlawfully erasing or obliterating any name or entry lawfully made therein, or by unlawfully inserting therein any name, note or memorandum, with intent thereby to influence or affect the result of any election or to defraud any person of an election to office, shall be deemed guilty of forgery; and the person so offending shall, for every such offence, be punished by imprisonment in the State Prison not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year, nor less than ninety days.

[43] See 1859 PA 177, § 1 (imposing a duty on city and township officials to provide one register or book of electors for each township or ward); 1917 PA 126, ch 2, § 5 ("The registration book or books of any township or city shall remain in the custody of the township or city clerk, as the case may be, at all times except when they are in use by boards of registration or boards of inspectors of an election or an official primary election, as provided by this act.").

[44] That statute, 1917 PA 126, ch 2, § 8, provided as follows:

> Whoever shall wilfully cut, burn, mutilate or destroy any registration book, or copy thereof filed for preservation, or shall

from the first grouping of prohibited conduct, and instead provided that a person who violated that clause "shall be deemed guilty of a felony." And it deleted the penalty provision from the statute defining these substantive offenses and created a separate penalty provision for the crime of election-related forgery.[45] The latter provision was nearly identical to § 937, the present-day penalty provision at issue in this case.[46] In 1948, these provisions were recodified as 1948 CL 195.8 and 1948 CL 198.3, respectively.[47]

> unlawfully take and carry away any such registration book or copy, or shall unlawfully conceal or refuse or neglect to surrender the same with intent to prevent its being used, as authorized by law, shall be deemed guilty of a felony. Whoever shall falsify such registration book, or copy thereof, by unlawfully erasing or obliterating any name or entry lawfully made therein, or by unlawfully inserting therein any name, note or memorandum, shall be deemed guilty of forgery.

[45] See 1917 PA 126, ch 2, § 8 (substantive offense); 1917 PA 126, ch 11, § 7 ("Any person found guilty of forgery under the provisions of this act shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the State Prison for a term not exceeding five years, or by both such fine and imprisonment, in the discretion of the court.").

[46] In another public act passed the same year, Public Act 203, the Legislature enacted a penalty provision identical to the one in 1917 PA 126 except for the amount of the fine. 1917 PA 203, ch 25, § 16. It appears that this penalty provision was unaccompanied by any substantive offense, as PA 203 nowhere defined forgery. The Legislature corrected this oversight by combining multiple election provisions into a more comprehensive scheme a few years later in 1925 PA 351. That act defined the substantive offense of forgery, 1925 PA 351, part 5, ch 1, § 8, just as it had in 1917 PA 126. The act also provided the penalty for forgery—in the chapter called "Penalties"—using the same structure as the penalty provisions in 1917 PA 126 and 203. 1925 PA 351, part 5, ch 4, § 3.

[47] Another election-related forgery statute, 1941 PA 246, § 14 (later codified at 1948 CL 200.14), made it unlawful to affix a forged name to an initiative or referendum petition. *Id*. (retained as MCL 168.484 after 1954 PA 116 and repealed by 1965 PA 312, § 2). While 1948 CL 200.14 did mention forgery, it has no relationship to § 937 because it provided its own punishment. See *id*. ("Any person found guilty of violating the provisions of this section shall be deemed guilty of a misdemeanor.").

During a rewrite of the Election Law in 1954, the Legislature expanded the scope of this election-related forgery prohibition when it enacted MCL 168.932(c), which essentially combined the two offenses from 1948 CL 195.8 into one.[48] But § 932(c) continued to focus (now explicitly) on the actions of election officials and those who have custody of election records—it applies to "[a]n inspector of election, clerk, or other officer or person having custody" of the enumerated documents.[49] In addition, instead of applying only to "a reg-

[48] See 1954 PA 116. As enacted, MCL 168.932(c) provided:

> No inspector of election, clerk or other officer or person having custody of any record, election list of voters, affidavit, return or statement of votes, certificates, poll book, or of any paper, document or vote of any description, in this act directed to be made, filed or preserved, shall wilfully destroy, mutilate, deface, falsify or fraudulently remove or secrete the whole or part thereof, or fraudulently make any entry, erasure or alteration therein, or permit any other person to do so.

This statute, which has since been amended in style but not substance, does not list all of the same items as its predecessor. Thus, for example, it does expressly prohibit cutting, burning, or unlawfully taking and carrying away a registration book. And it adds some items to the list that were not included previously, such as "deface" and "alter[]." But, especially as it relates to the forgery-type conduct, the new statute appears to encompass most, if not all, of the same conduct.

Our conclusion that § 932 is a direct descendant of the original, independent substantive forgery offense is further confirmed by the official compiler's notes to its predecessor, 1948 CL 195.8. Those notes indicate that 1948 CL 195.8 originated in 1917 PA 126, ch 2, § 8, the first statute in which the substantive forgery crime was independent of the penalty provision. In other words, § 932(c) hails from the original substantive forgery offense. While the compiler's notes are not necessary to our conclusion, which follows from the plain text, the notes offer a form of support contemplated by the Legislature, which instructs that official compilations shall include "notes, references, and other materials" the compiler "considers necessary." MCL 8.41(3); cf. *Camaj v S S Kresge Co*, 426 Mich 281, 289; 393 NW2d 875 (1986) (noting that marginal notations in a statute can provide persuasive, but not conclusive, proof of meaning).

[49] MCL 168.932(c).

istration book or copy thereof filed for preservation" like its predecessor, the new offense was expanded to cover "any record, election list of voters, affidavit, return, statement of votes, certificates, poll book, or . . . any paper, document, or vote of any description, which pursuant to this act is directed to be made, filed, or preserved . . . ."[50]

Finally, the new statute dropped the reference to "forgery," presumably because the newly combined statute also includes some of the former so-called "larceny" activities, so it no longer made sense to use the term "forgery." Perhaps because of this change, the statute also now makes it clear (in its introductory clause) that a person who violates § 932(c) "is guilty of a felony." This, of course, obviated the need for § 937, since the general felony penalty provision (§ 935) applies as the penalty provision. Despite these changes, the 1954 amendments recodified 1948 CL 198.3 as § 937.[51] Thus, the Legislature retained § 937, but omitted the only provision in the Election Law to which it pertained.

To summarize, the previous statute defining "forgery"—1948 CL 195.8—was extremely limited, applying only when an individual falsified a registration book. In 1954, the Legislature combined two offenses into one, dramatically expanded the scope of documents covered, dropped the label "forgery," and made the combined offense a felony (thus obviating the need for a separate forgery penalty provision).

At the same time, the Legislature enacted another statute, MCL 168.957, with potential applicability to the conduct at issue in this case.[52] And, as noted above,

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[50] *Id*.

[51] See 1954 PA 116.

[52] See 1954 PA 116. MCL 168.957, which governs the conduct of petition circulators, was amended by 1976 PA 66 and currently provides:

the Legislature also recodified a provision making it unlawful to affix a forged name to an initiative or referendum petition. See MCL 168.484.[53] Finally, in 1995, the Legislature added another narrow forgery offense to the Election Law. In that provision, MCL 168.759(8), the Legislature provided that "[a] person who forges a signature on an absent voter ballot application is guilty of a felony."[54]

Why, one might ask, would the Legislature go to all this trouble if it intended to transform § 937, the prior

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> A person circulating a petition shall be a qualified and registered elector in the electoral district of the official sought to be recalled and shall attach thereto his certificate stating that he is a qualified and registered elector in the electoral district of the official sought to be recalled and shall state the city or the township wherein he resides and his post-office address; further, that signatures appearing upon the petition were not obtained through fraud, deceit, or misrepresentation and that he has neither caused nor permitted a person to sign the petition more than once and has no knowledge of a person signing the petition more than once; that all signatures to the petition were affixed in his presence; and that to the best of his knowledge, information, and belief, the signers of the petition are qualified and registered electors and the signatures appearing thereon are the genuine signatures of the persons of whom they purport to be. A person who knowingly makes a false statement in the certificate hereby required is guilty of a misdemeanor.

Defendant was acquitted of six misdemeanor counts under this statute for allegedly permitting six individuals to sign the recall petition twice. He was convicted of five felony counts under MCL 168.937 for altering the dates of some petition signatures so they would count for the recall. Amicus curiae the American Civil Liberties Union of Michigan makes the interesting point that § 957 may also be a potential avenue of prosecution for altering dates. We, of course, offer no opinion on the validity of this argument because the issue is not before us and involves a matter of prosecutorial discretion.

[53] See note 47 of this opinion.

[54] See 1995 PA 261. MCL 168.759(8), like § 932(c), does not rely on § 937 to define the scope of the punishment for a violation of its provisions. Instead, it also designates the forgery offense it creates as a felony, making it punishable under the general felony penalty provision (§ 935), not under § 937.

penalty provision, into an omnibus forgery offense covering all election-related documents? And would the Legislature really choose to create such a vast and far-reaching offense in an existing penalty provision by (drumroll please) . . . making *no* substantive changes to its language?

We think it unreasonable to conclude that the Legislature signaled its intention to convert § 937 from a penalty provision to a stand-alone crime by making no meaningful changes to its language.[55] Instead, our review of the statutory history of § 937 confirms that it was previously, and remains now, a penalty provision.

C. THE CANON AGAINST SURPLUSAGE

The Court of Appeals also declined to read § 937 as a penalty provision because of its fear that doing so would render it "mere surplusage."[56] That is, § 937 would be a penalty provision without a crime. This is a serious concern because, as a general rule, "we must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory."[57] Thus, the Court of Appeals was justifiably reluctant to declare an entire statutory section meaningless. But we are even more reluctant to use the surplusage canon to create a crime when a plain-language reading of the statute and

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[55] If it is true (and we think it is) that "a change in the language of a prior statute presumably connotes a change in meaning," *Reading Law*, p 256, the converse seems even more obviously true: namely, that no change in the text connotes no change in its meaning.

[56] In particular, the Court of Appeals opined that interpreting § 937 as a penalty provision would render it surplusage because § 935 already "sets forth the penalties for a felony conviction under the provisions of the Michigan Election Law . . . ." *Pinkney*, 316 Mich App at 464.

[57] *Miller*, 498 Mich at 25 (quotation marks and citation omitted).

consideration of its history provide no evidence that the Legislature intended to do so.

The canon against surplusage is not an absolute rule. As Justice THOMAS COOLEY explained 150 years ago:

> The rule applicable here is, that *effect is to be given, if possible, to the whole instrument*, *and to every section and clause*. If different portions seem to conflict, the courts must harmonize them, if practicable, and lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory.[58]

More recently, our Court has stated that "[*w*]*hen possible*, we strive to avoid constructions that would render any part of the Legislature's work nugatory."[59]

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[58] Cooley, Constitutional Limitations (1868), p 58 (some emphasis added). The roots of the surplusage canon may be traced even further. See 2 Blackstone, Commentaries on the Laws of England, pp *379-380 ("That the construction be made upon the entire deed, and not merely upon disjointed parts of it. '*Nam ex antecedentibus et consequentibus fit optima interpretatio*.' And therefore that every part of it, be (if possible) made to take effect; and no word but what may operate in some shape or other.").

[59] *People v Seewald*, 499 Mich 111, 123; 879 NW2d 237 (2016) (emphasis added). Although we have sometimes stated the canon in absolute terms, see, e.g., *Miller*, 498 Mich at 25, we have also articulated the canon in nonabsolute terms, see, e.g., *Seewald*, 499 Mich at 123; *State Bd of Ed v Houghton Lake Community Sch*, 430 Mich 658, 671; 425 NW2d 80 (1988) ("[E]very word of a statute should be given meaning, and no word should be treated as surplusage or rendered nugatory *if at all possible*.") (emphasis added); *Baker v Gen Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980) ("Every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible."). The latter formulation comports with the canon's historical roots, the jurisprudence of the United States Supreme Court, and outside authorities. *Marx v Gen Revenue Corp*, 568 US 371, 385; 133 S Ct 1166; 185 L Ed 2d 242 (2013) ("The canon against surplusage is not an absolute rule . . . ."); *Lamie v United States Trustee*, 540 US 526, 536; 124 S Ct 1023; 157 L Ed 2d 1024 (2004) ("Surplusage

Logically, "the canon against superfluity assists only where a competing interpretation gives effect to every clause and word of a statute."[60] However, in this case, construing § 937 as creating the separate offense of forgery appears to render all or part of two other statutory provisions surplusage. Both § 932(c) (prohibiting most of the forgery-type conduct contained in 1948 CL 195.8, the previous election-law forgery offense)[61] and § 759(8) (prohibiting forgery of a signature on an absentee voter ballot application) prohibit forgery of certain Election Law documents. Section 932(c), in particular, prohibits forgery of an expansive list of documents by certain election officials or other persons having custody of such documents. But if the Legislature intended § 937 to be a general forgery provision prohibiting forgery of any document in the Election Law, why would it have included two other forgery provisions describing how forgery is committed? There would, of course, be no need to do so because § 937 would cover all such conduct. Therefore, reading § 937 as creating a substantive offense of forgery renders all or part of §§ 932(c) and 759(8) surplusage. As a result, the canon against surplusage cannot help us, because both proffered interpretations of the text leave some sections of the Election Law without meaning.[62]

As noted above, the Court of Appeals' interpretation is not based on the plain language of § 937—instead, it is an attempt to salvage that provision and give it some current legal effect. But this goes beyond the work of the

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does not always produce ambiguity and our preference for avoiding surplusage constructions is not absolute."); *Reading Law*, p 174 ("*If possible*, every word and every provision is to be given effect[.]") (emphasis added; formatting altered).

[60] *Microsoft Corp v i4i Ltd Partnership*, 564 US 91, 106; 131 S Ct 2238; 180 L Ed 2d 131 (2011) (quotation marks and citations omitted).

[61] Section 932(c) is discussed in detail in Part III(B) of this opinion.

[62] See *Microsoft Corp*, 564 US at 106.

surplusage canon.[63] Using the surplusage canon—or any rule of construction—*to create a criminal offense* is impermissible.[64]

Even though interpreting § 937 as a penalty provision means that it lacks effect because it has no corresponding substantive offense, we cannot disregard the historical textual clues and supplement the otherwise plain text of § 937 to reach a different result.[65] This is true even when enforcing the plain language of the statute may frustrate its purpose.[66]

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[63] See *Connecticut Nat'l Bank v Germain*, 503 US 249, 253-254; 112 S Ct 1146; 117 L Ed 2d 391 (1992) (stating in relation to the surplusage canon that "canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.") (quotation marks and citations omitted).

[64] *Goulding*, 275 Mich at 359-360 ("The statute may not be extended beyond its plain terms by judicial construction, and defendant convicted, by showing acts which ought to have been within the terms of the statute but are not. *There are no constructive criminal offenses*.") (emphasis added).

[65] Another lens through which to view this case is the unintelligibility canon. That canon applies when statutory language makes no sense because it is intractably ambiguous or because two provisions are irreconcilable. *Reading Law*, pp 134-135. In such cases, the unintelligible text is inoperative and cannot be given effect because it is meaningless. In this case, § 937 has a clear semantic meaning—it is a penalty provision. When viewed in its larger statutory context, however, it could be considered meaningless because, as a penalty with no corresponding substantive offense, it has no effect. Considered thusly, we agree with Justice Scalia and Professor Garner that "[t]o give meaning to what is meaningless is to create a text rather than to interpret one." *Id*. at 134. Although the unintelligibility canon contains parallels to this case, we take no position on whether it applies here because no party has raised the issue.

[66] See *People v Oakland Co Bank*, 1 Doug 282, 287 (1844) ("We cannot, in order to give effect to what we may *suppose* to be the intention of the

Even if we believed—contrary to the analysis above—that the Legislature mistakenly omitted a forgery offense from the Election Law, it is not the job of a court to supply the omitted provision.[67] And this is true even if interpreting the statute according to its plain language, context, and history leads us to the conclusion that it is inoperative.[68]

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legislature, put upon the provisions of a statute a construction not supported by the words, though the consequence be to defeat the object of the act[.]"). See also *King v Barham*, 108 Eng Rep 980, 982; 8 B & C 100 (1828) ("Our decision may, perhaps, in this particular case, operate to defeat the object of the [statute]; but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the Act, in order to give effect to what we may suppose to have been the intention of the Legislature.").

[67] See *Malpass v Dep't of Treasury*, 494 Mich 237, 251; 833 NW2d 272 (2013) (" '[T]o supply omissions transcends the judicial function.' "), quoting *Iselin v United States*, 270 US 245, 251; 46 S Ct 248; 70 L Ed 566 (1926). See also *Hobbs v McLean*, 117 US 567, 579; 6 S Ct 870; 29 L Ed 940 (1886) ("When a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe."); *Jones v Smart*, 1 Term Rep 44, 52 (1785) ("[W]e are bound to take the act of parliament, as they have made it: a *casus omissus* can in no case be supplied by a court of law, for that would be to make laws; nor can I conceive that it is our province to consider, whether such a law that has been passed be tyrannical or not."); *Crawford v Spooner*, 18 Eng Rep 179, 6 Moore, PC 1 (1846) ("The construction of the Act must be taken from the bare words of the Act. We cannot fish out what possibly may have been the intention of the Legislature; we cannot aid the Legislature's defective phrasing of the Statute; we cannot add, and mend, and, by construction, make up deficiencies which are left there."); *Reading Law*, p 93 ("Nothing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*). That is, a matter not covered is to be treated as not covered.") (formatting altered); Crawford, Construction of Statutes (1940), § 169, p 269 ("Omissions in a statute cannot, as a general rule, be supplied by construction. . . . As is obvious, to permit the court to supply the omissions in statutes, would generally constitute an encroachment upon the field of the legislature.").

[68] See Endlich, Commentary on the Interpretation of Statutes (1888), § 22, p 29 ("It has been seen that the plain meaning of the language used in a statute will not be departed from in its construction, though the

But alas, it does not appear to us that the Legislature left something out when it overhauled the Election Law in 1954; instead, it appears that it left something in—a penalty provision that was no longer needed. Regardless, courts do not have the power to rewrite statutes to ensure they have some substantive effect. After focusing on the plain language, context, and history of § 937, we conclude that it is nothing more than an inoperative penalty provision.

As noted at the outset, we recognize that our conclusion that § 937 is an inoperative penalty provision is an unusual one, and it is not one that we reach lightly. To be clear, a statute should only be deemed inoperative after the most careful consideration of alternative

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purpose of the enactment be defeated by following it. Upon the same principle, courts cannot supply legislative defects and omissions, although, by reason of such, the statute becomes, in whole or in part, practically unenforceable or inoperative."), citing *In re Willis Ave*, 56 Mich 244, 250; 22 NW 871 (1885) (holding that a statute, through the oversight of the Legislature, failed to provide a procedure to effectuate the expressed intent of the statute, rendering that portion of the statute inoperative). See also *CN Ray Corp v Secretary of State*, 241 Mich 457, 461; 217 NW 334 (1928) (holding that an act that expressly purported to repeal prior statutes failed to repeal anything because it lacked a necessary repealing clause); *People v Boothe*, 16 NY3d 195; 944 NE2d 1137 (2011) (holding that where the legislature added a new definition of criminal conduct without amending the substantive provision to make that conduct unlawful, no crime was created and the charges were properly dismissed); *Farmers' Bank of Fayetteville v Hale*, 59 NY 53, 57-58 (1874), overruled on other grounds by *Hintermister v First Nat'l Bank of Chittenango*, 64 NY 212 (1876) ("It is said that this [interpretation] renders the statute inoperative, and that this result must be avoided. This is a plausible but not a valid or sound position. There is nothing in the Constitution nor in any legal principle to prevent the legislature from passing an act with provisions which render it inoperative. When different constructions may be put upon an act, one of which will accomplish the purpose of the legislature and the other render the act nugatory, the former should be adopted; but when the provisions of an act are such that to make it operative would violate the declared meaning of the legislature, courts should be astute in construing it inoperative.").

interpretations and rigorous application of the interpretative tools at our disposal, including the necessity of "reading individual words and phrases in the context of the entire legislative scheme."[69] This finding has historically been—and will continue to be—exceedingly rare. Indeed, as we have already stated, "[e]very word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory *if at all possible*."[70] Ultimately, however, we must here, as in every case, give effect to the will of the Legislature by scrupulously examining the statutory text to determine its plain meaning.

IV. CONCLUSION

We hold that § 937, by its plain language, does not set forth a substantive offense. As a result, defendant was not properly charged under § 937 with the substantive offense of election-law forgery. Therefore, his convictions must be vacated and the charges dismissed. We reverse the Court of Appeals' holding to the contrary and remand to the trial court for further proceedings not inconsistent with this opinion.[71]

MARKMAN, C.J., and ZAHRA, MCCORMACK, BERNSTEIN, and WILDER, JJ., concurred with VIVIANO, J.

CLEMENT, J., took no part in the decision of this case.

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[69] *Madugula*, 496 Mich at 696.

[70] *Baker*, 409 Mich at 665 (emphasis added).

[71] Because we hold that § 937 does not create a substantive offense, we do not reach defendant's argument that the trial court improperly admitted other-acts evidence under MRE 404(b). Additionally, because we hold that § 937 unambiguously sets forth a penalty provision and not a substantive offense, we do not reach defendant's additional arguments that the rule of lenity precludes enforcement of § 937 against defendant or that § 937 is void for vagueness.

In re WILLIAMS

Docket No. 155994. Argued March 6, 2018 (Calendar No. 3). Decided May 18, 2018.

In 2012, the Department of Health and Human Services (DHHS) initiated a child protective proceeding in the Macomb Circuit Court, Family Division, under MCL 712A.2(b), requesting that the court take jurisdiction of two-year-old JJW and newborn ELW after ELW tested positive for controlled substances at birth. The minor children were removed from the biological parents' care and placed with foster parents. Both children were eligible for membership in the Sault Ste. Marie Tribe of Chippewa Indians. In 2015, the biological parents released their rights to the minor children under MCL 710.28 and MCL 710.29 of the Michigan Adoption Code, MCL 710.21 *et seq*. A referee accepted the parents' releases and entered standard orders terminating the biological parents' rights. In the Oakland Circuit Court, Family Division, the children's foster parents petitioned to adopt the children, the Sault Tribe objected, and Karen D. McDonald, J., denied the foster parents' petition. The court committed the children to the Michigan Children's Institute (MCI) for further case planning. Respondent-father Jack G. Williams then filed a notice in the Macomb Circuit Court to withdraw his prior consent to the termination of his parental rights and demanded the return of the children under MCL 712B.13(3) of the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*. The court denied Williams's withdrawal request, reasoning that MCL 712B.13(3) did not apply because Williams had not voluntarily consented to placement for purposes of adoption under MCL 712B.13(3) but instead had released his parental rights to the minor children to DHHS under MCL 710.28. The foster parents appealed the Oakland Circuit Court order denying their adoption petition (Docket No. 334095), and Williams appealed by delayed leave granted the Macomb Circuit Court order denying his motion to withdraw his consent to the termination of his parental rights and for return of the children (Docket No. 335932). The Court of Appeals consolidated the cases. In a per curiam opinion, the Court of Appeals, SAWYER, P.J., and SAAD and RIORDAN, JJ., vacated the Oakland Circuit Court order denying the foster parents' petition for adoption and remanded the adoption case for further proceedings; the

Court of Appeals affirmed the Macomb Circuit Court's denial of Williams's motion to withdraw his consent to the termination of his parental rights and to have his children returned to his custody. 320 Mich App 88 (2017). Williams sought leave to appeal, and the Michigan Supreme Court granted the application. 501 Mich 870 (2017).

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

MIFPA was enacted to promote the stability and security of Indian tribes and families. One way the act accomplishes this goal is by permitting the parents of Indian children who voluntarily consent to the termination of their parental rights for the purpose of adoption to withdraw that consent at any time before an adoption is finalized. Williams voluntarily consented to termination of his parental rights under MCL 712B.13(1), the court accepted his consent, and he properly requested that his consent be withdrawn under MCL 712B.13(3). Because the adoption of his children had not been finalized, MIFPA required that Williams's request to withdraw his consent be granted.

1. Among other things, MCL 712B.13(3) of MIFPA permits the parents of Indian children who voluntarily consent to the termination of their parental rights for the purpose of adoption to withdraw that consent at any time before an adoption is finalized. Williams voluntarily consented to the termination of his parental rights under MCL 712B.13(1) by executing a release under MCL 710.28 and MCL 710.29 of the Adoption Code. The court accepted Williams's consent, and Williams later properly requested that his consent be withdrawn under MCL 712B.13(3). That Williams released his children to DHHS rather than to a specific adoptive parent was not relevant to his ability to withdraw his consent; the Court of Appeals correctly concluded that a specific adoptive placement was not required under the plain language of MCL 712B.13(1).

2. The Court of Appeals concluded that Williams was still not entitled to withdraw his consent under MCL 712B.13 for two other reasons: because the record did not establish that Williams executed a consent under MCL 712B.13(1), and because he was a participant in a child protective proceeding otherwise governed by MCL 712B.15, which, the Court of Appeals concluded, does not address or provide for withdrawal of a release. The Court of Appeals erred by concluding that Williams was not entitled to withdraw his consent under MCL 712B.13(3) because he had failed to execute a consent under MCL 712B.13(1). According to the Court of Appeals, MCL 712B.13(3) required Williams to execute a consent under MCL 712B.13(1) in conjunction with

signing a second form—either a consent to adopt (MCL 710.43 and MCL 710.44 of the Adoption Code) or a consent to release (MCL 710.28 and MCL 710.29 of the Adoption Code). Contrary to the Court of Appeals' conclusion, the phrase "in conjunction with" as used in MCL 712B.13(3) does not require the signing of two separate forms. A consent under MCL 712B.13(1) also acts as the release required by MCL 710.28 and MCL 710.29 of the Adoption Code. A release under MCL 710.28 and MCL 710.29 of the Adoption Code and a consent under MCL 712B.13(1) and (2) of MIFPA are conjoined in the execution of the Supreme Court Administrative Office form titled "Release of Indian Child by Parent." Although Williams signed a different form given to him by the referee in this case that contained fewer protections than he was entitled to, that fact could not be used against him to deprive him of those protections.

3. The Court of Appeals also erred by holding that as a participant in a child protective proceeding otherwise governed by the protections of MCL 712B.15, Williams was unable to benefit from the withdrawal provision of MCL 712B.13. Both MCL 712B.13 and MCL 712B.15 of MIFPA applied at different times in Williams's case. MCL 712B.15 applies when an Indian child is the subject of a child protective proceeding and a parent does not provide consent to the termination of his or her parental rights for the express purpose of adoption. MCL 712B.13 applies when a parent consents to adoptive placement or the termination of his or her parental rights for the express purpose of adoption. Thus, when the state seeks to terminate the rights of a parent of an Indian child and the parent does not consent, the parent can count on the protections of MCL 712B.15. But if a parent of an Indian child willingly consents to the termination of his or her parental rights for the purpose of adoption, the parent can then rely on the added protections of MCL 712B.13, which does not exclude from its coverage parents who are participants in involuntary child protective proceedings when they provide consent as described in MCL 712B.13(1). When the court accepted Williams's release, and the proceedings went from adversarial to cooperative, the protections of MCL 712B.15 did not apply. They will apply once again after Williams withdraws his consent under MCL 712B.13(3). What matters is whether the parent consents to the termination of his or her parental rights by executing a release of those rights under the Adoption Code, which is exactly what Williams did. And if the court accepts that consent, the parent has the right to withdraw it at any time before entry of a final order of adoption by filing a written demand requesting the return of the child under MCL 712B.13(3). By consenting to the termination of his or her parental rights under MCL 712B.13, a

parent of an Indian child reduces the evidentiary and procedural burdens on the state. He or she is thereby entitled to the statute's benefit—the right to withdraw consent under MCL 712B.13(3). The statute contemplates a parent doing exactly what Williams did here. Although the state had begun termination proceedings against him and although he had a right to all the protections of MCL 712B.15, he voluntarily released his rights under MCL 712B.13(1). DHHS did not object to his consent, and the court accepted it. He was therefore entitled to withdraw his consent at any time before entry of a final order of adoption.

4. Williams, however, was not entitled to the return of his children to his custody. Instead of returning to Williams's custody, the children had to be returned to the position they were in before Williams consented to the termination of his parental rights, and DHHS could decide to pursue termination of Williams's parental rights under MCL 712B.15(5). Consequently, the children were to remain in foster care, and the procedures and protections of MCL 712B.15 would govern the future resolution of the matter.

Reversed and remanded.

1. PARENT AND CHILD — CHILD PROTECTIVE PROCEEDINGS — PARENT OF AN INDIAN CHILD — WITHDRAWAL OF CONSENT TO THE TERMINATION OF PARENTAL RIGHTS.

MCL 712B.13(3) of the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq*., permits the parent of an Indian child who voluntarily consents to the termination of his or her parental rights to withdraw that consent at any time before an adoption is finalized; the parent of an Indian child who voluntarily consents to the termination of his or her parental rights under MCL 712B.13(1) by executing a release under MCL 710.28 and MCL 710.29 of the Michigan Adoption Code, MCL 710.21 *et seq*., is entitled to withdraw that consent under MCL 712B.13(3) at any time before an adoption is finalized by filing a written demand requesting the return of the child without regard to the fact that the parent consented to the termination of parental rights for the purpose of adoption rather than consenting to a specific adoptive placement.

2. PARENT AND CHILD — CHILD PROTECTIVE PROCEEDINGS — PARENT OF AN INDIAN CHILD — PROPER EXECUTION OF CONSENT TO THE TERMINATION OF PARENTAL RIGHTS.

MCL 712B.13(3) of the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq*., requires that a consent under MCL 712B.13(1) and (2) to adoptive placement or to the termination of parental rights for the express purpose of adoption be executed in conjunction with either a consent to adopt (under

MCL 710.43 and MCL 710.44 of the Michigan Adoption Code, MCL 710.21 *et seq*.) or a release (under MCL 710.28 and MCL 710.29 of the Michigan Adoption Code); the phrase "in conjunction with" as used in MCL 712B.13(3) does not require the signing of two separate forms; a release under MCL 710.28 and MCL 710.29 and a consent under MCL 712B.13(1) and (2) are conjoined in the execution of a single form issued by the Supreme Court Administrative Office.

3. PARENT AND CHILD — CHILD PROTECTIVE PROCEEDINGS — PARENT OF AN INDIAN CHILD — APPLICABLE STATUTORY PROTECTIONS.

MCL 712B.15 of the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq*., applies when an Indian child is the subject of a child protective proceeding and a parent does not consent to the termination of his or her parental rights for the express purpose of adoption; MCL 712B.13 of the act applies when a parent consents to adoptive placement or the termination of his or her parental rights for the express purpose of adoption and does not exclude from its protection parents who are participants in involuntary child protective proceedings when they provide consent as described in MCL 712B.13(1).

4. PARENT AND CHILD — CHILD PROTECTIVE PROCEEDINGS — PARENT OF AN INDIAN CHILD — CUSTODY AFTER WITHDRAWAL OF CONSENT TO THE TERMINATION OF PARENTAL RIGHTS.

MCL 712B.13(3) of the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq*., permits the parent of an Indian child who voluntarily consents to the termination of his or her parental rights to withdraw that consent at any time before an adoption is finalized; after the withdrawal of consent is accepted, the child must be returned to the position he or she was in before the parent consented to the termination of parental rights.

Eric J. Smith, Prosecuting Attorney, *Joshua D. Abbott*, Chief Appellate Attorney, and *John Ange* and *Emil Semaan*, Assistant Prosecuting Attorneys, for the Department of Health and Human Services.

Vivek S. Sankaran for Jack G. Williams.

Amici Curiae:

Rosette, LLP (by *Tanya Gibbs*) for the American Indian Law Section of the State Bar of Michigan.

Kathryn E. Fort, *Neoshia Roemer*, and *Elizabeth Eggert* for the Sault Ste. Marie Tribe of Chippewa Indians.

MCCORMACK, J. At issue is the ability of the parent of an Indian child to withdraw his consent to the termination of his parental rights for the purpose of adoption before a final order of adoption has entered. Typically, a termination of parental rights becomes final and irrevocable when a court enters the termination order. The Legislature carved out an exception to this general rule, however, for the parents of Indian children who voluntarily release their parental rights or consent to termination of those rights under the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*. MIFPA, like its federal progenitor, the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., was enacted to "[p]rotect the best interests of Indian children and promote the stability and security of Indian tribes and families." MCL 712B.5(a). The protections in both acts aim to address the historical injustice caused by the removal of Indian children from their families and tribes. ICWA sets a floor, establishing the minimum national standards that must be met before an Indian child may be removed from his or her family in the context of child protective proceedings. 25 USC 1902. MIFPA similarly provides special protections when an Indian child is involved in certain proceedings in Michigan courts. Sometimes the protections afforded under MIFPA are greater than those provided under ICWA, as with the issue we consider today: when may the parent of an Indian child withdraw consent to the termination of parental rights.

Jack Williams, a member of the Sault Ste. Marie Tribe of Chippewa Indians (Sault Tribe), has two children, both of whom are eligible for tribal member-

ship and are Indian children as defined in MIFPA. The Michigan Department of Health and Human Services (DHHS) instituted child protective proceedings against Williams, but before the trial court terminated Williams's parental rights to the children, he released those rights under §§ 28 and 29 of the Michigan Adoption Code, MCL 710.28 and MCL 710.29. DHHS did not object, and the court accepted his release.

Before the adoptions of his children were finalized, Williams filed a notice in the trial court to withdraw his consent to the termination of his parental rights, citing MIFPA's withdrawal provision, MCL 712B.13(3). But the trial court denied his request because he had released his children to DHHS rather than to a specific adoptive parent. The Court of Appeals affirmed, but for different reasons.

Williams believes the plain language of MCL 712B.13(3) entitled him to withdraw his consent because the trial court had not yet entered a final order of adoption for his children. We agree.

I. FACTUAL AND PROCEDURAL BACKGROUND

Williams's children were first removed from his care and placed in foster care in 2012, and DHHS eventually filed a petition to terminate Williams's parental rights. Before the termination hearing, however, Williams consented to the termination of his parental rights by executing releases under §§ 28 and 29 of the Adoption Code. Williams signed State Court Administrative Office (SCAO) forms releasing his parental rights to both children "for the purpose of adoption" and accompanying statements of his intent to sign for both children a "Release of the Child for Purposes of Adoption." DHHS did not object.

As acknowledged by Williams, a referee had advised him that there was no guarantee that the minor children would be adopted by their foster parents. The referee accepted Williams's releases, referred the case to an adoption agency, and entered standard orders terminating Williams's parental rights based on the releases and accompanying statements.[1] The children's foster parents then petitioned to adopt the children. But the Sault Tribe intervened and objected to the adoption under ICWA and MIFPA, which require that proper notice of child custody proceedings be given to the child's tribe, enable tribes to intervene in such proceedings, and allow tribes to object to an adoption.

As a result, the trial court denied the foster parents' adoption petition and placed the children with new foster parents. That same month, after having learned that the original foster parents' petition to adopt the children had been denied, Williams filed a request to withdraw his consent to the termination of his parental rights under MCL 712B.13(3) of MIFPA.

The trial court denied Williams's request, holding that Williams was not entitled to withdraw his release once the court had entered the order terminating his parental rights because Williams had released his children to DHHS rather than to a specific adoptive parent. The Court of Appeals affirmed, but for different reasons. It held that Williams could not withdraw his release because he had not executed a separate consent under MCL 712B.13(1) and, because MCL 712B.15 of MIFPA applies when a release is executed under §§ 28 and 29 of the Adoption Code during a child protective proceeding brought under MCL 712A.2(b), MCL 712B.15 "does not address or provide for withdrawal of

[1] The children's mother also released her parental rights to the children and has not sought to appeal or withdraw her releases.

the release." *In re Williams*, 320 Mich App 88, 120-121; 902 NW2d 902 (2017).[2] This Court granted leave to appeal to address whether, under MIFPA, Williams was entitled "to withdraw his consent to the termination of his parental rights for the purpose of adoption at any time before entry of a final order of adoption. MCL 712B.13(3)." *In re Williams*, 501 Mich 870, 870-871 (2017).

II. LEGAL BACKGROUND

A. STANDARD OF REVIEW

We review de novo the interpretation and application of statutes. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). That means we review these questions independently, with no required deference to the trial court. If statutory language is unambiguous, we enforce it as written. *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007).

B. STATUTORY BACKGROUND OF ICWA AND MIFPA

Congress enacted ICWA in part because "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 . . . ." 25 USC 1901. ICWA's purpose is "to promote the stability and security of Indian tribes and families," 25 USC 1902, and "to protect and preserve Indian

[2] The original foster parents appealed the trial court's denial of their petition to adopt the minor children, and Williams appealed the denial of his motion to withdraw consent. The Court of Appeals addressed both appeals in one opinion, and the opinion caption therefore listed the two different case names. Because we are concerned only with Williams's motion to withdraw consent to the termination of his parental rights, we refer to the Court of Appeals' opinion as simply *In re Williams*, 320 Mich App 88.

families, tribes, and tribal culture," *In re England*, 314 Mich App 245, 250-251; 887 NW2d 10 (2016).

ICWA's provisions accomplish these objectives by, for example, requiring notice to the child's parents or Indian custodian and to the Indian child's tribe of the start of an involuntary child custody proceeding involving an Indian child. 25 USC 1912(a). ICWA also imposes heightened evidentiary and procedural burdens on the state to sustain the termination of parental rights, such as qualified expert witness testimony and proof beyond a reasonable doubt. See 25 USC 1912(f).

In 2012, the Legislature adopted MIFPA to establish state law standards for child welfare and adoption proceedings involving Indian children. 2012 PA 565. Some of these standards provide greater protections for Indian families than those provided by ICWA. The goal of MIFPA is explicit: to require courts to "[p]rotect the best interests of Indian children and promote the stability and security of Indian tribes and families," MCL 712B.5(a), and to "[e]nsure that the [DHHS] uses practices, in accordance with [ICWA], this chapter, and other applicable law, that are designed to prevent the voluntary or involuntary out-of-home care placement of Indian children," MCL 712B.5(b). One example of a protection that MIFPA provides to the parents of an Indian child that ICWA does not is the opportunity for parents who consent to the termination of their parental rights for purposes of adoption to withdraw that consent at any time before entry of a final order of adoption. MCL 712B.13(3). MCL 712B.13 provides, in relevant part:

> (1) . . . [I]f a parent consents to adoptive placement or the termination of his or her parental rights for the express purpose of adoption by executing a release under sections 28 and 29 of [the Adoption Code], or consent

> under sections 43 and 44 of [the Adoption Code], the following requirements must be met:
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> * * *
>
> (3) If the placement is for purposes of adoption, a consent under subsection (1) of the Indian child's parent must be executed in conjunction with either a consent to adopt, as required by sections 43 and 44 of [the Adoption Code], or a release, as required by sections 28 and 29 of [the Adoption Code]. *A parent who executes a consent under this section may withdraw his or her consent at any time before entry of a final order of adoption by filing a written demand requesting the return of the Indian child. Once a demand is filed with the court, the court shall order the return of the Indian child.* Withdrawal of consent under this section constitutes a withdrawal of a release executed under sections 28 and 29 of [the Adoption Code] or a consent to adopt executed under sections 43 and 44 of [the Adoption Code]. [Emphasis added.]

ICWA, by contrast, allows for withdrawal of consent "at any time prior to the entry of a final decree of termination or adoption, as the case may be . . . ." 25 USC 1913(c); *In re Kiogima*, 189 Mich App 6, 13; 472 NW2d 13 (1991).

This is our first opportunity to consider whether the withdrawal provision of MCL 712B.13(3) applies when the parent of an Indian child consents to the termination of his or her parental rights during a child protective proceeding by executing a release under §§ 28 and 29 of the Adoption Code.

C. CHILD PROTECTIVE PROCEEDINGS IN MICHIGAN INVOLVING INDIAN CHILDREN

MIFPA governs both cases in which the parent of an Indian child voluntarily consents to the termination of his or her parental rights for the purpose of adoption,

MCL 712B.13, and cases in which the parent of an Indian child faces involuntary termination of parental rights because of abuse or neglect, MCL 712B.15. To facilitate adoptions, MIFPA refers to the Adoption Code. See MCL 712B.13(1), MCL 712B.13(3), and MCL 712B.15(1).

When the state seeks to terminate the rights of a parent of an Indian child without his or her consent, MCL 712B.15 of MIFPA requires the state to meet heightened evidentiary and procedural burdens.[3] For

[3] MCL 712B.15 provides:

(1) If an Indian child is the subject of a child protective proceeding under section 2(b) of chapter XIIA, including instances in which the parent executed a release under section 28 of chapter X during the pendency of that proceeding, or a guardianship proceeding under section 5204 or 5205 of the estates and protected individuals code, 1998 PA 386, MCL 700.5204 and 700.5205, and if a parent does not provide consent as described in section 13 of this chapter, or a guardianship proceeding under section 19a or 19c of chapter XIIA, the following requirements must be met:

(a) Notice of the pending proceeding must be given as prescribed by Michigan supreme court rule, the Indian child welfare act, and section 9 of this chapter.

(b) The proceeding shall be conducted in accordance with Michigan supreme court rules and subsections (2) to (4).

(c) Section 25 of this chapter applies in a guardianship proceeding under section 5204 or 5205 of the estates and protected individuals code, 1998 PA 386, MCL 700.5204 and 700.5205.

(2) An Indian child may be removed from a parent or Indian custodian, placed into a foster care placement, or, for an Indian child already taken into protective custody, remain removed from a parent or Indian custodian pending further proceedings, only upon 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, that the active efforts were unsuccessful, and 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 Indian

example: (1) the state must give notice of the pending proceeding to the Indian tribe; (2) before removal or to continue removal, the state must prove by clear and convincing evidence that active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, that the active efforts were unsuccessful, and 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; (3) when seeking termination, the state must demonstrate that active efforts were made to prevent the breakup of the Indian family and that the efforts were unsuccessful; and (4) any termination of parental rights must be supported by

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child. The active efforts must take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. The evidence must include the testimony of at least 1 qualified expert witness, who has knowledge of the child rearing practices of the Indian child's tribe, 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 Indian child.

(3) A party seeking a termination of parental rights to an Indian child under state law must demonstrate to the court's satisfaction that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that the active efforts were unsuccessful.

(4) No termination of parental rights may be ordered in a proceeding described in this section without a determination, supported by evidence beyond a reasonable doubt, including testimony of at least 1 qualified expert witness as described in section 17, 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 Indian child.

(5) Any Indian child who is the subject of any action for termination of parental rights under state law, any parent or Indian custodian from whose custody the Indian child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate the action upon a showing that the action violated any provision of this section.

evidence beyond a reasonable doubt and by the testimony of at least one qualified expert who knows about the child-rearing practices of the Indian child's tribe. MCL 712B.15(1) to (4).

Under MCL 712B.13 of MIFPA, the parent of an Indian child may consent to the termination of his or her parental rights under the Adoption Code and facilitate adoption in one of two ways. A parent may consent to the termination of his or her parental rights for the express purpose of adoption by executing a release under §§ 28 and 29 of the Adoption Code, which releases the child to an agency or DHHS for adoption. Or a parent may voluntarily release his or her parental rights to allow placement of a child with a specific adoptive parent by signing a consent under §§ 43 and 44 of the Adoption Code, MCL 710.43 and MCL 710.44. For a consent to be valid, certain conditions must be satisfied, each of which provides additional protection to the parent of an Indian child. For example, the consent must be executed on an approved form, in writing, and recorded before a judge who certifies that the parent fully understood the consequences of the consent. MCL 712B.13(1)(a).[4] The consent must also

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[4] MCL 712B.13(1) provides:

> If both parents or Indian custodian voluntarily consent to a petition for guardianship under section 5204 or 5205 of the estates and protected individuals code, 1998 PA 386, MCL 700.5204 and 700.5205, or if a parent consents to adoptive placement or the termination of his or her parental rights for the express purpose of adoption by executing a release under sections 28 and 29 of chapter X, or consent under sections 43 and 44 of chapter X, the following requirements must be met:
>
> (a) To be valid, consent under this section must be executed on a form approved by the state court administrative office, in writing, recorded before a judge of a court of competent jurisdiction, and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in

contain specific information about the child's tribe and consenting parent, as well as the parent's signature "verifying an oath of understanding of the significance of the voluntary placement and the parent's right to file a written demand to terminate the voluntary placement or consent at any time." MCL 712B.13(2)(a) to (e).[5] A parent who voluntarily releases his or her rights under MCL 712B.13(1) "may withdraw his or

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detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given before, or within 10 days after, birth of the Indian child is not valid.

(b) Notice of the pending proceeding must be given as prescribed by Michigan supreme court rule, the Indian child welfare act, and section 9 of this chapter.

(c) The voluntary custody proceeding shall be conducted in accordance with Michigan supreme court rules and the following statutes:

(*i*) In a guardianship proceeding under section 5204 or 5205 of the estates and protected individuals code, 1998 PA 386, MCL 700.5204 and 700.5205, section 25 of this chapter also applies.

(*ii*) In an adoption proceeding, section 27 of this chapter also applies.

[5] MCL 712B.13(2) provides:

Consent described under subsection (1) must contain the following information:

(a) The Indian child's name and date of birth.

(b) The name of the Indian child's tribe and any identifying number or other indication of the child's membership in the tribe, if any.

(c) The name and address of the consenting parent or Indian custodian.

(d) A sworn statement from the translator, if any, attesting to the accuracy of the translation.

her consent at any time before entry of a final order of adoption by filing a written demand requesting the return of the Indian child," MCL 712B.13(3), and "[w]ithdrawal of consent under this section constitutes a withdrawal of a release executed under sections 28 and 29 [of the Adoption Code]," MCL 712B.13(3).

Causing disagreement in this case, MCL 712B.13(5) provides, in part, that "[a] release executed under sections 28 and 29 of [the Adoption Code] during a pendency of a [child protective] proceeding . . . *is subject to* [MCL 712B.15]." (Emphasis added.)

III. ANALYSIS

Williams consented to the termination of his parental rights for the express purpose of adoption by executing a release under §§ 28 and 29 of the Adoption Code. That Williams released his children to DHHS rather than to a specific adoptive parent is not relevant to his ability to withdraw his consent; we agree with the Court of Appeals that "a specific adoptive placement was not required under MCL 712B.13(1)." *In re Williams*, 320 Mich App at 120. The statute contains no

(e) The signature of the consenting parent, parents, or Indian custodian recorded before the judge, verifying an oath of understanding of the significance of the voluntary placement and the parent's right to file a written demand to terminate the voluntary placement or consent at any time.

(f) For consent for voluntary placement of the Indian child in foster care, the name and address of the person or entity who will arrange the foster care placement as well as the name and address of the prospective foster care parents if known at the time.

(g) For consent to termination of parental rights or adoption of an Indian child, in addition to the information in subdivisions (a) to (f), the name and address of the person or entity that will arrange the preadoptive or adoptive placement.

language that a specific adoptive placement is required. The plain language of MCL 712B.13 allows a parent of an Indian child to both consent to the termination of his or her parental rights for the express purpose of adoption by executing a release under §§ 28 and 29 of the Adoption Code and also to withdraw that consent before a final order of adoption is entered.

But the Court of Appeals concluded that Williams was still not entitled to withdraw his consent under MCL 712B.13 for two other reasons: because the record does not establish that Williams executed a consent under MCL 712B.13(1), *In re Williams*, 320 Mich App at 119, and because he was a participant in a child protective proceeding otherwise governed by MCL 712B.15, which "does not address or provide for withdrawal of the release," *id*. at 121. We disagree.

The panel held that Williams did not have the right to withdraw his consent under MIFPA because he had not executed a consent under MCL 712B.13(1), which the panel concluded was "a separate obligation from executing a consent to adopt or release." *Id*. at 119. It viewed the text of MCL 712B.13(3) as requiring this additional MIFPA consent: a consent of the Indian child's parent under MCL 712B.13(1), executed *in conjunction with* either a consent to adopt, as required by §§ 43 and 44 of the Adoption Code, or a release, as required by §§ 28 and 29 of the Adoption Code. *Id*. at 118-119.

We don't read the text the same way. The panel erred by construing the language "in conjunction with" to mean that a consenting parent must complete two separate forms. "Conjunction" is defined as "the act or an instance of conjoining: the state of being conjoined." *Merriam-Webster's Collegiate Dictionary* (11th ed). "Conjoin" is defined as "to join together for a common

purpose." *Id*. A consent under MCL 712B.13(1) conjoins with a release under §§ 28 and 29 of the Adoption Code because a consent under MCL 712B.13(1) is a release under §§ 28 and 29 of the Adoption Code with more protections. There are two court forms approved by the SCAO for releasing parental rights. One form is titled "Release of Child by Parent"[6] and the other form is titled "Release of Indian Child by Parent."[7] These forms are almost identical. The only difference is that the form for release of an Indian child by his or her parent includes the additional information and process required by MCL 712B.13(1) and (2). So a consent under MCL 712B.13(1) is executed "in conjunction with" a release as required by §§ 28 and 29 of the Adoption Code when a "Release of Indian Child by Parent" form is completed. There is no third form as envisioned by the Court of Appeals. A consent under MCL 712B.13(1) also acts as the release required by §§ 28 and 29 of the Adoption Code. A release under §§ 28 and 29 of the Adoption Code and a consent under MCL 712B.13(1) and (2) of MIFPA are conjoined in the execution of a "Release of Indian Child by Parent" form.[8]

Notably, the referee did not use the proper SCAO form "Release of Indian Child by Parent," which would have ensured the additional protections and information detailed by MCL 712B.13(1) and (2). And so Williams did not verify that he understood "the signifi-

[6] SCAO, Form PCA 305 (Feb 2015).

[7] SCAO, Form PCA 305-I (Sept 2017).

[8] Similarly, the requirement of MCL 712B.27(1) that "[i]f a release or consent to adoption under [the Adoption Code] is executed, consent to voluntary placement of an Indian child *must also be executed* by both parents of the Indian child in accordance with [MCL 712B.13]" is satisfied by the execution of the SCAO form "Release of Indian Child by Parent." (Emphasis added.)

cance of the voluntary placement and [his] right to file a written demand to terminate the voluntary placement or consent at any time." MCL 712B.13(1)(e). But all the additional requirements in MCL 712B.13(1) (and captured in the corresponding SCAO form) are there to provide more protections to parents of Indian children who consent to release their parental rights. See MCL 712B.5(a) (stating that MIFPA's purpose is to "promote the stability and security of Indian tribes and families"). That Williams released his parental rights without the benefit of the added protections he was due under MCL 712B.13(1) and (2) cannot be used against him to deprive him of the protections of MCL 712B.13(3). That outcome surely would frustrate the Legislature's intent. The referee's failures during the consent process should not imperil Williams's withdrawal demand.[9]

The plain language of MCL 712B.13(1) requires only that a parent consent to "the termination of his or her parental rights for the express purpose of adoption by executing a release under sections 28 and 29" of the Adoption Code. Williams did that. The language of the statute requires no additional consent.[10]

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[9] Williams argues that his consent was not properly given as a result of these failures and because his consent was taken by a referee and not a judge as the statute requires. See MCL 712B.13(1)(a). We assume without deciding that the consent was proper.

[10] Our determination that there is no separate "consent" required by MCL 712B.13 is supported by our court rules, which require no separate "consent" or additional step for the parent of an Indian child, but rather impose additional requirements on the state for a release under §§ 28 and 29 of the Adoption Code when a parent of an Indian child is involved. See MCR 3.804(A) (specifying requirements that must be met "[i]n addition to the requirements of MCL 710.29 or MCL 710.44, if a parent of an Indian child intends to voluntarily consent to adoptive placement or the termination of his or her parental rights for the express purpose of adoption pursuant to MCL 712B.13"). See also

Nor do we agree with the Court of Appeals that, as a participant in a child protective proceeding otherwise governed by the protections of MCL 712B.15, Williams was unable to benefit from the withdrawal provision of MCL 712B.13. The panel held that Williams could not withdraw his consent because, under MCL 712B.13(5), he was still subject to MCL 712B.15, which "does not address or provide for withdrawal of the release." *In re Williams*, 320 Mich App at 121. As we concluded in *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 160; 680 NW2d 840 (2004), the phrase "subject to" can mean that two statutory provisions are both applicable and "work together[.]" MCL 712B.13 and MCL 712B.15 are meant to be read together; Williams is entitled to the protections of both.

Both MCL 712B.13 and MCL 712B.15 of MIFPA applied at different times in this case. MCL 712B.15 applies when "an Indian child is the subject of a child protective proceeding . . . [and] a parent *does not provide consent*" to the termination of his or her parental rights for the express purpose of adoption. MCL 712B.15(1) (emphasis added). MCL 712B.13 applies when "a parent *consents* to adoptive placement or the termination of his or her parental rights for the express purpose of adoption . . . ." MCL 712B.13(1) (emphasis added). In other words, when the state seeks to terminate the rights of a parent of an Indian child and the parent does not consent, the parent can count on the protections of MCL 712B.15. But if a parent of an Indian child willingly consents to the termination of his or her parental rights for the purpose of adoption, the parent can then count on the added protections of

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MCR 3.804(B)(2) (providing that "[a] consent hearing involving an Indian child pursuant to MCL 712B.13 must be held in conjunction with either a consent to adopt, as required by MCL 710.44, or a release, as required by MCL 710.29").

MCL 712B.13, which does not exclude from its coverage parents who are participants in involuntary child protective proceedings when they provide consent as described in MCL 712B.13(1). None of the protections in MCL 712B.15, which are designed for contested and adversarial proceedings, remains relevant once a parent voluntarily releases his or her rights under MCL 712B.13. When the court accepted Williams's release, and the proceedings went from adversarial to cooperative, the protections of MCL 712B.15 did not apply. They will apply once again after Williams withdraws his consent under MCL 712B.13(3).

What matters is whether the parent consents to the termination of his or her parental rights by executing a release of those rights under the Adoption Code. That's exactly what Williams did. And if the court accepts that consent, the parent has the right to withdraw it at any time before entry of a final order of adoption by filing a written demand requesting the return of the child. MCL 712B.13(3). By consenting to the termination of his or her parental rights under MCL 712B.13, a parent of an Indian child reduces the evidentiary and procedural burdens on the state.[11] He or she is thereby entitled to the statute's benefit—the right to withdraw consent under MCL 712B.13(3).

There is no textual support in MCL 712B.13 (or anywhere else) for a conclusion that the Legislature intended to deny parents of Indian children involved in child protective proceedings the protections in that provision if they consent to termination. In fact, MCL 712B.15 states that parents involved in child protective proceedings can "provide consent as described in [MCL 712B.13]." MCL 712B.15(1). The statute contem-

[11] We need not decide today whether and when DHHS may object to a parent's consent or when a court may reject it.

plates a parent doing exactly what Williams did here. Although the state had begun termination proceedings against him and although he had a right to all of the protections of MCL 712B.15, he voluntarily released his rights under MCL 712B.13(1). DHHS did not object to his consent, and the court accepted it. He was therefore entitled to withdraw his consent at any time before entry of a final order of adoption.

None of this is to say, however, that MCL 712B.13(5) does not have meaning in a case like this one. It does. MCL 712B.13(5) governs what happens next. Williams may withdraw his consent, but his termination case can still proceed, governed by the protections of MCL 712B.15. That is, Williams may withdraw his consent, but because he is still subject to MCL 712B.15, DHHS may refile a termination petition. MCL 712B.15. And, under MCL 712B.13(3), a parent who consents during an involuntary termination proceeding is not entitled to "the return of the Indian child" *to him or her*. Instead, the child returns to the position the child was in before his or her parent consented to the termination of parental rights. Williams's children were in foster care when he consented to the termination of his parental rights, his children will remain in foster care, and Williams will be once again subject to the procedures and protections of MCL 712B.15. DHHS may proceed with its termination case if it chooses, and if DHHS can satisfy the heightened requirements of MCL 712B.15, Williams's parental rights can be terminated.

IV. CONCLUSION

The Legislature enacted MIFPA to promote the stability and security of Indian tribes and families. One way the act accomplishes this goal is by permit-

ting the parents of Indian children who voluntarily consent to the termination of their parental rights for the purpose of adoption to withdraw that consent at any time before an adoption is finalized. Williams voluntarily consented to the termination of his parental rights under MCL 712B.13(1), the court accepted his consent, and he properly requested that his consent be withdrawn under MCL 712B.13(3). Because the adoption of his children had not been finalized, MIFPA requires that we grant Williams's request.

We therefore reverse the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion.

MARKMAN, C.J., and ZAHRA, VIVIANO, BERNSTEIN, WILDER, and CLEMENT, JJ., concurred with MCCORMACK, J.

TM v MZ

Docket No. 155398. Argued on application for leave to appeal March 7, 2018. Decided May 18, 2018.

TM (petitioner) sought an ex parte personal protection order (PPO) against MZ (respondent) in the St. Clair Circuit Court, requesting that the court issue the PPO under MCL 600.2950a(12) and MCR 3.705(A) because respondent had allegedly harassed petitioner in a variety of Facebook posts. The court, John D. Tomlinson, J., granted petitioner's request and issued the PPO. Respondent objected, arguing that the PPO should be terminated because there were no allegations of any physical contact between the parties or threats of violence made by respondent against petitioner. The court denied respondent's request but did amend the order to prohibit only posting a message through any medium of communication, including the Internet, a computer, or any electronic medium, pursuant to MCL 750.411s. Respondent appealed in the Court of Appeals, but the case was not argued until nearly a year after the PPO had expired. In an unpublished per curiam opinion, issued January 19, 2017 (Docket No. 329190), the Court of Appeals held that expiration of the PPO rendered the case moot. Respondent sought leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 501 Mich 901 (2017).

In a unanimous memorandum opinion, the Supreme Court, in lieu of granting leave to appeal, *held*:

As a general rule, a court will not entertain moot issues or decide moot cases. A moot case is one in which a judgment cannot have any practical legal effect upon a then existing controversy. In this case, it was uncontested that the PPO against respondent had expired; the issue was whether an appeal taken from the entry of a PPO was rendered moot solely due to the expiration of the PPO during the pendency of the appeal. Two different statutes, MCL 600.2950 and MCL 600.2950a, provide for three types of PPOs in Michigan. Regardless of the type of PPO issued, MCL 600.2950(10), MCL 600.2950a(10), and MCR 3.706(A)(6) provide that when a court issues a PPO, the court must designate the law enforcement agency that is responsible for entering the

PPO into the Law Enforcement Information Network (LEIN). Then, under MCL 600.2950(15)(a) and (17), MCL 600.2950a(15)(a) and (17), and MCR 3.706(A)(6), the clerk of the court must file a true copy of the PPO with the law enforcement agency designated by the court in the PPO, and the agency must immediately enter the PPO into LEIN. Additionally, under MCL 600.2950(19)(b), MCL 600.2950a(19)(b), and MCR 3.707(A)(3), the clerk of the court must advise law enforcement if the PPO is rescinded, modified, or extended by court order. Finally, under MCL 600.2950(20) and MCL 600.2950a(20), the law enforcement agency must enter the updated information or cause the information to be entered into LEIN. When previously presented with the argument that a PPO respondent has an interest in identifying an improperly issued PPO in LEIN as having been rescinded, the Court of Appeals has issued inconsistent decisions: in one line of cases, the Court of Appeals held that when a PPO expires during the pendency of an appeal, the appeal is necessarily moot; in another line of cases, the Court of Appeals held that a case is not moot despite the expiration of a PPO if the respondent can show a presently existing collateral consequence, usually employment-related, of the PPO; and in yet another line of cases, the Court of Appeals held that a respondent's interest in correcting LEIN is sufficient to prevent an appeal from becoming moot, suggesting either that the presence of the PPO in LEIN is itself a collateral consequence or that the issue is not moot because it is possible for the court to provide some remedy. With regard to the expiration of a PPO during the pendency of an appeal, identifying an improperly issued PPO as rescinded is a live controversy and thus not moot. An appeal challenging a PPO, with an eye toward determining whether a PPO should be updated in LEIN as rescinded, need not fall within an exception to the mootness doctrine to warrant appellate review; instead, such a dispute is simply not moot. In this case, the judgment could have a practical legal effect: if the trial court should never have issued the PPO, respondent would be entitled to have LEIN reflect that fact. Accordingly, the mere fact that the PPO expired during the pendency of the appeal did not render the appeal moot.

Reversed and remanded to the Court of Appeals for consideration on the merits.

INJUNCTIONS — PERSONAL PROTECTION ORDERS — EXPIRATION OF PERSONAL PROTECTION ORDERS DURING THE PENDENCY OF AN APPEAL — MOOTNESS.

When a personal protection order (PPO) respondent alleges that the PPO was improperly issued but the PPO expires during the pendency of an appeal, the opportunity to identify the PPO as

having been rescinded in the Law Enforcement Information Network makes the case a live controversy and thus not moot, meaning the case need not fall within an exception to the mootness doctrine to warrant appellate review.

Outside Legal Counsel PLC (by *Philip L. Ellison*) for MZ.

Amicus Curiae:

Alfonso I. Viggers *in propria persona*.

MEMORANDUM OPINION. The issue in this case is whether an appeal taken from the entry of a personal protection order (PPO) is rendered moot solely due to the expiration of the PPO. We hold that the PPO's expiration alone does not render the appeal moot, and we remand to the Court of Appeals for further proceedings.

Petitioner TM and respondent MZ[1] are neighbors. Petitioner sought a PPO against respondent under MCL 600.2950a(1), pointing to a variety of Facebook posts in which petitioner alleged that respondent was harassing petitioner. Petitioner asked the trial court to issue the order ex parte under MCL 600.2950a(12) and MCR 3.705(A), and the court granted this request.[2] Respondent objected to the PPO, arguing that petitioner was simply annoyed by respondent's comments to others, that there were no allegations of any physical contact between the parties or threats of violence made by respondent against petitioner, and that petitioner's proper recourse was, if anything, a defamation action, not a PPO. The trial court denied respondent's

[1] We refer to the parties by their initials to avoid identifying the party protected by the PPO. See MCR 3.705(C); 18 USC 2265(d)(3).

[2] The court must rule on a request for an ex parte PPO within 24 hours of the request. MCR 3.705(A)(1).

request to terminate the PPO altogether, but the court did amend the order in August 2015[3] to prohibit only "posting a message through the use of any medium of communication, including the Internet or a computer or any electronic medium, pursuant to MCL 750.411s." Respondent promptly appealed in the Court of Appeals, but the case was not argued until nearly a year after the PPO had expired. Shortly after argument, the panel issued an unpublished opinion holding that the expiration of the PPO rendered the case moot.[4] Respondent sought leave to appeal in this Court, and we directed the clerk to schedule oral argument on the application. *TM v MZ*, 501 Mich 901 (2017). "The applicability of a legal doctrine," such as mootness, "is a question of law," which "[t]his Court reviews . . . de novo." *James v Alberts*, 464 Mich 12, 14; 626 NW2d 158 (2001).

Two different statutes, MCL 600.2950 and MCL 600.2950a, provide for three types of PPOs in Michigan. "The nature of the petitioner's relationship with the respondent and the respondent's acts govern which form of PPO is appropriate." Shiemke, *Domestic Violence*, in 2 Michigan Family Law (Kelly et al eds, 7th ed, May 2017 update), § 19.5, p 1167. Domestic-relationship PPOs under MCL 600.2950 require the presence of a domestic relationship as defined under the statute, while sexual-assault PPOs under MCL

[3] The amended PPO itself is dated August 21, 2015. The court issued an order dated August 25 that was responsive to respondent's request to terminate the PPO, noting that his request was being granted only in part. That order was entered into the register of actions on August 26. For purposes of appellate timelines, " 'entry' means the date a judgment or order is signed, *or* the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions." MCR 7.204(A) (emphasis added).

[4] *TM v MZ*, unpublished per curiam opinion of the Court of Appeals, issued January 19, 2017 (Docket No. 329190).

600.2950a(2) require a sexual assault. Neither of these are implicated in this case; instead, we deal with a stalking-type PPO under MCL 600.2950a(1). To obtain a PPO under MCL 600.2950a(1), the petitioner must "allege[] facts that constitute stalking as defined in [MCL 750.411h or MCL 750.411i], or conduct that is prohibited under [MCL 750.411s]." The PPO here was premised on MCL 750.411s, sometimes called the "cyberstalking" statute. *Domestic Violence*, § 19.8.

Regardless of the type of PPO issued, when a court issues a PPO it must "designate the law enforcement agency that is responsible for entering the [PPO] into the L.E.I.N.[5]" MCL 600.2950a(10). See also MCL 600.2950(10); MCR 3.706(A)(6). The clerk of the court "shall . . . [f]ile a true copy of the [PPO] with the law enforcement agency designated by the court in the [PPO]," which agency "shall immediately . . . enter the [PPO] into the L.E.I.N." MCL 600.2950a(15)(a) and (17). See also MCL 600.2950(15)(a) and (17); MCR 3.706(A)(6). The clerk of the court also must advise law enforcement if "[t]he [PPO] is rescinded, modified, or extended by court order." MCL 600.2950a(19)(b). See also MCL 600.2950(19)(b); MCR 3.707(A)(3). The law enforcement agency "shall enter the [updated] information or cause the information to be entered into the L.E.I.N." MCL 600.2950a(20). See also MCL 600.2950(20).

Respondent argued in the Court of Appeals both that petitioner had failed to allege facts satisfying MCL 750.411s and that the PPO was an unconstitutional prior restraint on respondent's speech. The Court of Appeals never reached the merits of these arguments, concluding that the matter was moot because there

[5] That is to say, "the law enforcement information network regulated under . . . MCL 28.211 to 28.216." MCL 600.2950h(b).

was no longer a PPO to invalidate. In this Court, respondent challenges only the Court of Appeals' determination that this appeal is moot. It is uncontested that the PPO against respondent has expired. "[A]s a general rule, this Court will not entertain moot issues or decide moot cases." *East Grand Rapids Sch Dist v Kent Co Tax Allocation Bd*, 415 Mich 381, 390; 330 NW2d 7 (1982). A moot case presents "nothing but abstract questions of law which do not rest upon existing facts or rights." *Gildemeister v Lindsay*, 212 Mich 299, 302; 180 NW 633 (1920). It involves a case in which a judgment "cannot have any practical legal effect upon a then existing controversy." *Anway v Grand Rapids R Co*, 211 Mich 592, 610; 179 NW 350 (1920) (quotation marks and citation omitted).

Respondent argues that this appeal is not moot because there *is* practical legal relief he could receive: if the Court of Appeals were to conclude that the PPO should never have issued in the first place, it would be rescinded, and notice of the same would be entered into LEIN under MCL 600.2950a(19)(b) and (20). Because law enforcement performs background checks with LEIN, respondent argues, he has an interest in clearing the cloud of this allegedly erroneous PPO from his name. The Court of Appeals has confronted the argument that a PPO respondent has an interest in identifying an improperly issued PPO in LEIN as having been rescinded, with varying results.

One line of cases in the Court of Appeals has held that when a PPO expires during the pendency of an appeal, the appeal is necessarily moot.[6] In another line

[6] See, e.g., *Petrucelli v Moore*, unpublished per curiam opinion of the Court of Appeals, issued November 14, 2013 (Docket No. 311112); *Gupton v Johnston*, unpublished per curiam opinion of the Court of Appeals, issued January 28, 2010 (Docket No. 288847); *Funk v Mikkelson*,

of cases, the Court of Appeals has held that a case is not moot despite the expiration of a PPO if the respondent can show a presently existing collateral consequence, usually employment-related, of the PPO. For instance, in *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008), the Court held that the appeal was not moot even though the PPO had been terminated during the pendency of the appeal because the "respondent earned a living building rifles and other firearms" and "entry of a PPO may affect eligibility for a federal firearms license," meaning that the respondent potentially "st[ood] to permanently lose his license and livelihood." Several unpublished opinions have similarly concluded that cases were not moot when the respondent could identify a presently existing collateral consequence due to the presence of the PPO in LEIN.[7]

On the other hand, other panels have held that a respondent's interest in correcting LEIN alone is enough to prevent an appeal from becoming moot, suggesting either that the presence of the PPO in LEIN is *itself* a present collateral consequence, or that the issue is not moot because it is possible for the court to provide some remedy. For example, in *Visser v*

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unpublished memorandum opinion of the Court of Appeals, issued May 17, 2005 (Docket No. 252088); *Butler v Frederick*, unpublished memorandum opinion of the Court of Appeals, issued June 15, 2004 (Docket No. 245651).

[7] See *Hackett-Mayer v Mayer*, unpublished per curiam opinion of the Court of Appeals, issued December 18, 2014 (Docket No. 317744); *Lipscombe v Lipscombe*, unpublished per curiam opinion of the Court of Appeals, issued February 4, 2010 (Docket No. 287822); *Boggs v Boggs*, unpublished per curiam opinion of the Court of Appeals, issued September 24, 2009 (Docket No. 285040); see also *Beckwith v Tyers*, unpublished per curiam opinion of the Court of Appeals, issued February 20, 2014 (Docket No. 312616), p 1 n 1 (asserting that "the issuance of the PPO may affect respondent's livelihood" without further detail).

Visser, 299 Mich App 12, 15; 829 NW2d 242 (2012), the petitioner had obtained a PPO that was extended twice, and the respondent appealed each extension order. In considering mootness, the Court of Appeals noted that the respondent had failed to "articulate what collateral consequences [were] likely to befall him," but the panel did not consider the issue moot because it "d[id] not doubt that having a PPO on one's record may have some adverse consequences." *Id*. at 16. The panel scrutinized but ultimately affirmed the issuance of the PPO.[8] Several unpublished opinions have similarly concluded that a correction of LEIN itself is sufficient to avoid mootness.[9]

We conclude that identifying an improperly issued PPO as rescinded is a live controversy and thus not moot. A judgment here *can* have a "practical legal effect" under *Anway* because if the Court concludes that the trial court should never have issued the PPO, respondent would be entitled to have LEIN reflect that fact.[10] Thus, an appeal challenging a PPO, with an eye

[8] We ultimately vacated the Court of Appeals' analysis of the merits of the PPO because the respondent had taken appeals only from the extension orders and not the original PPO itself. See *Visser v Visser*, 495 Mich 862 (2013).

[9] See *Benson v Foster*, unpublished per curiam opinion of the Court of Appeals, issued February 24, 2015 (Docket No. 315384) (relying on a "court is capable of granting relief" theory); *Dooley v Hartsell*, unpublished per curiam opinion of the Court of Appeals, issued December 23, 2008 (Docket No. 280833) (same, but also implying that the retention of a PPO in LEIN is a "collateral legal consequence" preventing the appeal from becoming moot); *Londo v Jay*, unpublished per curiam opinion of the Court of Appeals, issued March 22, 2002 (Docket No. 227691); *Coolman v Laisure*, unpublished per curiam opinion of the Court of Appeals, issued November 30, 2001 (Docket No. 224050); see also *Boggs* (ZAHRA, J., concurring), unpub op at 1 (observing that the possibility of LEIN correction rendered the appeal not moot notwithstanding the PPO's expiration).

[10] Given this conclusion, we need not decide whether the PPO's existence in LEIN is *itself* a present collateral consequence.

toward determining whether a PPO should be updated in LEIN as rescinded, need not fall within an exception to the mootness doctrine to warrant appellate review; instead, such a dispute is simply not moot. Consequently, and contrary to the decision of the Court of Appeals, the mere fact that the instant PPO expired during the pendency of this appeal does not render this appeal moot.[11] We therefore reverse the judgment of the Court of Appeals and remand to that Court for consideration on the merits.

MARKMAN, C.J., and ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, WILDER, and CLEMENT, JJ., concurred.

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[11] This appeal does not present the question of the extent of relief possible, and we express no opinion on this issue. Appellant's counsel conceded at oral argument that the only available relief is a notation in LEIN that the PPO has been rescinded, and we hold that this is enough to avoid concluding that the case is moot.

PEOPLE v WINTERS

Docket No. 156388. Decided May 18, 2018.

George W. Winters pleaded *nolo contendere* in the Mason Circuit Court to charges of second-degree arson, MCL 750.73(1); and attempted second-degree arson, MCL 750.92, as a third-offense habitual offender, MCL 769.11(1)(a). Defendant entered into a plea agreement with the prosecutor that, in exchange for the plea, his sentence on the charge of second-degree arson would be 8 to 40 years. The plea agreement did not set forth a sentence for attempted arson. The court, Susan K. Sniegowski, J., subsequently sentenced defendant consistently with this plea agreement. During the plea colloquy, the court correctly advised defendant that his maximum possible term of imprisonment for second-degree arson was 40 years, but the court mistakenly informed defendant that his maximum possible term of imprisonment for attempted second-degree arson was 20 years when his maximum possible term of imprisonment for that conviction was 10 years. Defendant later sought to withdraw his plea, arguing that the court's misstatement regarding his maximum penalty for attempted second-degree arson violated MCR 6.302(B)(2), which requires the court to advise a defendant of the maximum possible prison sentence for the offense before accepting a plea of guilty or *nolo contendere*. The court denied the motion. Defendant appealed, and the Court of Appeals, MARKEY, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ., affirmed, holding that a misstatement of the maximum possible sentence does not require reversal if no prejudice is shown and that, because defendant was not told that he was facing a shorter sentence than he actually was, he could not show that he was prejudiced. 320 Mich App 506 (2017). Defendant sought leave to appeal in the Supreme Court.

In a unanimous memorandum opinion, the Supreme Court, in lieu of granting leave to appeal and without hearing oral argument, *held*:

The Court of Appeals correctly held that defendant was not entitled to withdraw his plea because he was accurately advised of the maximum possible term of imprisonment he was eligible to serve and did not suffer any prejudice as a result of the trial

court's misstatement of his maximum penalty for attempted second-degree arson. However, the Court of Appeals erred by holding that a defendant who is mistakenly advised that he or she is eligible to serve a lengthier maximum sentence than he or she actually is can never show prejudice. Accordingly, the portion of the opinion reading "[b]ecause defendant was not told that he was facing a shorter sentence than he actually was, he cannot show that he was prejudiced" and the accompanying citation of *People v Shannon*, 134 Mich App 35, 38 (1984), were vacated. To the extent that *Shannon* conflicted with the decision in this case, it was overruled.

Court of Appeals judgment affirmed in part and vacated in part.

CRIMINAL LAW — PLEAS OF GUILTY OR NO CONTEST — ADVISING OF MAXIMUM POSSIBLE SENTENCE — ERRORS — PREJUDICE.

MCR 6.302(B)(2) requires a court to advise a defendant of the maximum possible prison sentence for the offense charged before accepting a plea of guilty or *nolo contendere*; a defendant who was incorrectly advised about the maximum possible prison sentence may argue that the error resulted in prejudice regardless of whether the error represented a longer or shorter maximum sentence.

State Appellate Defender (by *Jeanice Dagher-Margosian*) for defendant.

MEMORANDUM OPINION. Defendant, George W. Winters, pleaded *nolo contendere* to one count of second-degree arson, MCL 750.73(1); and one count of attempted second-degree arson, MCL 750.92, as a third-offense habitual offender, MCL 769.11(1)(a). Defendant entered into a plea agreement with the prosecutor that, in exchange for the plea, his sentence on the charge of second-degree arson would be 8 to 40 years.[1] The plea agreement did not set forth a sentence for the attempted-arson charge. The trial court subsequently

[1] The prosecutor also agreed to dismiss one count of maliciously burning personal property, MCL 750.78(1)(a)(*i*), a second count of second-degree arson, MCL 750.73(1), and the fourth-offense habitual-offender notice, MCL 769.12.

sentenced defendant consistently with this plea agreement. During the plea colloquy, the trial court correctly advised defendant that his maximum possible term of imprisonment for second-degree arson was 40 years,[2] but mistakenly informed him that his maximum possible term of imprisonment for attempted second-degree arson was 20 years, when in fact his maximum possible term of imprisonment for that conviction was 10 years.[3] Defendant later sought to withdraw his plea, arguing that the trial court's misstatement regarding his maximum penalty for attempted second-degree arson violated MCR 6.302(B)(2). The trial court denied defendant's motion to withdraw, and the Court of Appeals affirmed in a published decision. *People v Winters*, 320 Mich App 506; 904 NW2d 899 (2017). The Court of Appeals concluded that "a misstatement of the maximum possible sentence does not require reversal if no prejudice is shown" and that "[b]ecause defendant was not told that he was facing a shorter sentence than he actually was, he cannot show that he was prejudiced." *Id*. at 510-511.

MCR 6.302 sets forth procedures for accepting a defendant's plea of guilty or *nolo contendere*. In relevant part, it provides:

> Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that each defendant understands:
>
> * * *

[2] The statutory maximum sentence for second-degree arson is 20 years in prison, MCL 750.73(3), and with the third-offense habitual-offender notice, MCL 769.11(1)(a), that maximum is doubled to 40 years in prison.

[3] The statutory maximum sentence for attempted second-degree arson is five years in prison, MCL 750.92(2), and with the third-offense habitual-offender notice, MCL 769.11(1)(a), that maximum is doubled to 10 years in prison.

> (2) the maximum possible prison sentence for the offense . . . .

While we agree with the Court of Appeals that "a misstatement of the maximum possible sentence does not require reversal if no prejudice is shown," *Winters*, 320 Mich App at 510, to the extent that the Court of Appeals has held that one who is mistakenly advised that he or she is eligible to serve a *lengthier* maximum sentence than he or she actually is can *never* show prejudice from this misstatement, this holding is in error. Specifically, we vacate the Court of Appeals' statement that "[b]ecause defendant was not told that he was facing a shorter sentence than he actually was, he cannot show that he was prejudiced." *Winters*, 320 Mich App at 511, citing *People v Shannon*, 134 Mich App 35, 38; 349 NW2d 813 (1984).[4] In the instant case, however, defendant entered into a plea agreement that specifically informed him that he would be sentenced to 8 to 40 years on the charge of second-degree arson. Defendant was then sentenced consistently with this plea agreement after the trial court properly informed him of the maximum penalty for his second-degree arson conviction, which is lengthier than his maximum penalty for his attempted second-degree arson conviction. Consequently, defendant was accurately advised of the maximum possible term of imprisonment he was eligible to serve and did not suffer any prejudice as a result of the trial court's misstatement of his maximum penalty for attempted second-degree arson.[5]

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[4] To the extent that *Shannon* conflicts with our decision in this case, it is overruled.

[5] Because it is clear that defendant here suffered no prejudice as a result of the trial court's misstatement, we need not articulate the precise standard for determining whether a defendant has been prejudiced by a court's misstatement of the "maximum possible prison sentence for the offense" to which he pleaded guilty. MCR 6.302(B)(2).

For this reason, we vacate that portion of the Court of Appeals' opinion holding that one who is mistakenly advised that he or she is eligible to serve a lengthier maximum sentence than he or she actually is can *never* show prejudice, but affirm its holding that defendant here is not entitled to withdraw his plea. 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.

MARKMAN, C.J., and ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, WILDER, and CLEMENT, JJ., concurred.

ILIADES v DIEFFENBACHER NORTH AMERICA INC

Docket No. 154358. Argued on application for leave to appeal November 7, 2017. Decided May 23, 2018.

Steven Iliades (plaintiff) and Jane Iliades brought a products-liability action in the Oakland Circuit Court against Dieffenbacher North America Inc., alleging negligence, gross negligence, and breach of warranty after plaintiff was injured by a rubber molding press manufactured by defendant. The press was equipped with a presence-sensing device called a "light curtain" that stops the press when beams of light in front of the press opening are interrupted. Once the light curtain was no longer interrupted, the press would resume its cycle automatically. Plaintiff was injured when he attempted to retrieve parts that had fallen to the floor inside the press by reaching behind the light curtain without first placing the press into manual mode. Because of plaintiff's position behind the light curtain, the light curtain was not interrupted, the press resumed its automatic operation, and plaintiff was trapped between the two plates of the press. The court, Martha D. Anderson, J., granted summary disposition to defendant, ruling that plaintiff had misused the press given the evidence that he had been trained not to reach into the press while it was in automatic mode, knew how to place the press into manual mode, knew that the light curtain was not meant to be used as an emergency stop switch, and knew that the press would automatically begin its cycle if the light curtain was no longer interrupted. The court further ruled that plaintiff's misuse was not reasonably foreseeable because plaintiff had not presented any evidence that defendant could have foreseen that a trained press operator would crawl beyond a light curtain and partially inside a press to retrieve a part without first disengaging the press. The Court of Appeals, RONAYNE KRAUSE, P.J., and STEPHENS, J. (JANSEN, J., dissenting), reversed and remanded in an unpublished per curiam opinion issued July 19, 2016 (Docket No. 324726), holding that, regardless of whether plaintiff had misused the press, defendant could be held liable because plaintiff's conduct was reasonably foreseeable. Defendant applied for leave to appeal in the Supreme Court, which ordered and heard oral

argument on whether to grant the application or take other peremptory action. 500 Mich 965 (2017).

In a unanimous opinion by Justice ZAHRA, the Supreme Court, in lieu of granting leave to appeal, *held*:

Defendant would be liable under MCL 600.2947(2) for injuries sustained by plaintiff if plaintiff's conduct constituted misuse of the press under MCL 600.2945(e) and that misuse was reasonably foreseeable. Whether the misuse was reasonably foreseeable depended on whether defendant knew or should have known of the misuse, not on whether plaintiff was grossly negligent in operating the press. Because the majority of the Court of Appeals did not decide whether and how plaintiff misused the press, and because it did not apply the common-law meaning of reasonable foreseeability, the Court of Appeals judgment was reversed and the case was remanded to that Court to reconsider the trial court's grant of summary disposition in favor of defendant under the standards articulated in this opinion.

1. MCL 600.2947(2) provides that a manufacturer or seller is not liable in a products-liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. This provision further states that whether there was misuse and whether that misuse was reasonably foreseeable are both legal issues to be resolved by the court. Thus, the plain language of MCL 600.2947(2) clearly sets forth a two-part test for manufacturer liability pertaining to reasonably foreseeable product misuse: in order for a manufacturer to be liable for the misuse of its product, a court must first decide whether there was misuse of the product, and, if so, the court must then decide whether the particular misuse was reasonably foreseeable by the manufacturer.

2. MCL 600.2945(e) defines "misuse" as "use of a product in a materially different manner than the product's intended use." Under this provision, "misuse" includes (1) uses inconsistent with the specifications and standards applicable to the product, (2) uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training regarding the use or maintenance of the product, and (3) uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances.

3. The phrase "reasonably foreseeable" is not defined under the statute, but the Legislature is presumed to have adopted the common-law definition of that phrase when it enacted MCL 600.2947(2). Under Michigan common law, foreseeability depends

on whether a reasonable person could anticipate that a given event might occur under certain conditions. When dealing with the foreseeability of a product's misuse, the crucial inquiry is whether, at the time the product was manufactured, the manufacturer was aware, or should have been aware, of that misuse. Whether a manufacturer should have known of a particular misuse may depend on whether that misuse was a common practice, or whether foreseeability was inherent in the product.

4. The Court of Appeals majority erred by failing to squarely address whether plaintiff's conduct constituted misuse of the press under MCL 600.2945(e), which affected its reasonable-foreseeability analysis. For instance, the majority improperly framed the issue as whether it was reasonably foreseeable that press operators at plaintiff's place of employment would rely on the light curtains as exclusive safety devices. This overly broad account of misuse is inconsistent with the wording of MCL 600.2947(2), which specifically asks whether "the misuse" of the product was reasonably foreseeable. In other words, the question for purposes of foreseeability is whether defendant knew or should have known of plaintiff's particular misuse. Without deciding whether and how plaintiff had misused the press, the majority could not properly assess whether that misuse was reasonably foreseeable.

5. The Court of Appeals erred by importing the standard applicable to criminal gross negligence into its interpretation of MCL 600.2947(2). Had the Legislature intended to use this criminal standard for reasonable foreseeability in civil products-liability cases, as opposed to the common-law definition, the Legislature would have done so. Because the Legislature has not plainly shown a contrary intent, the common-law meaning of "reasonably foreseeable" must apply for purposes of MCL 600.2947(2).

Court of Appeals judgment reversed; case remanded to the Court of Appeals for further proceedings.

Justice CLEMENT took no part in the decision of this case.

1. PRODUCTS LIABILITY — MISUSE — REASONABLE FORESEEABILITY — QUESTIONS OF LAW.

MCL 600.2947(2) provides that a manufacturer or seller is not liable in a products-liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable; in order for a manufacturer to be liable for the misuse of its product under this provision, a court must first decide whether there was misuse of

the product, and, if there was, the court must then decide whether the particular misuse was reasonably foreseeable by the manufacturer.

2. PRODUCTS LIABILITY — WORDS AND PHRASES — "MISUSE."

MCL 600.2945(e) defines "misuse" as the use of a product in a materially different manner than the product's intended use; under this provision, "misuse" includes (1) uses inconsistent with the specifications and standards applicable to the product, (2) uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training regarding the use or maintenance of the product, and (3) uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances.

3. PRODUCTS LIABILITY — WORDS AND PHRASES — "REASONABLY FORESEEABLE."

To determine whether the misuse of a product was reasonably foreseeable in a products-liability action, a court must decide whether, at the time the product was manufactured, the manufacturer was aware, or should have been aware, of that misuse; whether a manufacturer should have known of a particular misuse may depend on whether that misuse was a common practice or whether foreseeability was inherent in the product (MCL 600.2947(2)).

Bendure & Thomas, PLC (by *Mark R. Bendure*) and *Hilborn & Hilborn, PC* (by *Craig E. Hilborn*) for plaintiffs.

LeClair Ryan (by *Evan A. Burkholder* and *Norma Gant*) and *Thomas, DeGrood & Witenoff, PC* (by *Michelle A. Thomas*) for defendant.

Amici Curiae:

Irene Bruce Hathaway, *Larry J. Saylor*, and *Christopher A. Knight* for the Michigan Defense Trial Counsel.

Miller, Canfield, Paddock and Stone, PLC (by *Clifford W. Taylor*, *Paul D. Hudson*, and *Kamil Robakiewicz*) for the Michigan Manufacturers Association.

Law Offices of Robert June, PC (by *Robert B. June*) for the Michigan Association for Justice.

ZAHRA, J. This products-liability action presents a question of first impression in regard to the proper interpretation of MCL 600.2947(2).[1] That provision provides that a manufacturer is not liable for harm caused by the misuse of a product unless that misuse was reasonably foreseeable.

In this case, plaintiff Steven Iliades sustained serious injuries after he reached inside a 500-ton press machine to retrieve molded rubber parts from the floor and became trapped when the press started its automatic cycle.[2] Iliades places fault with defendant Dieffenbacher North America Inc., the manufacturer of the press. If Iliades's conduct constituted misuse of the press, however, Dieffenbacher would only be liable if that particular misuse was reasonably foreseeable by Dieffenbacher.

In an unpublished, split decision, the Court of Appeals concluded that, regardless of whether Iliades misused the press, Dieffenbacher can be held liable for the harm sustained by Iliades because his conduct was reasonably foreseeable under a criminal gross-negligence standard. The Court of Appeals erred by applying that standard in this context.

The Legislature set forth a clear two-part test in MCL 600.2947(2) for manufacturer liability arising from

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[1] Although this Court's analysis in *Greene v A P Prod, Ltd*, 475 Mich 502; 717 NW2d 855 (2006), tangentially touched upon product misuse, that case was limited to addressing the scope of a manufacturer's duty to warn of product risks under MCL 600.2948(2).

[2] Steven Iliades's wife, Jane Iliades, is also a party in this action with an independent claim for loss of consortium, which would be derivative of her husband's legally cognizable bodily injury. In this opinion, use of the singular "Iliades" refers to Steven only.

product misuse. First, a court must decide whether there was misuse of the product. Second, if there was misuse, a court must decide whether that particular misuse was reasonably foreseeable by the manufacturer. Although the Legislature defined "misuse" in MCL 600.2945(e), it did not provide a definition for "reasonably foreseeable." Nevertheless, under long-standing principles of statutory construction, the phrase "reasonably foreseeable" must be construed in accordance with its common-law meaning. And under Michigan common law, foreseeability depends on whether a reasonable person could anticipate that a given event might occur under certain conditions. When dealing with the foreseeability of a product's misuse in particular, the crucial inquiry is whether, at the time the product was manufactured, the manufacturer was aware, or should have been aware, of that misuse.

Because the majority of the Court of Appeals did not decide whether and how Iliades misused the press, and because it improperly used a criminal gross-negligence standard to determine whether Iliades's misuse was reasonably foreseeable instead of the common-law meaning of that phrase, we reverse the judgment of the Court of Appeals and remand this case to that Court to reconsider whether the trial court's grant of summary disposition in favor of Dieffenbacher was proper under the standards articulated in this opinion.

I. FACTS AND PROCEEDINGS

Flexible Products Company supplies molded rubber parts for the automotive industry. As of June 10, 2011, Iliades had more than a year of experience working on presses at Flexible Products. Although he usually worked on Press Number 1, that press was temporarily inoperable that day, so Iliades was operating Press

Number 25, a 500-ton vertical rubber molding press machine manufactured by Dieffenbacher. The press creates injection-molded rubber parts by pressing together two large plates called "platens," which hold interchangeable molds, and then injecting rubber into the molds. Each cycle of the press takes less than 10 minutes to complete. Upon completion, the press stops and the finished product is manually removed by the operator.

Press Number 25 is also equipped with a presence-sensing device, often referred to as a "light curtain," whereby beams of light pass in front of the opening to the press. When this light curtain is interrupted by, for example, a hand or arm crossing the light beams, the press stops its cycle. While some of the presses would have to be manually reset once the light curtain was intact and no longer interrupted, other presses, like Press Number 25, would resume their cycle automatically.

Although the presses were generally set to cycle automatically, they could also operate in manual mode. Because the presses do not always eject the rubber parts properly, causing some parts to fall to the floor of a press, operators were instructed to place a press in manual mode before reaching into the press to remove any wayward part. Operators were also instructed to use a "parts grabber" to reach into the press to remove these parts.

After returning from a break on this particular day, Iliades sought to retrieve parts that had fallen to the floor inside Press Number 25 by using his parts grabber. Iliades, however, did not place the press into manual mode before doing so. In reaching into the press, Iliades's torso and back were completely inside the press, while his right knee rested on top of the guard or metal

skirting on the front of the press. Despite having his left foot still touching the floor, Iliades's body was positioned in such a way that he was behind the light curtain.

With the light curtain no longer interrupted, the press resumed its automatic operation and trapped Iliades between the two plates of the press. Iliades was able to bang a tool against the side of the press and attract the attention of the foreman. After approximately 15 minutes, the press was partially disassembled, freeing Iliades. Iliades sustained serious fractures in his back and severe burns, and he continues to suffer from post-traumatic stress disorder, chronic pain, and major depression.

In 2012, Iliades filed this products-liability action against Dieffenbacher, alleging negligence, gross negligence, and breach of warranty. Following discovery, Dieffenbacher moved for summary disposition under MCR 2.116(C)(10), arguing that, pursuant to MCL 600.2945(e) and MCL 600.2947(2), Iliades's actions in climbing partway into the press constituted misuse that was not reasonably foreseeable. In response, Iliades argued that there was a genuine issue of material fact regarding whether he engaged in unforeseeable misuse of the press.

At the conclusion of the motion hearing on September 17, 2014, the trial court agreed with Dieffenbacher and granted the motion. The trial court found that Iliades misused the press, as the record evidence demonstrated that he was trained not to reach into the press while it was in automatic mode. He also knew how to place the press into manual mode, that the light curtain was not meant to be used as an emergency stop switch, and that the press would automatically begin its cycle if the light curtain was no longer interrupted. The trial court then concluded

that Iliades's misuse was not reasonably foreseeable because Iliades did not present any evidence that Dieffenbacher could have foreseen that a trained press operator would crawl beyond a light curtain and partially inside a press to retrieve a part without first disengaging the press.[3]

On July 19, 2016, the Court of Appeals issued an unpublished, split decision reversing the trial court.[4] The majority chose not to expressly decide whether Iliades's conduct constituted misuse, claiming instead that "the dispositive issue is whether [Iliades's] conduct was *foreseeable*."[5] Employing the criminal-law standard for distinguishing ordinary negligence from gross negligence to define foreseeability, the majority focused on whether Dieffenbacher should have reasonably expected that press operators, like Iliades, would rely on light curtains as exclusive safety devices. The majority concluded that it was common practice for operators to routinely disregard their training and rely on light curtains as the sole safety device when removing finished parts. The majority also concluded that Iliades had no reason to know that the light curtain on Press Number 25 "would be cleared if one got *between* the light curtain and the press . . . ."[6] Therefore, the majority concluded that the evidence did not show that

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[3] Iliades filed a motion for reconsideration, which was denied in an order issued on October 9, 2014. Iliades thereafter filed a delayed application for leave to appeal with the Court of Appeals.

[4] *Iliades v Dieffenbacher North America Inc*, unpublished per curiam opinion of the Court of Appeals, issued July 19, 2016 (Docket No. 324726).

[5] *Id*. at 3. Nevertheless, the majority did recognize that "misuse," as defined under MCL 600.2945(e), includes " 'uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training regarding the use or maintenance of the product' " and that Iliades acted in a manner that "appears to have been contrary to instruction provided by his employer." *Id*.

[6] *Id*. at 4.

Iliades "obviously committed gross negligence" and that it was reasonably foreseeable to Dieffenbacher that press operators would rely entirely on light curtains for safety.

In her dissent, Judge JANSEN would have affirmed the trial court's grant of summary disposition. According to Judge JANSEN, the evidence showed that Iliades misused the press by acting contrary to instructions provided by Joe Whiteside, who was an employee at Flexible Products with knowledge and training regarding the use of the press. Specifically, Whiteside instructed Iliades to never reach inside the press when it was in automatic mode. Whiteside also trained Iliades to never transgress the light curtain. Nevertheless, that is precisely what Iliades did here. Judge JANSEN also concluded that Dieffenbacher could not have reasonably foreseen Iliades's particular misuse because there was no evidence that anyone had ever suffered the type of injury that Iliades sustained as a result of partially climbing into a press and because there was no evidence that partially climbing into a press while it was in automatic mode was common practice among press operators.

Dieffenbacher applied for leave to appeal in this Court. We directed the Clerk to schedule oral argument on whether to grant the application or take other action.[7]

II. STANDARD OF REVIEW AND RULES OF STATUTORY INTERPRETATION

Questions of statutory interpretation are reviewed de novo.[8] When interpreting a statute, this Court's

[7] *Iliades v Dieffenbacher North America Inc*, 500 Mich 965 (2017).

[8] *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 199; 895 NW2d 490 (2017), citing *Hannay v Dep't of Transp*, 497 Mich 45, 57; 860 NW2d 67 (2014).

primary goal is to " 'ascertain the legislative intent that may reasonably be inferred from the words in [the] statute.' "[9] If the statute's language is clear and unambiguous, then the statute must be enforced as written.[10] A necessary corollary of this principle is that a " 'court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.' "[11]

This Court must give effect to every word, phrase, and clause in a statute, and, in particular, consider the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme, to avoid rendering any part of the statute nugatory or surplusage.[12] If a statutory word or phrase is undefined, it must be accorded its plain and ordinary meaning.[13] A legal term of art, on the other hand, must be construed in accordance with its peculiar and appropriate legal meaning.[14] Consequently, when the

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[9] *Covenant Med Ctr*, 500 Mich at 199, quoting *People v Couzens*, 480 Mich 240, 249; 747 NW2d 849 (2008).

[10] *Covenant Med Ctr*, 500 Mich at 199, citing *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008).

[11] *Covenant Med Ctr*, 500 Mich at 199, quoting *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

[12] *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 70-71; 894 NW2d 535 (2017).

[13] *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012), citing *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011).

[14] *Hannay*, 497 Mich at 57, citing *In re Bradley Estate*, 494 Mich 367, 377; 835 NW2d 545 (2013); see also *Bradley Estate*, 494 Mich at 377 ("While terms must be construed according to their plain and ordinary meaning, words and phrases 'as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.' "), quoting MCL 8.3a.

Legislature uses an undefined term with a " 'settled, definite, and well known meaning at common law,' " that settled meaning applies " 'unless a contrary intent is plainly shown.' "[15]

III. ANALYSIS

As part of major tort reform efforts in 1995,[16] the Legislature amended the Revised Judicature Act[17] to provide that a "manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable."[18] The statute further provides that whether there was misuse, and whether that misuse was reasonably foreseeable, are both "legal issues to be resolved by the court."[19] Thus, the plain language of MCL 600.2947(2) clearly sets forth a two-part test for manufacturer liability pertaining to reasonably foreseeable product misuse: in order for a manufacturer to be liable for the misuse of its product, a court must first decide whether there was misuse of the product, and, if so, the court must then decide whether the particular misuse was reasonably foreseeable by the manufacturer.

Turning to the first part of the test, MCL 600.2945(e) defines "misuse" as "use of a product in a materially different manner than the product's intended use."[20] This provision defines "misuse" to include the following: (1) "uses inconsistent with the specifications and

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[15] *People v March*, 499 Mich 389, 398; 886 NW2d 396 (2016), quoting *People v Covelesky*, 217 Mich 90, 100; 185 NW 770 (1921), superseded by statute on other grounds.

[16] See 1995 PA 161 and 1995 PA 249.

[17] MCL 600.101 *et seq*.

[18] MCL 600.2947(2).

[19] *Id*.

[20] MCL 600.2945(e).

standards applicable to the product," (2) "uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training regarding the use or maintenance of the product," and (3) "uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances."[21]

The second part of the test requires a court to decide whether the particular misuse of the product was reasonably foreseeable by the manufacturer. Unlike "misuse," "reasonably foreseeable" is not defined under the statute. As a matter of statutory construction, however, the Legislature is presumed to have adopted the common-law definition of "reasonably foreseeable" when it enacted MCL 600.2947(2).[22]

Under Michigan common law, foreseeability depends on whether a reasonable person "could anticipate that a given event might occur under certain conditions."[23] When dealing with the foreseeability of a product's misuse in particular, the crucial inquiry is

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[21] *Id*.

[22] *March*, 499 Mich at 398; *Hannay*, 497 Mich at 57; *In re Bradley*, 494 Mich at 377; see also *People v Moreno*, 491 Mich 38, 46; 814 NW2d 624 (2012) ("We must presume that the Legislature knows of the existence of the common law when it acts.") (quotation marks and brackets omitted).

[23] *Samson v Saginaw Prof Bldg, Inc*, 393 Mich 393, 406; 224 NW2d 843 (1975); see also *Schultz v Consumers Power Co*, 443 Mich 445, 452; 506 NW2d 175 (1993), quoting *Samson*, 393 Mich at 406; *Groncki v Detroit Edison Co*, 453 Mich 644, 668; 557 NW2d 289 (1996) (MALLETT, J., concurring in part and dissenting in part) (defining "foreseeability" to similarly mean, in part, "whether the reasonable person . . . could anticipate the likelihood that a particular event would occur"), citing *Samson*, 393 Mich at 406; accord *Moore v Sky Chefs, Inc*, 79 F Appx 130, 135 (CA 6, 2003), quoting *Samson*, 393 Mich at 406. *Black's Law Dictionary* similarly defines "foreseeability" as the "quality of being reasonably anticipatable." *Black's Law Dictionary* (10th ed).

whether, at the time the product was manufactured, the manufacturer was aware, or should have been aware, of that misuse.[24] Whether a manufacturer should have known of a particular misuse may depend on whether that misuse was a common practice,[25] or if foreseeability was inherent in the product.[26]

Accordingly, under MCL 600.2947(2), Dieffenbacher would not be liable for Iliades's injuries caused by the misuse of the press unless that misuse was reasonably foreseeable at the time the press was manufactured. This necessarily requires a court to first decide whether Iliades's conduct constituted misuse of the press under MCL 600.2945(e). Next, under the established common-law meaning of the phrase, Iliades's

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[24] See *Villar v E W Bliss Co*, 134 Mich App 116, 121; 350 NW2d 920 (1984) ("[T]he specific use to which plaintiff's employer put the machine was not *foreseeable* without *some* evidence that defendant knew or should have known of the purchaser's unsafe use.").

[25] See, e.g., *Mach v Gen Motors Corp*, 112 Mich App 158, 163; 315 NW2d 561 (1982) ("The crucial inquiries under this test [of foreseeability by the manufacturer] are whether the use made of the product was a common practice and whether the manufacturer was aware of that use."); accord *Gootee v Colt Indus, Inc*, 712 F2d 1057, 1064 (CA 6, 1983) ("Crucial inquiries in determining whether a use is foreseeable include whether the use made of the product was a common practice and whether the manufacturer was, or should have been aware, of that use."), citing *Mach*, 112 Mich App 158.

[26] See, e.g., *Portelli v I R Constr Prod Co, Inc*, 218 Mich App 591, 599; 554 NW2d 591 (1996) ("Foreseeability of misuse may be inherent in the product or may be based on evidence that the manufacturer had knowledge of a particular type of misuse."); *Van Eizenga v Straley*, unpublished per curiam opinion of the Court of Appeals, issued March 31, 1998 (Docket No. 198819), p 4, quoting *Portelli*, 218 Mich App at 599; accord *Adams v Mestek Machinery, Inc*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued November 9, 2017 (Case No. 16-cv-11764), p 8, quoting *Portelli*, 218 Mich App at 599. Although the design of a product may be enhanced with the passage of time and improvements in technology, the adequacy of a design and foreseeability of misuse is measured at the time the product is in fact manufactured, not at the time of injury.

alleged misuse of the press would only be "reasonably foreseeable" if Dieffenbacher could have anticipated that the "given event"—here, Iliades reaching inside the press to remove rubber parts and transgressing the light curtain while the press was in automatic mode—might occur under certain conditions. To answer this question, a court would look to the record evidence to decide whether Dieffenbacher knew or should have known of Iliades's conduct.

Although it recognized that Iliades likely misused the press under MCL 600.2945(e), the Court of Appeals majority failed to squarely address the first prong of the test. This apparently deliberate decision was problematic for several reasons. Not only did the majority disregard the Legislature's clear directive that a court must decide whether a person misused the product, it also failed to focus specifically on Iliades's conduct, which affected its reasonable-foreseeability analysis. For instance, the majority improperly framed the issue as whether it was reasonably foreseeable that press operators at Flexible Products would rely on the light curtains as exclusive safety devices. This overly broad account of misuse in this case is inconsistent with the wording of MCL 600.2947(2), which specifically asks whether "*the* misuse" of the product was reasonably foreseeable.[27] In other words, the question for purposes of foreseeability is whether Dieffenbacher knew or should have known of Iliades's particular misuse. Without deciding whether and how Iliades misused the press, the majority could not properly assess whether that misuse was reasonably foreseeable.

Furthermore, the Court of Appeals majority does not explain why it opted to disregard the wealth of reasonable-foreseeability jurisprudence when it im-

[27] Emphasis added.

ported the standard applicable to criminal gross negligence into its interpretation of MCL 600.2947(2). Had the Legislature intended to use this criminal standard for reasonable foreseeability in civil products-liability cases, as opposed to the common-law definition, the Legislature would have done so. Because the Legislature has not plainly shown a contrary intent, the common-law meaning of "reasonably foreseeable" must apply for purposes of MCL 600.2947(2).

IV. CONCLUSION

For these reasons, this Court concludes that Dieffenbacher would be liable under MCL 600.2947(2) for injuries sustained by Iliades if Iliades's conduct constituted misuse of the press under MCL 600.2945(e) and that misuse was reasonably foreseeable. Whether the misuse was reasonably foreseeable depends on whether Dieffenbacher knew or should have known of the misuse, not whether Iliades was grossly negligent in operating the press. Because the majority of the Court of Appeals did not decide whether and how Iliades misused the press, and because it did not apply the common-law meaning of reasonable foreseeability, we reverse the judgment of the Court of Appeals and remand this case to that Court to reconsider the trial court's grant of summary disposition in favor of Dieffenbacher under the standards articulated in this opinion. We do not retain jurisdiction.

MARKMAN, C.J., and MCCORMACK, VIVIANO, BERNSTEIN, and WILDER, JJ., concurred with ZAHRA, J.

CLEMENT, J., took no part in the decision of this case.

PEOPLE v WASHINGTON

Docket No. 156283. Argued on application for leave to appeal April 11, 2018. Decided June 12, 2018.

Tarone D. Washington was convicted in the Berrien Circuit Court, Charles T. LaSata, J., of keeping or maintaining a drug house in violation of MCL 333.7405(1)(d), carrying or possessing a firearm when committing or attempting to commit a felony (felony-firearm) in violation of MCL 750.227b, possession of marijuana in violation of MCL 333.7403(2)(d), and receiving and concealing a stolen firearm in violation of MCL 750.535b. Defendant's conviction for keeping and maintaining a drug house served as the predicate felony for his felony-firearm conviction. Defendant appealed, challenging the sufficiency of the evidence to support his convictions. After additional briefing by the parties, the Court of Appeals, MURPHY, P.J., and SAWYER, J. (SWARTZLE, J., concurring in part and dissenting in part), vacated defendant's felony-firearm conviction but affirmed the remaining convictions in an unpublished per curiam opinion, issued July 6, 2017 (Docket No. 330345). The Court of Appeals majority concluded that the misdemeanor offense of keeping or maintaining a drug house was not a "felony" for purposes of the Michigan Penal Code, MCL 750.1 *et seq*., and therefore could not serve as the predicate felony for a felony-firearm conviction. The majority concluded that it was compelled to reach this outcome given the Supreme Court's decision in *People v Smith*, 423 Mich 427 (1985)—which the majority claimed stood for the proposition that crimes labeled as misdemeanors are misdemeanors for purposes of the Penal Code regardless of where that offense is found in the law—and the Court of Appeals' decisions in *People v Williams*, 243 Mich App 333 (2000), and *People v Baker*, 207 Mich App 224 (1994)—both holding that an offense explicitly labeled as a misdemeanor in the Penal Code but punishable by up to two years' imprisonment could not serve as the predicate felony for a different offense in the Penal Code. In a partial dissent, Judge SWARTZLE concurred in affirming three of defendant's convictions but disagreed with the majority that vacating the felony-firearm conviction was required by *Smith*, *Williams*, or *Baker*. Judge SWARTZLE concluded that the general definition of "felony" in the Penal Code, where the primary

offense of felony-firearm is located, trumps the misdemeanor label for the underlying offense of keeping or maintaining a drug house in the Public Health Code, MCL 333.1101 *et seq*. And because keeping or maintaining a drug house is punishable by up to two years' imprisonment, it meets the definition of "felony" in the Penal Code and can serve as the predicate felony for purposes of a felony-firearm conviction. Furthermore, Judge SWARTZLE distinguished *Williams* and *Baker* from the instant matter because both those cases dealt with primary and underlying offenses in the Penal Code, whereas the instant case involves a primary offense in the Penal Code and an underlying offense in the Public Health Code. The prosecution sought leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 501 Mich 942 (2017).

In a unanimous opinion by Justice ZAHRA, the Supreme Court, in lieu of granting leave to appeal, *held*:

Whether a person is guilty of felony-firearm under the Penal Code depends on whether that person committed or attempted to commit a "felony" when he or she was carrying or possessing a firearm. The Penal Code defines "felony" as an offense punishable by imprisonment in a state prison. Although the Legislature intended the offense of keeping or maintaining a drug house to be a misdemeanor for purposes of the Public Health Code, that offense is punishable by imprisonment in a state prison, and therefore it satisfies the definition of "felony" in the Penal Code and may serve as the predicate felony for a felony-firearm conviction. Thus, under the clear and unambiguous language of the Penal Code, a person who carries or possesses a firearm when keeping or maintaining a drug house is guilty of felony-firearm.

1. Under MCL 750.227b(1) of the Michigan Penal Code, a person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony is guilty of a felony. Under MCL 750.7, the term "felony" in the Penal Code must be interpreted to mean an offense that is punishable by imprisonment in a state prison upon the defendant's conviction. Therefore, whether an offense satisfies the Penal Code's definition of a "felony" is dependent upon the correctional institution in which a defendant could be imprisoned upon conviction. Under MCL 769.28 of the Michigan Code of Criminal Procedure, a defendant may be imprisoned in a state prison if the punishment for the offense is more than one year's imprisonment. Accordingly, a person is guilty of felony-firearm under the Penal Code if he or she carries or possesses a firearm when committing or attempting

to commit an offense that is punishable by imprisonment for more than one year. Under MCL 333.7405(1)(d) of the Public Health Code, a person shall not knowingly keep or maintain a drug house. Under MCL 333.7406, this offense is punishable by imprisonment for not more than two years if the defendant is found to have knowingly or intentionally violated MCL 333.7405(1)(d). Because the offense of keeping or maintaining a drug house is punishable by imprisonment for more than one year, the offense is necessarily punishable by imprisonment in a state prison. And because this offense is punishable by imprisonment in a state prison, it undeniably meets the definition of "felony" in the Penal Code. Accordingly, under the clear and unambiguous language of the Penal Code, a person is guilty of felony-firearm if he or she carries or possesses a firearm when keeping or maintaining a drug house.

2. Definitions and labels in one code apply only to that particular code; they are not to be transferred and applied to other codes. In other words, an offense expressly labeled a misdemeanor in one code does not necessarily mean the same offense is a misdemeanor for purposes of interpreting and applying a different code. Rather, whether a misdemeanor offense in one code is a misdemeanor or a felony in another code may depend on the latter code's definitions. The *Smith* Court held that although two-year misdemeanors in the Penal Code might be considered misdemeanors for purposes of the Penal Code, when it comes to interpreting and applying provisions in the Code of Criminal Procedure, those same two-year misdemeanors must be considered felonies because they are punishable by more than one year's imprisonment under the latter code's definition of "felony," regardless of those offenses' "misdemeanor" labels. The logic and rationale of *Smith* applied equally to the present situation. The clear and unambiguous language of the Penal Code defines a "felony" as an offense punishable by imprisonment in a state prison. There was no dispute that the offense of keeping or maintaining a drug house is punishable by imprisonment in a state prison. Therefore, a person is guilty of felony-firearm under the Penal Code if he or she carries or possesses a firearm when keeping or maintaining a drug house, regardless of the label the Legislature gave this offense in the Public Health Code. This outcome was entirely consistent with the reasoning in *Smith*.

3. The portion of a sentence in the introductory section of *Smith* stating that the "Legislature intended two-year misdemeanors to be considered as misdemeanors for purposes of the Penal Code" did not alter the outcome in this case for two reasons.

First, the *Smith* Court was tasked with deciding whether two-year misdemeanors in the Penal Code could be considered felonies for purposes of the Code of Criminal Procedure. Accordingly, the *Smith* Court did not need to opine on whether two-year misdemeanors should be considered misdemeanors for purposes of the Penal Code, and any assertion of legislative intent to that effect in *Smith* was therefore obiter dictum. Because obiter dictum is nonbinding, the portion of that sentence in the introductory section of *Smith* exerted no influence on the present matter. Second, even if this sentence was not dictum, the Court of Appeals majority failed to fully appreciate the context in which the introductory statement was made; the statutes that are mentioned in that sentence were statutes in the Penal Code and the Code of Criminal Procedure. Because the two-year misdemeanors at issue in *Smith* were those in the Penal Code, the proper inference to be drawn from this sentence was that the Legislature intended two-year misdemeanors *in the Penal Code* to be considered as misdemeanors *for purposes of the Penal Code*. The focus of the inquiry in *Smith* was on two-year misdemeanors specifically located in the Penal Code, not two-year misdemeanors in general. Therefore, the Court of Appeals majority erred by concluding that, pursuant to *Smith*, the offense of keeping or maintaining a drug house in the Public Health Code must be treated as a misdemeanor for purposes of the Penal Code.

Court of Appeals' judgment reversed to the extent that it reached a contrary conclusion; defendant's felony-firearm conviction reinstated; case remanded to the Court of Appeals to address defendant's remaining arguments.

1. CRIMINAL LAW — FELONIES — MISDEMEANORS — FELONY-FIREARM — KEEPING OR MAINTAINING A DRUG HOUSE.

Whether a person is guilty of felony-firearm under the Penal Code depends on whether that person committed or attempted to commit a "felony" when he or she was carrying or possessing a firearm; the Penal Code defines "felony" as an offense punishable by imprisonment in a state prison; although the Legislature intended the offense of keeping or maintaining a drug house to be a misdemeanor for purposes of the Public Health Code, that offense is punishable by imprisonment in a state prison, and therefore it satisfies the definition of "felony" in the Penal Code and may serve as the predicate felony for a felony-firearm conviction; thus, under the clear and unambiguous language of the Penal Code, a person who carries or possesses a firearm when

keeping or maintaining a drug house is guilty of felony-firearm (MCL 333.7405; MCL 333.7406; MCL 750.7; MCL 750.227b; MCL 769.28).

2. CRIMINAL LAW — FELONIES — MISDEMEANORS — DEFINITIONS AND LABELS IN SEPARATE CODES.

Definitions and labels in one code apply only to that particular code; they are not to be transferred and applied to other codes; in other words, an offense expressly labeled a misdemeanor in one code does not necessarily mean the same offense is a misdemeanor for purposes of interpreting and applying a different code; rather, whether a misdemeanor offense in one code is a misdemeanor or a felony in another code may depend on the latter code's definitions.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Michael J. Sepic*, Prosecuting Attorney, and *Aaron J. Mead*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Marilena David-Martin*) for defendant.

Amicus Curiae:

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *B. Eric Restuccia*, Chief Legal Counsel, and *Linus Banghart-Linn*, Assistant Attorney General, for the people.

ZAHRA, J. Under the Michigan Penal Code, a person is guilty of the offense of felony-firearm if he or she carries or possesses a firearm when committing or attempting to commit a felony. For purposes of the Penal Code, a "felony" is an offense that is punishable by imprisonment in a state prison. Under Michigan's Public Health Code, a person is guilty of a misdemeanor if he or she knowingly or intentionally keeps or maintains a drug house. This offense, however, is punishable by imprisonment in a state prison. The issue presented in this case is whether a person is

guilty of felony-firearm if he or she carries or possesses a firearm when keeping or maintaining a drug house.

In an unpublished, split decision, the Court of Appeals majority concluded that the misdemeanor offense of keeping or maintaining a drug house is not a "felony" for purposes of the Penal Code and, therefore, cannot serve as the predicate felony for a felony-firearm conviction. The majority concluded that it was compelled to reach this outcome given this Court's decision in *People v Smith*[1] as well as its own decisions in *People v Williams*[2] and *People v Baker*.[3] In a partial dissent, Judge SWARTZLE explained why the offense of keeping or maintaining a drug house, which satisfies the definition of "felony" in the Penal Code, can be treated as the underlying felony for felony-firearm in the Penal Code notwithstanding *Smith*, *Williams*, and *Baker*.

For the reasons discussed in this opinion, we reverse the Court of Appeals. When the government charges a criminal defendant with felony-firearm under the Penal Code, this Court must look to the Penal Code to ascertain the meaning of the word "felony," which is defined as an offense punishable by imprisonment in state prison. Although the Legislature intended the offense of keeping or maintaining a drug house to be a misdemeanor for purposes of the Public Health Code, that offense is punishable by imprisonment in a state prison, and, therefore, it unquestionably satisfies the definition of "felony" in the Penal Code. Thus, under the clear and unambiguous language of the Penal Code, which this Court must apply as written, a person who carries or possesses a firearm when keeping or maintaining a drug house is guilty of felony-firearm.

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[1] *People v Smith*, 423 Mich 427; 378 NW2d 384 (1985).

[2] *People v Williams*, 243 Mich App 333; 620 NW2d 906 (2000).

[3] *People v Baker*, 207 Mich App 224; 523 NW2d 882 (1994).

We reverse the portion of the Court of Appeals' judgment that reached the contrary conclusion, reinstate defendant's felony-firearm conviction, and remand this case to the Court of Appeals to consider defendant's remaining arguments.

I. FACTS AND PROCEEDINGS

Following a jury trial, defendant, Tarone D. Washington, was convicted of keeping or maintaining a drug house in violation of MCL 333.7405(1)(d), felony-firearm in violation of MCL 750.227b, possession of marijuana in violation of MCL 333.7403(2)(d), and receiving and concealing a stolen firearm in violation of MCL 750.535b. Defendant's conviction for keeping and maintaining a drug house served as the predicate felony for his felony-firearm conviction.

On direct appeal, defendant challenged the sufficiency of the evidence to support his convictions.[4] After additional briefing by the parties,[5] the Court of Appeals vacated defendant's felony-firearm conviction but affirmed the remaining convictions.[6]

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[4] Defendant also raised a claim of prosecutorial misconduct, argued that the prosecutor failed to file a timely habitual-offender notice, and objected to various alleged inaccuracies in the presentence investigation report, all of which were rejected by the Court of Appeals.

[5] The Court of Appeals sua sponte ordered the parties to submit supplemental briefs addressing whether a "conviction for keeping or maintaining a drug house, MCL 333.7405(1)(d), a misdemeanor punishable by up to 2 years in prison, when enhanced under the habitual offender statute, MCL 769.10, constitute[s] a predicate felony for purposes of the offense of possession of a firearm during the commission of a felony, MCL 750.227b." *People v Washington*, unpublished order of the Court of Appeals, entered January 12, 2017 (Docket No. 330345).

[6] *People v Washington*, unpublished per curiam opinion of the Court of Appeals, issued July 6, 2017 (Docket No. 330345).

In vacating defendant's felony-firearm conviction, the Court of Appeals majority relied on our decision in *Smith*, which held that offenses labeled as misdemeanors in the Penal Code but punishable by up to two years' imprisonment can be treated as felonies for purposes of the habitual-offender, probation, and consecutive-sentencing statutes in the Code of Criminal Procedure.[7] The majority claimed, however, that *Smith* stands for the proposition that "crimes labelled misdemeanors are misdemeanors for purposes of the Penal Code," regardless of where that offense is found in the law.[8] In further support of its assertion, the majority relied on the Court of Appeals' decisions in *Williams* and *Baker*,[9] both of which held that an offense explicitly labeled as a "misdemeanor" in the Penal Code but punishable by up to two years' imprisonment could not serve as the predicate "felony" for a different offense in the Penal Code.[10]

According to the majority, only by applying the Michigan Code of Criminal Procedure's definition of "felony" can the misdemeanor offense of keeping or maintaining

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[7] *Id*. at 7, citing *Smith*, 423 Mich at 439-440 (opinion by WILLIAMS, C.J.), MCL 769.10, MCL 769.11, MCL 769.12 (habitual offender), MCL 771.2 (probation), and MCL 768.7b (consecutive sentences).

[8] *Washington*, unpub op at 9.

[9] *See id*. at 7-8.

[10] In *Williams*, the Court of Appeals held that the then "misdemeanor" of resisting or obstructing a police officer found in the Penal Code, which was punishable by two years' imprisonment, could not "serve as a felony for purposes of establishing the crime of absconding on a felony bond" in the Penal Code. *Williams*, 243 Mich App at 335. And in *Baker*, the Court of Appeals concluded that the "trial court erred when it instructed the jury that resisting arrest could establish the felony element of the felony-firearm charge" because the "provisions of the Penal Code govern whether resisting arrest is a felony for purposes of the felony-firearm statute" and that "[u]nder the Penal Code, resisting arrest is a misdemeanor because it is specifically designated as such . . . ." *Baker*, 207 Mich App at 225 (citation omitted).

a drug house be treated as a felony for purposes of a felony-firearm conviction.[11] This would be impermissible, said the majority, because that definition "cannot be used to make a two-year misdemeanor offense that is located in a different act, such as the Penal Code or the Public Health Code into a felony[.]"[12] Thus, the majority concluded that defendant's conviction for keeping or maintaining a drug house could not serve as the underlying felony for his felony-firearm conviction because the offense is a misdemeanor, not a felony.[13]

The majority nonetheless indicated that had it been writing on a proverbial "blank slate," it would have concluded that a "two-year misdemeanor qualifies as a felony for purposes of the felony-firearm statute" because the "offense of felony-firearm is found in the Penal Code and, therefore, [it] should apply the definition of 'felony' found in the Penal Code."[14]

Although he concurred in affirming three of defendant's convictions, Judge SWARTZLE disagreed with the majority that vacating the felony-firearm conviction was required by *Smith*, *Williams*, or *Baker*. In his partial dissent, Judge SWARTZLE read our decision in *Smith* as establishing the following general proposition:

> Definitions and labels in a code apply to and throughout that code, but that code alone. When a primary offense and underlying offense are located in the same code, then any conflict is resolved through traditional rules of statutory construction. When the two offenses are located in

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[11] *Washington*, unpub op at 8.

[12] *Id*. at 9.

[13] *Id*. at 10, citing *Williams*, 243 Mich App at 335, and *Baker*, 207 Mich App at 225-226.

[14] *Washington*, unpub op at 9-10.

> different codes, the definitions and labels in the primary offense code trump those in the other code.[15]

Based on this proposition, Judge SWARTZLE concluded that the general definition of "felony" in the Penal Code, where the primary offense of felony-firearm is located, trumps the misdemeanor label for the underlying offense of keeping or maintaining a drug house in the Public Health Code.[16] And because keeping or maintaining a drug house is punishable by up to two years' imprisonment, it meets the definition of "felony" in the Penal Code and can serve as the predicate felony for purposes of a felony-firearm conviction.[17] He further used this proposition to distinguish *Williams* and *Baker* from the present matter because both of those cases dealt with primary and underlying offenses in the Penal Code, whereas this case involves a primary offense in the Penal Code and an underlying offense in the Public Health Code.[18] Therefore, Judge SWARTZLE would have affirmed on all counts.[19]

The prosecutor thereafter sought leave to appeal in this Court. We directed the Clerk to schedule oral argument on whether to grant the application or take other action.[20]

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[15] *Washington* (SWARTZLE, J., concurring in part and dissenting in part), unpub op at 2.

[16] *Id*. at 5.

[17] *Id*. at 6-7.

[18] *Id*. at 5. In further support of his position, Judge SWARTZLE referred to an unpublished opinion of the Court of Appeals that held that a defendant's conviction for felony-firearm based on the predicate conviction of possession of marijuana, second offense, was valid, even though possession of marijuana is expressly designated as a misdemeanor under the Public Health Code. See *id*. at 5-6, citing *People v Thomas*, unpublished per curiam opinion of the Court of Appeals, issued October 23, 2008 (Docket No. 279439), p 2.

[19] *Washington* (SWARTZLE, J., concurring in part and dissenting in part), unpub op at 7.

[20] *People v Washington*, 501 Mich 942 (2017).

II. STANDARD OF REVIEW AND RULES OF STATUTORY INTERPRETATION

Questions of statutory interpretation are reviewed de novo.[21] When interpreting a statute, this Court's primary goal is to " 'ascertain the legislative intent that may reasonably be inferred from the words in [the] statute.' "[22] This Court gives effect to every word, phrase, and clause in a statute—and, in particular, considers the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme—to avoid rendering any part of the statute nugatory or surplusage if at all possible.[23] If the statute's language is clear and unambiguous, then the statute must be enforced as written.[24] A necessary corollary of this principle is that a " 'court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.' "[25]

III. ANALYSIS

The Michigan Penal Code[26] provides that a "person who carries or has in his or her possession a firearm

[21] *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 199; 895 NW2d 490 (2017). Although defendant is correct that the issue presented in this appeal was not preserved, this Court can consider an "unpreserved issue if it is one of law and the facts necessary for resolution of the issue have been presented," as is the case here. *McNeil v Charlevoix Co*, 484 Mich 69, 81 n 8; 772 NW2d 18 (2009).

[22] *Covenant Med Ctr*, 500 Mich at 199, quoting *People v Couzens*, 480 Mich 240, 249; 747 NW2d 849 (2008).

[23] See *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 70-71; 894 NW2d 535 (2017); *State Bd of Ed v Houghton Lake Community Sch*, 430 Mich 658, 671; 425 NW2d 80 (1988).

[24] *Covenant Med Ctr*, 500 Mich at 199.

[25] *Id*., quoting *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

[26] MCL 750.1 *et seq*.

when he or she commits or attempts to commit a felony . . . is guilty of a felony . . . ."[27] This offense is colloquially referred to as felony-firearm. As mandated by the Legislature, this Court must interpret the term "felony" in the Penal Code to mean an offense that is punishable "by imprisonment in state prison" upon the defendant's conviction.[28] Thus, whether an offense satisfies the Penal Code's definition of a "felony" is dependent upon the correctional institution in which a defendant could be imprisoned upon conviction.

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[27] MCL 750.227b(1). While there are exceptions when it comes to certain underlying offenses, see *id*., those offenses are not applicable here.

[28] MCL 750.7 ("The term 'felony' when used in this act, *shall* be construed to mean an offense for which the offender, on conviction may be punished . . . by imprisonment in state prison.") (emphasis added); see also MCL 750.2 ("The rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof. All provisions of this act shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law."). The Penal Code also defines the term "felony" to mean an offense that is punishable "by death" upon the defendant's conviction. MCL 750.7. Because capital punishment has been abolished in the state of Michigan, see generally Wanger, *Historical Reflections on Michigan's Abolition of the Death Penalty*, 13 TM Cooley L Rev 755 (1996), and because the offense of keeping or maintaining a drug house is not punishable by death, see MCL 333.7406, this portion of MCL 750.7 is not applicable. Misdemeanors, on the other hand, are defined in the Penal Code as any nonfelonious offenses, MCL 750.8 ("When any act or omission, *not a felony*, is punishable according to law, by a fine, penalty or forfeiture, and imprisonment, or by such fine, penalty or forfeiture, or imprisonment, in the discretion of the court, such act or omission shall be deemed a misdemeanor.") (emphasis added), as well as criminal offenses for which there is no express punishment provided in the relevant statutes, MCL 750.9 ("When the performance of any act is prohibited by this or any other statute, and no penalty for the violation of such statute is imposed, either in the same section containing such prohibition, or in any other section or statute, the doing of such act shall be deemed a misdemeanor.").

According to Michigan's Code of Criminal Procedure,[29] a defendant may be imprisoned in a "state penal institution," as opposed to a "county jail," if the punishment for the offense is more than one year's imprisonment.[30] In other words, an offense punishable by more than one year's imprisonment would be an offense for which an individual may be imprisoned in a state prison.[31] Accordingly, the Legislature clearly expressed its intent that a person is guilty of felony-firearm under the Penal Code if he or she carries or possesses a firearm when committing or attempting to commit an offense that is punishable by imprisonment for more than one year. With this in mind, we now turn to the primary issue in this appeal: whether keeping or

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[29] MCL 760.1 *et seq*. This Court has previously recognized that although the Penal Code and the Code of Criminal Procedure "were separately enacted and have distinct purposes," the two codes "relate generally to the same thing and must therefore be read *in pari materia* . . . ." *Smith*, 423 Mich at 442 (opinion by WILLIAMS, C.J.).

[30] MCL 769.28 ("Notwithstanding any provision of law to the contrary, if a person convicted of a crime or contempt of court is committed or sentenced to imprisonment for a maximum of 1 year or less, the commitment or sentence shall be to the county jail of the county in which the person was convicted and not to a state penal institution."); see also *People v Weatherford*, 193 Mich App 115, 117; 483 NW2d 924 (1992) ("Michigan courts consistently have interpreted [MCL 769.28] to require that crimes for which the punishment is one year or less be punished by imprisonment in the county jail and not in the state prison system."), and the cases cited in *Weatherford*.

[31] Hence the Code of Criminal Procedure's definition of "felony" as including a violation of Michigan's penal law that is punishable by "imprisonment for more than 1 year . . . ." MCL 761.1(f). Notably, the code also defines "felony" as "an offense expressly designated by law to be a felony." *Id*. Although the code provides a definition for "misdemeanor," see MCL 761.1(n) (" 'Misdemeanor' means a violation of a penal law of this state that is not a felony or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or a fine that is not a civil fine."), that definition does not include the same "expressly designated by law" language.

maintaining a drug house can be treated as the predicate felony for a felony-firearm conviction.

Under Michigan's Public Health Code,[32] a person shall not

> [k]nowingly keep or maintain a store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place that is frequented by persons using controlled substances in violation of this article for the purpose of using controlled substances or that is used for keeping or selling controlled substances in violation of this article.[33]

This offense is "punishable by imprisonment for not more than 2 years" if the defendant is found to have "knowingly or intentionally" violated this provision of the Public Health Code.[34]

Given the Public Health Code's clear and unequivocal language, the offense of keeping or maintaining a drug house is punishable by imprisonment for more than one year, which necessarily means that the offense is punishable by imprisonment in a state prison.[35] And because this offense is punishable by imprisonment in a state prison, it undeniably meets the definition of "felony" in the Penal Code. Accordingly, under the clear and unambiguous language of the Penal Code, a person is guilty of felony-firearm if

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[32] MCL 333.1101 *et seq*.

[33] MCL 333.7405(1)(d). As the Court of Appeals correctly notes, this provision was amended after defendant's conviction, see 2016 PA 49, but those minor changes do not alter the provision's substantive meaning.

[34] MCL 333.7406. Misdemeanors that are punishable by up to two years' imprisonment are colloquially referred to as "two-year," "circuit court," or "high" misdemeanors. See *Smith*, 423 Mich at 438 (opinion by WILLIAMS, C.J.).

[35] The parties do not dispute that the offense of keeping or maintaining a drug house is punishable by imprisonment in a state prison.

he or she carries or possesses a firearm when keeping or maintaining a drug house.

While this outcome would be otherwise unobjectionable, there is a purported conflict between the Penal Code and the Public Health Code. Although it did not provide definitions for either "felony" or "misdemeanor," the Legislature expressly intended the offense of keeping or maintaining a drug house to be considered a "misdemeanor" for purposes of the Public Health Code, notwithstanding the accompanying punishment.[36] Because the offense is explicitly labeled a misdemeanor, both defendant and the Court of Appeals majority surmise that it cannot serve as the predicate felony for a felony-firearm charge brought under the Penal Code. We disagree.

This issue of statutory interpretation is strikingly similar to the one this Court addressed in *Smith*, which involved a purported conflict between provisions in the Penal Code that expressly labeled certain offenses punishable by up to two years' imprisonment as misdemeanors and the provision in the Code of Criminal Procedure that defines offenses punishable by more than one year as felonies. More specifically, we had to decide whether two-year misdemeanors in the Penal Code could be treated as felonies for the purpose of applying the habitual-offender, probation, and consecutive-sentencing provisions of the Code of Crimi-

[36] MCL 333.7406 ("A person who violates section 7405 may be punished by a civil fine of not more than $25,000.00 in a proceeding in the circuit court. However, if the violation is prosecuted by a criminal indictment alleging that the violation was committed knowingly or intentionally, and the trier of the fact specifically finds that the violation was committed knowingly or intentionally, the person is guilty of a *misdemeanor*, punishable by imprisonment for not more than 2 years, or a fine of not more than $25,000.00, or both.") (emphasis added).

nal Procedure, all of which required the commission of an underlying felony to be operable.

In concluding that they could be treated as felonies, we made it abundantly clear that definitions and labels in one code apply only to that particular code; they are not to be transferred and applied to other codes.[37] In other words, the fact that an offense is expressly labeled a misdemeanor in one code does not necessarily mean the same offense is a misdemeanor for purposes of interpreting and applying a different code. Rather, whether a misdemeanor offense in one code is a misdemeanor or a felony in another code may depend on the latter code's definitions. Although two-year misdemeanors in the Penal Code might be considered misdemeanors for purposes of the Penal Code, when it comes to interpreting and applying provisions in the Code of Criminal Procedure, we held that those same two-year misdemeanors must be considered felonies because they are punishable by more than one year's imprisonment under the latter code's definition of "felony," regardless of those offenses' "misdemeanor" labels.[38]

The logic and rationale of *Smith* apply equally to the present situation. Here, we are called upon to interpret

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[37] See, e.g., *Smith*, 423 Mich at 443 (opinion by WILLIAMS, C.J.) ("The Legislature clearly expressed its intent that offenses punishable by more than one year of imprisonment be treated as 'felonies' throughout the Code of Criminal Procedure."); *id*. at 444 ("It is obvious that the Penal Code definitions apply only to the Penal Code. Similarly, the definitions of the Code of Criminal Procedure are limited in application to that code. To apply the definition of misdemeanor in one statute to the operations of the other statute would defeat the purposes of the other statute."); *id*. at 445 ("The label placed upon an offense in the Penal Code is just as irrelevant in determining statutorily mandated post-conviction procedures in the Code of Criminal Procedure as it is in determining constitutionally mandated post-conviction procedures."); *id*. at 446 n 2 ("[T]he definitions in each code have full meaning for all the purposes of *that* code, but are not simply transferable to the other code.").

[38] *Id*. at 445.

and apply the clear and unambiguous language of the Penal Code, which defines a "felony" as an offense punishable by imprisonment in a state prison. There is no dispute that the offense of keeping or maintaining a drug house is punishable by imprisonment in a state prison. Thus, a person is guilty of felony-firearm in the Penal Code if he or she carries or possesses a firearm when keeping or maintaining a drug house, regardless of the label the Legislature gave this offense in the Public Health Code. This outcome is entirely consistent with our reasoning in *Smith*.

Were we to apply the Public Health Code's misdemeanor label to the application of the Penal Code and treat this offense as a misdemeanor, we would be ignoring the Legislature's clear directive to interpret the term "felony" for purposes of applying the Penal Code as an offense punishable "by imprisonment in state prison" upon the defendant's conviction.[39] This we cannot do.[40]

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[39] MCL 750.7. Conversely, treating two-year misdemeanors in the Public Health Code as felonies for purposes of the Penal Code would not render the misdemeanor label irrelevant for purposes of interpreting and applying the Public Health Code. As the prosecutor aptly notes, a defendant would not be subjected to consecutive sentencing if he or she is found guilty of both keeping or maintaining a drug house and manufacturing or delivering a controlled substance under the Public Health Code. See MCL 333.7401(3) ("A term of imprisonment imposed under [MCL 333.7401(2)(a)] may be imposed to run consecutively with any term of imprisonment imposed for the commission of another *felony*.") (emphasis added). Nor could a defendant be convicted of recruiting, inducing, soliciting, or coercing a minor to keep or maintain a drug house under the Public Health Code. See MCL 333.7416(1) ("A person 17 years of age or over who recruits, induces, solicits, or coerces a minor less than 17 years of age to commit or attempt to commit any act that would be a *felony* under this part if committed by an adult is guilty of a felony . . . .") (emphasis added).

[40] *Covenant Med Ctr*, 500 Mich at 199; see also *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992) ("When a statute is clear

Nevertheless, the Court of Appeals majority concluded that keeping or maintaining a drug house cannot serve as the predicate felony for a felony-firearm conviction by grasping upon part of a sentence in the introductory section of *Smith*, which stated that the "Legislature intended two-year misdemeanors to be considered as misdemeanors for purposes of the Penal Code . . . ."[41] Admittedly, this assertion, standing in isolation, would seem to suggest that any two-year misdemeanor, regardless of the code in which it is located, must be considered a misdemeanor for purposes of the Penal Code. There are, however, two reasons why this sentence does not alter the outcome we reach today.

First and foremost, we were tasked in *Smith* with deciding whether two-year misdemeanors in the Penal Code could be considered felonies for purposes of the Code of Criminal Procedure.[42] Accordingly, we did not need to opine on whether two-year misdemeanors should be considered misdemeanors for purposes of the Penal Code, and any assertion of legislative intent to that effect in *Smith* was an extraneous statement of

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and unambiguous, judicial construction or interpretation is unnecessary and therefore, precluded."); *Addison Twp v Barnhart*, 495 Mich 90, 98; 845 NW2d 88 (2014) (" '[W]hen a statute specifically defines a given term, that definition alone controls.' ") (citation omitted); *W S Butterfield Theatres, Inc v Dep't of Revenue*, 353 Mich 345, 350; 91 NW2d 269 (1958) ("We need not, indeed we must not, search afield for meanings where the act supplies its own."); accord *Smith*, 423 Mich at 446 n 2 (opinion by WILLIAMS, C.J.) (noting that the defendants' reading of the Penal Code "might render meaningless the Code of Criminal Procedure's clear definition of 'felony' "). We are unable to deduce from the plain language of the Penal Code that, regardless of which code contains the offense, the Legislature manifested its intent that the Penal Code treat all offenses labeled as misdemeanors but punishable by up to two years' imprisonment as misdemeanors.

[41] *Smith*, 423 Mich at 434 (opinion by WILLIAMS, C.J.).

[42] See *id*.

opinion that was not necessary or essential to the disposition of that case. In other words, it was obiter dictum.[43] And because obiter dictum is nonbinding and " 'lack[s] the force of an adjudication,' "[44] this part of the sentence in the introduction of *Smith* exerts no influence on our decision today.

Second, even if this sentence was not dictum, the majority's reading of *Smith* fails to fully appreciate the context in which that introductory statement was made. To begin, the full sentence reads:

> The plain language of *the statutes involved*, considered in light of the purposes sought to be accomplished, leads us to conclude that the Legislature intended two-year misdemeanors to be considered as misdemeanors for purposes of the Penal Code, but as felonies for purposes of the Code of Criminal Procedure's habitual-offender, probation, and consecutive sentencing statutes.[45]

The "statutes" we were referring to at the beginning of this sentence were statutes in the Penal Code and the Code of Criminal Procedure.[46] Because the two-year misdemeanors at issue in *Smith* were those in the Penal Code, the proper inference to be drawn from this

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[43] *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011); see also *McNally v Bd of Canvassers of Wayne Co*, 316 Mich 551, 558; 25 NW2d 613 (1947) (" 'It is a well-settled rule that any statements and comments in an opinion concerning some rule of law or debated legal proposition not necessarily involved nor essential to determination of the case in hand are, however illuminating, but obiter dicta and lack the force of an adjudication.' "), quoting *People v Case*, 220 Mich 379, 382-383; 190 NW 289 (1922).

[44] *Peltola*, 489 Mich at 190 n 32, quoting *Wold Architects & Engineers v Strat*, 474 Mich 223, 232 n 3; 713 NW2d 750 (2006).

[45] *Smith*, 423 Mich at 434 (opinion by WILLIAMS, C.J.) (emphasis added).

[46] See, e.g., *id*. at 437-440 (Part II(A) of the decision is entitled "*The Statutes*" and discusses relevant portions of the Penal Code and the Code of Criminal Procedure).

sentence is that the Legislature intended two-year misdemeanors *in the Penal Code* to be considered as misdemeanors *for purposes of the Penal Code*.[47]

This interpretation is further supported by the first sentence of the *Smith* decision:

> The primary issue in this case is whether *offenses defined in the Penal Code as misdemeanors punishable by up to two years in prison* may be considered "felonies" for the purposes of the habitual-offender, probation, and consecutive sentencing provisions of the Code of Criminal Procedure, where the code defines "felony" as an offense punishable by more than one year in the state prison.[48]

Again, the focus of the inquiry in *Smith* was on two-year misdemeanors specifically located in the Penal Code, not two-year misdemeanors in general.[49] And subsequent analysis similarly focused on those Penal Code offenses.[50] With nothing to suggest that we were

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[47] For this reason, the present matter is easily distinguishable from both *Williams* and *Baker*, as they both addressed whether a two-year misdemeanor *in the Penal Code* could serve as a predicate felony for another offense *in the Penal Code*. Because this case involves a two-year misdemeanor in the Public Health Code, not the Penal Code, neither *Williams* nor *Baker* would contradict the outcome we reach today. For the same reason, our decision in *People v Wyrick*, 474 Mich 947 (2005), is distinguishable, as it involved a sentence-enhancement statute and an underlying offense that were both located in the Public Health Code.

[48] *Smith*, 423 Mich at 433 (opinion by WILLIAMS, C.J.) (emphasis added).

[49] This reading would be consistent with Justice RILEY's concurrence in *Smith*, wherein she sought to address any perceived inconsistency between *Smith* and her opinion in *People v Bernard Smith*, 81 Mich App 561; 266 NW2d 40 (1978), rev'd on other grounds 406 Mich 926 (1979). According to Justice RILEY, "*Bernard Smith* dealt with a conflict between two provisions of one act—the Penal Code—unlike the cases decided today which involve provisions in the Penal Code and the Code of Criminal Procedure." *Smith*, 423 Mich at 465 (RILEY, J., concurring).

[50] See *id*. at 441-447 (opinion by WILLIAMS, C.J.); see also *id*. at 437 ("Defendants allege that provisions of the *Penal Code* which label

ever considering the issue of whether a non-Penal Code two-year misdemeanor should be considered a misdemeanor for purposes of the Penal Code, the majority of the Court of Appeals erred by concluding that, pursuant to *Smith*, the offense of keeping or maintaining a drug house in the Public Health Code must be treated as a misdemeanor for purposes of the Penal Code.[51]

IV. CONCLUSION

Whether a person is guilty of felony-firearm under the Penal Code depends on whether that person committed or attempted to commit a "felony" when he or she was carrying or possessing a firearm. The Legislature clearly intended that an offense punishable by imprisonment in a state prison is a "felony" for purposes of the Penal Code. Because the offense of keeping or maintaining a drug house in the Public Health Code

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particular offenses which are punishable by up to two years in state prison as 'misdemeanors' conflict with provisions of the Code of Criminal Procedure which define offenses punishable by more than one year in the state prison as 'felonies' and that the *Penal Code* label should control.") (emphasis added); *id*. at 438 ("The defendants in the cases at bar have all been convicted of offenses which are labeled 'misdemeanors' and which are punishable by a maximum of two years imprisonment under the *Penal Code*.") (emphasis added).

[51] Although the Court of Appeals majority would like us to "definitively resolve the status of two-year misdemeanors for purposes of the felony-firearm statute," *Washington*, unpub op at 10, and the prosecutor would like us to overrule *Williams* and *Baker*, the issue before us does not require such a broad-sweeping ruling. See *Washington*, 501 Mich 942 (ordering the parties to file supplemental briefs addressing the specific issue of "whether the crime of maintaining a drug house, MCL 333.7405(1)(d), MCL 333.7506, a misdemeanor punishable by up to two years in prison, may serve as the predicate felony for a conviction of possessing a firearm during the commission of a felony, MCL 750.227b"). Counseled by judicial restraint, we leave certain questions, such as whether a two-year misdemeanor in the Penal Code could serve as a predicate felony for a felony-firearm conviction and whether *Williams* and *Baker* were correctly decided, for another day.

is punishable by imprisonment in a state prison, it must be treated as a felony for purposes of the Penal Code, and, therefore, it may serve as the predicate felony for a felony-firearm conviction. We reverse the portion of the Court of Appeals' judgment that concluded otherwise and reinstate defendant's felony-firearm conviction. This case is remanded to the Court of Appeals to address any of defendant's outstanding arguments.[52] We do not retain jurisdiction.

MARKMAN, C.J., and MCCORMACK, VIVIANO, BERNSTEIN, WILDER, and CLEMENT, JJ., concurred with ZAHRA, J.

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[52] Although defendant did not file a cross-application for leave to appeal, there may be issues pertaining to his felony-firearm conviction that are still unresolved. For instance, on January 30, 2017, defendant filed a motion in the Court of Appeals seeking to add as an additional ground for appeal that his judgment of sentence must be corrected because his felony-firearm sentence is listed as running consecutively to his other three convictions but only the charge of keeping and maintaining a drug house was listed as the predicate felony. Although the Court of Appeals granted the motion, see *People v Washington*, unpublished order of the Court of Appeals, entered January 31, 2017 (Docket No. 330345), it did not address the merits of defendant's argument, presumably because it vacated defendant's felony-firearm conviction.

ORDERS IN CASES

ORDERS ENTERED IN CASES BEFORE THE SUPREME COURT

Leave to Appeal Denied July 31, 2017:

AB PETRO MART, INC v ALI T BEYDOUN INSURANCE AGENCY, INC, No. 154644; reported below: 317 Mich App 290.

Leave to Appeal Denied August 4, 2017:

In re JONES, No. 156107; Court of Appeals No. 335232.

In re BALLI, No. 156108; Court of Appeals No. 336103.

In re CALDWELL, No. 156148; Court of Appeals No. 335173.

Summary Disposition August 15, 2017:

PEOPLE v VIRGIL SMITH, No. 156182; Court of Appeals No. 332288. On order of the Court, the motion for immediate consideration is granted. The application for leave to appeal the April 18, 2017 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on reconsideration granted. We direct the Court of Appeals to issue an opinion on remand no later than 5:00 p.m. on Friday, August 25, 2017. Any appeal from that decision must be filed in this Court by 5:00 p.m. on Monday, August 28, 2017.

Leave to Appeal Denied August 18, 2017:

In re GUY, No. 156183; Court of Appeals No. 336421.

In re GIBSON, No. 156202; Court of Appeals No. 334443.

Summary Disposition September 8, 2017:

PEOPLE v COLLINS, No. 153952; Court of Appeals No. 327971. Pursuant to MCR 7.305(H)(1) and in light of the prosecutor's concession that the defendant in this case should receive relief under *People v Lockidge*, 498 Mich 358 (2015), we vacate our order dated January 24, 2017 and, in lieu of granting leave to appeal, we remand this case to the Kent Circuit Court for consideration of the defendant's issue regarding the assessment of court costs and to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *Lockridge*. On remand, the trial court shall

follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

Leave to Appeal Denied September 8, 2017:

PEOPLE v ROGER MARTIN, No. 155189; Court of Appeals No. 334416.

In re CROSS, No. 156248; Court of Appeals No. 337703.

In re THOMAS, No. 156258; Court of Appeals No. 339096.

In re DOWNING, No. 156264; Court of Appeals No. 334925.

In re SAYLOR, No. 156298; Court of Appeals No. 336157.

In re DORSEY, Nos. 156302 and 156303; Court of Appeals Nos. 336163 and 336228.

In re SPENCER, No. 156314; Court of Appeals No. 339685.

Application for Leave to Appeal Dismissed on Stipulation September 8, 2017:

WELLS FARGO BANK, NA v SBC IV REO, LLC, No. 155089; reported below: 318 Mich App 72.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered September 11, 2017:

PEOPLE v VIRGIL SMITH, No. 156353; reported below: 321 Mich App 80. On order of the Court, the motion for immediate consideration is denied. No party is requesting an order to remove the defendant from the ballot, nor could we enter such an order since the relevant election official is not a party to this case. Therefore, we are not persuaded that this case requires expedited consideration. The application for leave to appeal the August 22, 2017 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.305(H)(1). The parties shall file supplemental briefs within 42 days of the date of this order addressing, among other issues: (1) whether a prosecutor's inclusion of a provision in a plea agreement that prohibits a defendant from holding public office violates the separation of powers, see Const 1963, art 3, § 2; see also *United States v Richmond*, 550 F Supp 605 (ED NY, 1982), or is void as against public policy, *Davies v Grossmont Union High Sch Dist*, 930 F2d 1390, 1392-1393 (CA 9, 1991); (2) whether the validity of the provision

requiring the defendant to resign from public office was properly before the Court of Appeals since the defendant resigned from the Michigan Senate after the Wayne Circuit Court had struck that part of the plea agreement and, if so, whether it violates the separation of powers or is void as against public policy; and (3) whether the trial court abused its discretion by voiding terms of the plea agreement without affording the prosecutor an opportunity to withdraw from the agreement, see *People v Siebert*, 450 Mich 500, 504 (1995). The parties should not submit mere restatements of their application papers.

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.

MCCORMACK, VIVIANO, BERNSTEIN, and LARSEN, JJ. (*concurring*). We write to explain why, in our view, the prosecutor's motion for immediate consideration is properly denied.

MCR 7.311(E), which governs motions for immediate consideration or to expedite proceedings, requires that "[t]he motion or an accompanying affidavit . . . explain why immediate consideration of the motion or expedited scheduling of the proceeding is necessary."

In her first motion for immediate consideration, filed on August 10, 2017, the prosecutor asserted as follows:

> A decision from this Court is necessary by August 22, 2017, so that defendant may make an informed decision whether he will continue to run for office and, if he chooses to run, the voters casting ballots will be aware whether defendant will be violating the plea agreement if elected and that a special election would be necessary in the event defendant resigns or is removed from office.

She repeats this basic argument in her second motion for immediate consideration, which is presently before the Court.[1] Although we were initially taken by this argument, upon closer examination and for the reasons that follow, it is entirely without merit.[2]

The obvious implication of the prosecutor's initial assertion that a decision was "necessary by August 22, 2017," was that a final decision on the issues raised in the prosecutor's application was needed from this Court before the deadline for the printing of the ballots.[3] We accepted

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[1] The second motion, filed on August 24, 2017, states that "[a]lthough the candidates for the November election had to be certified and information sent to the printer for preparation of the ballots by August 22, 2017, an expedited decision . . . is still necessary [for the same reasons set forth in the prior motion]."

[2] And, for the same reasons, our previous order requiring expedited consideration of this case by the Court of Appeals was erroneous.

[3] In a footnote, the prosecutor asserted that the information regarding the timeline for printing of the ballots was obtained "from the City of

this representation at face value, and we ordered expedited consideration as on reconsideration granted by the Court of Appeals. *People v Smith*, 501 Mich 851 (2017). But we got that wrong: expedited action was not warranted because no decision from the Court of Appeals, or from this Court today, could affect whether defendant's name appears on the general-election ballot. No party requests that defendant's name be removed from the ballot, nor could we grant such relief since the relevant election official is not a party to this action (nor could she be).

We are also unpersuaded that an expedited ruling from this Court is necessary to give defendant an opportunity to "make an informed decision whether he will continue to run for office . . . ." Indeed, it is not entirely clear to us what the prosecution's representation means. However, to the extent the prosecutor is suggesting that an expedited ruling is necessary so that defendant can take some action to have his name removed from the ballot, it is not clear to us how, short of expiring (see MCL 168.326), defendant could accomplish this. Section 3-106 of the Detroit City Charter provides that, except as otherwise provided by the charter or a city ordinance, "state law applies to . . . the filing for office by candidates . . . ." Under MCL 168.322a, the state law governing election to city offices, a candidate for a city office is only permitted to withdraw if he or she files the appropriate notice within 3 days after the filing deadline (here that deadline was April 25, 2017). Thus, it appears the deadline for defendant to withdraw from the race has long since passed. And notably, while the prosecutor's concern that defendant be left with a full range of options is admirable, defendant himself has not expressed a similar concern or made any request for expedited review.

Next, the prosecutor's concern for the quality of information available to the general-election voters, a concern our colleagues in partial dissent apparently share, rings hollow. As an initial matter, it is not clear to us why, if the prosecutor believes this information is essential to the voters, she did not seek an expedited ruling in advance of the primary election so those voters, too, would have the benefit of it. The only difference now is not the voters' need for information, but that defendant came in second in the primary election and will therefore be on the general-election ballot. Moreover, the prosecutor represented to this Court that the voters need to be aware that "a special election would be necessary in the event defendant resigns or is removed from office." But that, like the ballot-access issue, seems to be a red herring since it appears that no special election would occur if defendant were to win the election, and were then to resign or be removed from his seat. Instead, under Section 3-105 of the Detroit City Charter, a replacement would be appointed by a vote of the Detroit City Council, and the election to fill

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Detroit Clerk's Office Department of Elections." No affidavit or other authority, however, was offered to support this assertion, or her request for expedited consideration as a whole.

the vacant position would occur at the next general election that is more than 180 days after the vacancy occurs.[4]

That leaves only the prosecutor's assertion that an expedited ruling from this Court is necessary so that "the voters casting ballots will be aware whether defendant will be violating the plea agreement if elected . . . ." However, we are not aware of any precedent for the notion that a court should expedite a ruling for such a purpose.[5] We are hesitant to conclude that courts and prosecutors should concern themselves with the quality or quantity of information available to voters, outside of enforcing the election laws and any attendant constitutional concerns. But even if such were our proper concern, it is not clear to us what information an expedited decision in this case would provide, beyond that which is already available to the voters, i.e., that this case might affect defendant's ability to complete his term. Even if we were to grant immediate consideration, peremptorily reverse the Court of Appeals, and hold that the plea agreement does not violate the Constitution or public policy, it is far from clear that the trial judge would be under any obligation to accept the plea agreement. Judges have wide discretion to reject any sentencing agreement, including this one. See *People v Siebert*, 450 Mich 500, 509 (1995) (opinion by BOYLE, J.) ("In the context of plea and sentence agreements, the court's interest in imposing a just sentence is protected by its right to reject any agreement, except that which invades the prosecutor's charging authority."). We would also need to consider whether to direct the trial court on remand to consider the dissenting Court of Appeals judge's assertion that the trial court failed to comply with MCR 6.302 because it "conducted no meaningful voir dire of defendant regarding the negotiation of the plea agreement or his voluntariness in entering the plea, or his now-purported unwillingness to do so." *People v Smith*, 321 Mich App 80, 103 (2017) (RIORDAN, J., dissenting). If the dissenting judge is correct, the trial court would have another reason to reject the plea.

Of course, if the plea agreement were not accepted by the trial court, defendant would be presumed innocent and would be entitled to a trial

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[4] Section 3-105 of the Detroit City Charter provides, in relevant part, as follows: If a vacancy occurs on City Council it shall be filled by appointment, based on a two-thirds (2/3) vote of members. The person appointed shall serve until an elected member takes office. The election to fill the vacant position shall occur at the next general election to be held not sooner than one hundred eighty (180) days after occurrence of the vacancy.

[5] The partial dissent likewise cites no authority for its rather confusing charge that by taking time to carefully consider the important constitutional issues of first impression presented in the prosecutor's application for leave, we have "substantially transformed the decision-making environment for each of the parties, as well as for Detroit voters."

by jury on all of the charges. See *People v Ferguson*, 383 Mich 645, 651 (1970) (opinion by T. E. BRENNAN, C.J.). And, if he were convicted at trial, he would then be entitled to appeal that conviction. Therefore, we are perplexed by the partial dissent's assertion that an immediate decision by this Court on the validity of the plea agreement would somehow leave the voters of Detroit "fully apprised" as to the eventual outcome of defendant's case (which necessarily will involve future decisions by the trial court, prosecutor, and defendant, and the resolution of any further appeals), or that a ruling by our Court after due deliberation, in the ordinary course, will leave the voters "entirely in the absence of such knowledge."[6]

For all of these reasons, we believe expedited consideration is not warranted in this case.

MARKMAN, C.J. (*concurring in part and dissenting in part*). I concur with the Court's order directing the Clerk to schedule oral argument on whether to grant the application or to take other action. However, I respectfully dissent from the denial of the motion for immediate consideration and the 42-day timetable for the filing of supplemental briefs imposed by the Court's order, which preclude this Court from resolving this matter prior to votes being cast in the November election. I view this as a highly time-sensitive matter. This Court previously directed the Court of Appeals to expedite its resolution of this case within 10 days, and that Court met the severe time constraint imposed upon it. However, we now decline to impose a similar obligation of expedition upon ourselves. By failing to hold this Court to the same standard imposed on the Court of Appeals, the Court has substantially transformed the decision-making environment for each of the parties, as well as for Detroit voters. Had the prosecutor prevailed before this Court *today*, a straightforward communication of her intentions with regard to enforcement of the present plea bargain with the defendant might well have been sufficient in resolving the present dispute. If, however, she prevails in accordance with the Court's timetable, the prosecutor may be confronted with a situation in which she will have to assess whether to pursue renewed criminal charges and possibly proceed to trial against a potentially newly elected member of the City Council. Furthermore, if elected, every day that defendant serves on the Council will be one more day that the prosecutor has lost some benefit of her plea bargain. Concerning defendant, had this case been resolved before this Court *today*, he would no longer be undertaking a potentially career-defining risk in deciding whether to present himself for public office and face possible criminal prosecution and an increased term of incarceration, or to comply with the apparent terms of his plea bargain by ceasing his campaign for office. And concerning the people of Detroit, who are more

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[6] The partial dissent also makes the rather serious allegation that we are "depriving the people of their right to directly choose their own Council member." It will suffice here to point out that the voters of Detroit made the democratic choice to fill vacancies by appointment followed by election, when they approved their current charter in 2011.

than bystanders to this dispute, had the case been resolved by this Court *today*, they would have been fully apprised as to whether one of the candidates on their ballot might be unable to serve in office and would have to be replaced after election (by an appointment of the Council) as the result of either a plea bargain or a successful criminal prosecution, thereby depriving the people of their right to directly choose their own Council member. Under the Court's timetable, however, Detroit voters will be required to cast their ballots entirely in the absence of such knowledge. Each of these individual predicaments implicate legitimately *public* concerns—the impact of a plea agreement; the circumstances under which a citizen may run for public office; the extent to which the public is entitled to know the fundamental penal circumstances of those who would represent them. Because, in my judgment, there are substantial consequences pertaining to matters of public interest that arise from the Court's decision not to treat this case with greater expedition, I respectfully dissent from the denial of the motion for immediate consideration and would instead grant that motion and enter an order providing for a far more prompt resolution.

ZAHRA and WILDER, JJ., joined the statement of MARKMAN, C.J.

Summary Disposition September 12, 2017:

THE DETROIT MEDICAL CENTER v MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION, No. 154363; Court of Appeals No. 326793. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to that court for reconsideration in light of *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191 (2017).

WILDER, J., did not participate because he was on the Court of Appeals panel.

VHS HURON VALLEY SINAI HOSPITAL v SENTINEL INSURANCE COMPANY, No. 154978; Court of Appeals No. 328005. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to that court for reconsideration in light of *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191 (2017).

PEOPLE v WATSON, No. 155207; Court of Appeals No. 335463. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The court shall address the defendant's argument that the trial court's alleged failure to advise him of the maximum possible prison sentence for the offense of assault with intent to commit murder rendered his plea involuntary and entitled him to the remedy provided by MCR 6.310(C). See *People v Brown*, 492 Mich 684 (2012). The motion to add an issue is denied, without prejudice to defendant's assertion of the motion on remand.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v COOK, No. 155570; Court of Appeals No. 336467. Pursuant

to MCR 7.305(H)(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 following issues: (1) whether the defendant's plea was conditional and reserved her right to appeal, (2) whether the defendant waived appeal of the trial court's decision denying her an evidentiary hearing under Section 8 of the Michigan Medical Marihuana Act, MCL 333.26421 *et seq.*, if her guilty plea was not conditional, and (3) if the defendant has preserved her right to appeal, whether the trial court erred in denying defendant a Section 8 evidentiary hearing.

Reconsideration Granted September 12, 2017:

ALTMAN v PAROLE BOARD, No. 155203; Court of Appeals No. 334371. Summary disposition entered at 500 Mich 1019. We vacate our order dated June 27, 2017. On reconsideration, the application for leave to appeal the December 21, 2016 order of the Court of Appeals is considered, and it is denied.

Order Granting a Joint Motion to Remand Entered September 12, 2017:

PEOPLE v RYAN LEWIS, No. 155224; Court of Appeals No. 328044. On order of the Court, the joint motion to remand is granted. Pursuant to MCR 7.316(A), we remand this case to the Wayne Circuit Court for consideration of the new evidence described in the joint motion and in the August 7, 2017 supplement, and of any related motions filed by either party. We direct the circuit court to commence a hearing within 56 days of the date of this order. We further order the circuit court to submit a transcript of the hearing, along with any findings of fact and its conclusions of law, to the Clerk of this Court within 28 days of the conclusion of the hearing. Within 21 days after the transcript is filed, the parties shall file supplemental briefs with the Clerk of this Court. The application for leave to appeal the December 6, 2016 judgment of the Court of Appeals remains pending.

Leave to Appeal Denied September 12, 2017:

REDMOND v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 150787; Court of Appeals No. 313413.

PEOPLE v CARSON, No. 152510; Court of Appeals No. 328413.

PEOPLE v SCOTTON, Nos. 153039 and 153040; Court of Appeals Nos. 321370 and 325372.

PEOPLE v SAMPSON, No. 153957; Court of Appeals No. 331229.

PEOPLE v TRZOS, No. 154066; Court of Appeals No. 332704.

PEOPLE v CHASE, No. 154238; Court of Appeals No. 331665.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v MONIZ, No. 154243; Court of Appeals No. 331418.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v STEPHEN YOUNG, No. 154539; Court of Appeals No. 332577.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v KELLY, No. 154558; Court of Appeals No. 334209.

PEOPLE v SALVADORE HERNANDEZ, No. 154579; Court of Appeals No. 333895.

SARKOZY v HANOVER INSURANCE COMPANY, No. 154790; Court of Appeals No. 326454.

PEOPLE v COUNTRYMAN, No. 154835; Court of Appeals No. 333161.

PEOPLE v RONNIE CRAWFORD, No. 154842; Court of Appeals No. 334280.

RIVERVIEW MACOMB HOME AND ATTENDANT CARE, LLC v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 154854; Court of Appeals No. 327030.

PEOPLE v IVORY, No. 154865; Court of Appeals No. 333784.

In re PETITION OF TUSCOLA COUNTY TREASURER FOR FORECLOSURE, No. 154869; reported below: 317 Mich App 688.

PEOPLE v SEALS, No. 154881; Court of Appeals No. 334497.

PEOPLE v SIMINISKI, No. 154908; Court of Appeals No. 335096.

PEOPLE v GRIGORYAN, No. 154928; Court of Appeals No. 327067.

PEOPLE v ALVIN DAVIS, No. 154958; Court of Appeals No. 334445.

PEOPLE v GOINS, No. 154965; Court of Appeals No. 334426.

PEOPLE v GREENE, No. 154974; Court of Appeals No. 334720.

RABER v AVONDALE SCHOOL DISTRICT, No. 154981; Court of Appeals No. 328289.

PEOPLE v JOHN LAY, No. 154985; Court of Appeals No. 334110.

PEOPLE v FRENCH, No. 154989; Court of Appeals No. 335141.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v GREGORY HOFFMAN, No. 154991; Court of Appeals No. 333608.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v LACKEY, No. 154992; Court of Appeals No. 334701.

PEOPLE v BURRIS, No. 154993; Court of Appeals No. 334526.

PEOPLE v JOHN HALL, No. 154998; Court of Appeals No. 334054.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v WOODLAND, No. 155001; Court of Appeals No. 334929.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v NATHANIEL DALE, No. 155014; Court of Appeals No. 333612.

PEOPLE v BEVERLY, No. 155017; Court of Appeals No. 326199.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v JOHNS, No. 155040; Court of Appeals No. 334834.

PEOPLE v JOEI JORDAN, No. 155082; Court of Appeals No. 326735.

PEOPLE v WILLIAM JORDAN, Nos. 155106 and 155107; Court of Appeals Nos. 328738 and 329111.

PEOPLE v TRUSS, No. 155127; Court of Appeals No. 334176.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v GLENN, No. 155153; Court of Appeals No. 327926.

PEOPLE v TERI JOHNSON, No. 155168; Court of Appeals No. 327736.

WILDER, J., did not participate because he was on the Court of Appeals panel.

DURHAM v AUTO CLUB GROUP INSURANCE COMPANY, No. 155185; Court of Appeals No. 329667.

WARDEN-PITTMAN v PANCOTTO, No. 155206; Court of Appeals No. 327005.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

WILDER, J., did not participate because he was on the Court of Appeals panel.

POSA v LAUB, Nos. 155242 and 155243; Court of Appeals Nos. 333545 and 334759.

PEOPLE v BRANTLEY, No. 155254; Court of Appeals No. 327811.

PEOPLE v GILLIS, No. 155255; Court of Appeals No. 335562.

KEYS OF LIFE v AUTO-OWNERS INSURANCE COMPANY, No. 155262; Court of Appeals No. 328227.

WILDER, J., did not participate because he was on the Court of Appeals panel.

CHICHESTER v CHICHESTER, No. 155267; Court of Appeals No. 334672.

PEOPLE v HODGES, No. 155307; Court of Appeals No. 328735.

PEOPLE v TERPENING, No. 155309; Court of Appeals No. 335891.

PEOPLE v SHIGWADJA, No. 155353; Court of Appeals No. 329471.

PEOPLE v THORNTON, No. 155357; Court of Appeals No. 327669.

JPMORGAN CHASE BANK v ZAIR, No. 155360; Court of Appeals No. 329761.

PEOPLE v WAYNE, No. 155369; Court of Appeals No. 329678.

PEOPLE v BERNARD, No. 155388; Court of Appeals No. 335530.

PEOPLE v KONKEL, No. 155390; Court of Appeals No. 336166.

PEOPLE v CEDRICK TAYLOR, No. 155400; Court of Appeals No. 329789.

PEOPLE v DITRAPANI, No. 155401; Court of Appeals No. 329676.

WILDER, J., did not participate because he was on the Court of Appeals panel.

DAVENPORT v BOARD OF EDUCATION OF THE LANSING SCHOOL DISTRICT, No. 155404; Court of Appeals No. 334362.

PEOPLE v DALLAS, No. 155409; Court of Appeals No. 335975.

PEOPLE v TEVIN SUTTON, No. 155412; Court of Appeals No. 328692.

LONG v FIEGER, No. 155417; Court of Appeals No. 334455.

LONG v FIEGER, No. 155419; Court of Appeals No. 335343.

PEOPLE v CABREJO, No. 155422; Court of Appeals No. 334559.

WOODLAND ESTATES, LLC v CITY OF STERLING HEIGHTS, No. 155426; Court of Appeals No. 328617.

CITY OF DETROIT v CITY OF HIGHLAND PARK, No. 155427; Court of Appeals No. 327448.

PEOPLE v JUSTIN BELL, No. 155434; Court of Appeals No. 328710.

PEOPLE v JUSTIN BELL, Nos. 155436 and 155437; Court of Appeals Nos. 328711 and 329070.

PEOPLE v CHRISTOPHER LEE TAYLOR, No. 155441; Court of Appeals No. 336019.

PEOPLE v DEBORD, No. 155442; Court of Appeals No. 330470.

KING v OAKLAND COUNTY PROSECUTOR, No. 155448; Court of Appeals No. 328403.

PEOPLE v LAYTON, No. 155452; Court of Appeals No. 336197.

PEOPLE v LAWRENCE THOMAS, No. 155456; Court of Appeals No. 328534.

PEOPLE v SARDY, No. 155458; reported below: 318 Mich App 558.

PEOPLE v DUKE, No. 155463; Court of Appeals No. 330074.

PEOPLE v HENRY SMITH, No. 155467; Court of Appeals No. 328247.

PEOPLE v JOMAR ROBINSON, No. 155471; Court of Appeals No. 329209.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v WONSEY, No. 155474; Court of Appeals No. 333090.

PEOPLE v OLVERA, No. 155480; Court of Appeals No. 330218.

PEOPLE v HOSECLAW, No. 155481; Court of Appeals No. 328354.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v BILAL, No. 155485; Court of Appeals No. 330021.

In re COLLEGE PHARMACY, No. 155488; Court of Appeals No. 328828.

PEOPLE OF THE CHARTER TOWNSHIP OF CANTON v BRIDGES, No. 155490; Court of Appeals No. 335115.

PEOPLE v YOUNGS, No. 155494; Court of Appeals No. 328969.

PAWLICKI v TRU-WALL CONSTRUCTION COMPANY, INC, No. 155495; Court of Appeals No. 330156.

PEOPLE v FREDERICK, No. 155509; Court of Appeals No. 328866.

BACON v SUNSHINE PRODUCTS OF MID-MICHIGAN, LLC, No. 155511; Court of Appeals No. 330332.

PEOPLE v ENGLAND, No. 155512; Court of Appeals No. 329739.

BRITSKY v WS CONSTRUCTION, INC, No. 155516; Court of Appeals No. 334392.

PEOPLE v MCCROY, No. 155520; Court of Appeals No. 329384.

PEOPLE v AARON WITHERSPOON, No. 155521; Court of Appeals No. 336275.

PEOPLE v KESSLER, No. 155522; Court of Appeals No. 329960.

PEOPLE v BROOME, No. 155525; Court of Appeals No. 328310.

KOSKI v AUTO CLUB INSURANCE ASSOCIATION, No. 155528; Court of Appeals No. 328233.

PEOPLE v OMAR GONZALEZ and PEOPLE v ROBERTO GONZALEZ, Nos. 155530, 155531 and 155532; Court of Appeals Nos. 327859, 327860 and 327861.

PEOPLE v DARIUS HUDSON, No. 155540; Court of Appeals No. 336341.

PEOPLE v LEMARR ROBINSON, No. 155543; Court of Appeals No. 329755.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v ETCHER, No. 155544; Court of Appeals No. 336191.

PEOPLE v POWER, No. 155546; Court of Appeals No. 336376.

PEOPLE v FABIAN RUCKER, No. 155549; Court of Appeals No. 329962.

PEOPLE v DIONNE HARRIS, No. 155550; Court of Appeals No. 336238.

PEOPLE v BRANDON MANN, No. 155553; Court of Appeals No. 329356.

WEBB-EATON v WAYNE COUNTY COMMUNITY COLLEGE DISTRICT, Nos. 155560 and 155561; Court of Appeals Nos. 328068 and 328069.

BALL v FOURMENT, No. 155567; Court of Appeals No. 331670.
BERNSTEIN, J., did not participate due to his prior relationship with the Sam Bernstein Law Firm.

PEOPLE v KENNETH HILL, No. 155579; Court of Appeals No. 329166.
WILDER, J., did not participate because he was on the Court of Appeals panel.

SPARTAN EQUITIES HIGH YIELD FUND I, LLC v OWENS, No. 155580; Court of Appeals No. 328942.

PEOPLE v ANDRE HAYNES, Nos. 155588, 155589, and 155590; Court of Appeals Nos. 329038, 329101, and 329109.

PEOPLE v DIAZ-GASKIN, No. 155594; Court of Appeals No. 329223.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v DWIGHT YOUNG, No. 155595; Court of Appeals No. 332358.

PEOPLE v GLIDDEN, No. 155598; Court of Appeals No. 329086.

PEOPLE v SHARON DAVIS, No. 155599; Court of Appeals No. 336562.

PEOPLE v CHUNN, No. 155600; Court of Appeals No. 329764.

PEOPLE v JOHN DAVIS, No. 155613; Court of Appeals No. 336591.

ROBINSON v FORD MOTOR COMPANY, No. 155619; Court of Appeals No. 335058.

PEOPLE v WEAVER, No. 155623; Court of Appeals No. 329900.

PEOPLE v FORSYTH, No. 155624; Court of Appeals No. 335748.

PEOPLE v KEVIN ADAMS, No. 155629; Court of Appeals No. 328028.

PAYNE v PAYNE, No. 155634; Court of Appeals No. 335952.

SANDERS v UNIVERSITY OF MICHIGAN BOARD OF REGENTS, No. 155636; Court of Appeals No. 336547.
BERNSTEIN, J., did not participate due to a familial relationship.

PEOPLE v DRANE, No. 155646; Court of Appeals No. 334220.

STIEVE v CITY OF DEARBORN, No. 155649; Court of Appeals No. 329591.

PEOPLE v FITZPATRICK, No. 155652; Court of Appeals No. 330086.

PEOPLE v REDMON, No. 155656; Court of Appeals No. 336539.

LEONARDO HARPER, LLC v LANDMARK COMMERCIAL REAL ESTATE SERVICES, INC, No. 155663; Court of Appeals No. 329338.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v MORSE, No. 155665; Court of Appeals No. 336254.

PEOPLE v BULLOCK, No. 155666; Court of Appeals No. 336204.

PEOPLE v CASILLAS, No. 155671; Court of Appeals No. 330424.

ALLEN v ALLSTATE INSURANCE COMPANY, No. 155683; Court of Appeals No. 330808.

PEOPLE v GEE, No. 155702; Court of Appeals No. 326634.

PEOPLE v ALVIN JORDAN, No. 155703; Court of Appeals No. 328474.

PEOPLE v TERRILL CURTIS, No. 155705; Court of Appeals No. 330139.

PEOPLE v WEATHERSPOON, No. 155711; Court of Appeals No. 335698.

SHEPARD v CIVIL RIGHTS COMMISSION, No. 155716; Court of Appeals No. 336824.

BURAU v DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 155718; Court of Appeals No. 335825.

PEOPLE v STEVEN HOFFMAN, No. 155722; Court of Appeals No. 336288.

PEOPLE v ALMASMARI, No. 155725; Court of Appeals No. 332008.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v HEAD, No. 155734; Court of Appeals No. 329248.

SHORELINE EAST CONDOMINIUM ASSOCIATION v GRAY, No. 155740; Court of Appeals No. 329403.

PEOPLE v GRAYSON, No. 155752; Court of Appeals No. 328173.

PEOPLE v ZALE, No. 155766; Court of Appeals No. 328001.

COVE MAP FUND, LLC v THURMOND, No. 155788; Court of Appeals No. 337753.

JPMORGAN CHASE BANK, NA v ELLIS, No. 155819; Court of Appeals No. 336618.

WILDER, J., did not participate because he was on the Court of Appeals panel.

VANERDEWYK v SEILER, No. 155832; Court of Appeals No. 335732.

In re CAW, No. 155835; Court of Appeals No. 333682.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v TERI JOHNSON, No. 155836; Court of Appeals No. 327736.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v LORENZO BROWN, No. 155871; Court of Appeals No. 327734.

WILDER, J., did not participate because he was on the Court of Appeals panel.

In re RAH, No. 155885; Court of Appeals No. 335382.

SPADE v VETERANS HOME CARE OF MICHIGAN, LLC, No. 155902; Court of Appeals No. 337857.

THESIER v TBSK LIMITED PARTNERSHIP, No. 155956; Court of Appeals No. 336398.

PEOPLE v DELACRUZ, No. 155988; Court of Appeals No. 337630.

PEOPLE v TITUS, No. 156004; Court of Appeals No. 329770.

MCCORMACK, J., did not participate because of her prior involvement in this case.

BYRNES v MARTINEZ, No. 156009; Court of Appeals No. 336806.

PLATT v ALMANZA, No. 156014; Court of Appeals No. 336527.

PEOPLE v SCOTTON, No. 156021; Court of Appeals No. 332864.

PEOPLE v DAY, No. 156030; Court of Appeals No. 338173.

PEOPLE v DERRICK JOHNSON, No. 156063; Court of Appeals No. 337537.

Superintending Control Denied September 12, 2017:

THOMAS v ATTORNEY GRIEVANCE COMMISSION, No. 155415.

FITZSIMONS v ATTORNEY GRIEVANCE COMMISSION, No. 155562.

SPITZER v ATTORNEY GRIEVANCE COMMISSION, No. 155568.

THOMAS v COURT OF APPEALS, No. 156019.

Reconsideration Denied September 12, 2017:

SHERMAN v SHERROD, No. 153652; Court of Appeals No. 320689. Leave to appeal denied at 500 Mich 999.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v SHAROC RICHARDSON, No. 154108; Court of Appeals No. 322195. Leave to appeal denied at 500 Mich 980.

MAKOWSKI v GOVERNOR, No. 154502; Court of Appeals No. 327396. Leave to appeal denied at 500 Mich 988.

MCCORMACK, J., did not participate because of her prior involvement in this case.

PEOPLE v LOPP, No. 154576; Court of Appeals No. 332119. Leave to appeal denied at 500 Mich 982.

PEOPLE v ALFONSO MARTINEZ, No. 154677; Court of Appeals No. 332456. Leave to appeal denied at 500 Mich 1000.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v MCINTYRE, No. 154678; Court of Appeals No. 333751. Leave to appeal denied at 500 Mich 1020.

PEOPLE v DOUGLAS BROWN, No. 154711; Court of Appeals No. 333649. Leave to appeal denied at 500 Mich 1000.

PEOPLE v FLY, No. 154791; Court of Appeals No. 329151. Leave to appeal denied at 500 Mich 979.

PEOPLE v LIONEL WRIGHT, No. 154831; Court of Appeals No. 319724. Leave to appeal denied at 500 Mich 1017.

SARDO v HAYMOUR, No. 154841; Court of Appeals No. 332951. Leave to appeal denied at 500 Mich 1021.

REFFITT v BACHI-REFFITT, No. 154876; Court of Appeals No. 333149. Leave to appeal denied at 500 Mich 1021.

PEOPLE v MENGEL, No. 154879; Court of Appeals No. 334224. Leave to appeal denied at 500 Mich 1001.

ANDERSONS ALBION ETHANOL, LLC v DEPARTMENT OF TREASURY, No. 154907; reported below: 317 Mich App 208. Leave to appeal denied at 500 Mich 1009.

MCKENNETT v KOLAILAT, No. 154946; Court of Appeals No. 335134. Leave to appeal denied at 500 Mich 1021.

MONACO v HOME-OWNERS INSURANCE COMPANY, No. 155000; reported below: 317 Mich App 738. Leave to appeal denied at 500 Mich 1002.

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 155013. Superintending control denied at 500 Mich 1004.

PEOPLE v CLIFTON JONES, No. 155054; Court of Appeals No. 332425. Leave to appeal denied at 500 Mich 1021.

PEOPLE v LANGENBURG, No. 155099; Court of Appeals No. 329156. Leave to appeal denied at 500 Mich 1003.

PEOPLE v MALLETT-RATHELL, No. 155698; Court of Appeals No. 330327. Leave to appeal denied at 500 Mich 1024.

Leave to Appeal Denied September 15, 2017:

In re HICKS, Nos. 156274 and 156275; Court of Appeals Nos. 335976 and 335977.

Rehearing Denied September 15, 2017:

CLAM LAKE TOWNSHIP v DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS and TERIDEE LLC v HARING CHARTER TOWNSHIP, Nos. 151800 and 153008; opinion at 500 Mich 362.

PEOPLE v LYLES, No. 153185; opinion at 501 Mich 107.

Application for Leave to Appeal Dismissed on Stipulation September 15, 2017:

BEDFORD v WITTE and STEWART v WITTE, Nos. 155034 and 155035; reported below: 318 Mich App 60.

Summary Disposition September 20, 2017:

PEOPLE v ROCAFORT, No. 153254; Court of Appeals No. 321804. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to that court for reconsideration in light of *People v Manuel*, 319 Mich App 291 (2017). In all other respects, leave to appeal is denied. We do not retain jurisdiction.

In re TIMON, No. 155845; Court of Appeals No. 333788. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the judgment of the Court of Appeals addressing the best interests determination and remand this case to the Wayne Circuit Court for reconsideration of whether terminating respondent's parental rights is in the best interests of the child. MCL 712A.19b(5). The trial court judge failed to articulate whether her generalized concerns regarding the lack of permanency and stability for younger children placed with a guardian are present for *this* child. On remand, the trial court shall make an individualized determination as to whether terminating respondent's parental rights is in the best interests of respondent's youngest child without regard to a generalized policy disfavoring guardianship for children under the age of 14. The trial court shall receive additional evidence from the parties as necessary to make this determination.

PEOPLE v TRACEY LAWRENCE, No. 156280; Court of Appeals No. 339228. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to

appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We further order that 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.

Leave to Appeal Denied September 20, 2017:

PEOPLE v HOLLIS, No. 153772; Court of Appeals No. 329396.

PEOPLE v MORRICE, No. 155241; Court of Appeals No. 326469.

PEOPLE v LOVE, No. 155258; Court of Appeals No. 328662.

MILOT v DEPARTMENT OF TRANSPORTATION, No. 155394; reported below: 318 Mich App 272.

DELL'ORCO v DELL'ORCO, No. 155418; Court of Appeals No. 329672.

PEOPLE v GORDON, No. 155967; Court of Appeals No. 329449.

PEOPLE v CLIFFORD THOMAS, No. 155995; Court of Appeals No. 329448.

PEOPLE v JEFFREY WILLIS, No. 156036; Court of Appeals No. 337627.

Leave to Appeal Granted September 22, 2017:

COLOMA CHARTER TOWNSHIP v BERRIEN COUNTY and HERMAN v BERRIEN COUNTY, Nos. 154556 and 154557; reported below: 317 Mich App 127. The parties shall address: (1) whether the gun range currently used by the Berrien County Sheriff's Department is given priority under the County Commissioners Act, MCL 46.1 *et seq*., specifically MCL 46.11(b) and (d), over a conflicting township zoning ordinance, see *Herman v Berrien Co*, 481 Mich 352 (2008); if so, (2) whether the Court of Appeals erred by reversing the Berrien Circuit Court's revision of the existing permanent injunction based on changed circumstances; and (3) whether the Court of Appeals properly vacated the trial court's decision to deny the plaintiffs' request for attorney fees pursuant to MCL 600.1721.

The Michigan Sheriffs' Association, Michigan Municipal League, Michigan Townships Association, Michigan Association of Counties, and International City/County Management 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.

OTTO v INN AT WATERVALE, INC, No. 155380; Court of Appeals No. 330214. The parties shall address whether the activities engaged in by the plaintiff's Next Friend and her three companions constituted "other outdoor recreational use" of the defendant's land under the Recreational

Land Use Act, MCL 324.73301(1). The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The Heart of the Lakes Center for Land Conservation Policy, Real Property Law Section of the State Bar of Michigan, and Environmental Law Section of the State Bar 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.

WILDER, J., did not participate because he was on the Court of Appeals panel.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered September 22, 2017:

PEOPLE v GARCIA-MANDUJANO, No. 153697; Court of Appeals No. 324963. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the defendant was denied the effective assistance of trial counsel where: (1) counsel failed to interview the physician's assistant who examined the complainant prior to trial; and (2) counsel failed to impeach the trial testimony of the physician's assistant, that she used an adult speculum to examine the 12-year-old complainant, where the witness made no mention of the speculum in her report documenting the complainant's examination. In addition to the brief, the appellant shall electronically file an appendix containing the items listed at MCR 7.312(D)(2). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

MERCHAND v CARPENTER, No. 154622; Court of Appeals No. 327272. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the medical records and testimony sought to be admitted were admissible under MRE 404(b). In addition to the brief, the appellant shall electronically file an appendix containing the items listed at MCR 7.312(D)(2). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

BERTIN v MANN, No. 155266; Court of Appeals No. 328885. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the reckless misconduct standard of care or the ordinary negligence standard of care applies to an injury resulting from the operation of a golf cart while playing golf recreationally.

Ritchie-Gamester v City of Berkley, 461 Mich 73, 87-89 (1999). In addition to the brief, the appellant shall electronically file an appendix containing the items listed at MCR 7.312(D)(2). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Golf Association of Michigan and Negligence Law Section of the State Bar 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.

Leave to Appeal Denied September 22, 2017:

In re SNOW, No. 156326; Court of Appeals No. 335536.

Leave to Appeal Denied September 26, 2017:

GOLDMAN V DEPARTMENT OF CORRECTIONS, No. 155758; Court of Appeals No. 337156.

Summary Disposition September 27, 2017:

MARQUARDT V UMASHANKAR, No. 151555; Court of Appeals No. 319615. By order of November 23, 2016, the application for leave to appeal the March 26, 2015 judgment of the Court of Appeals was held in abeyance pending the decision in *Haksluoto v Mt Clemens Regional Med Ctr* (Docket No. 153723). On order of the Court, the case having been decided on June 27, 2017, 500 Mich 304 (2017), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and remand this case to the Washtenaw Circuit Court for reconsideration in light of *Haksluoto*. We do not retain jurisdiction.

WILDER, J., did not participate because he was on the Court of Appeals panel.

Leave to Appeal Granted September 27, 2017:

In re WILLIAMS, No. 155994; Court of Appeals No. 335932; reported below: 320 Mich App 88. The parties shall address whether the respondent-father was entitled, under the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq*., to withdraw his consent to the termination of his parental rights for the purpose of adoption at any

time before entry of a final order of adoption. MCL 712B.13(3). The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The Sault Ste. Marie Tribe of Chippewa Indians, Inter-Tribal Council of Michigan, Inc., United Tribes of Michigan, National Indian Child Welfare Association, Indigenous Law & Policy Center of the Michigan State University College of Law, and the Children's Law, Family Law, and American Indian Law Sections of the State Bar 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.

Leave to Appeal Denied September 27, 2017:

DUDLEY v ST CLAIR COUNTY OFFICE OF DRAIN COMMISSIONER, No. 151416; Court of Appeals No. 317202.

RIDLEY v BRITNELL, No. 154139; Court of Appeals No. 326517.

PEOPLE v KAHN, No. 154143; Court of Appeals No. 324320.

PEOPLE v WALTER BASS, No. 154649; reported below: 317 Mich App 241.

WILDER, J., did not participate because he was on the Court of Appeals panel.

TILLMAN v PERFECT PITCHER SPORTS PUB, INC, No. 155117; Court of Appeals No. 328520.

PEOPLE v BREWER, No. 155308; Court of Appeals No. 335006.

PEOPLE v ORONDE GRAHAM, No. 155541; Court of Appeals No. 329298.

MARKMAN, C.J. (*concurring*). I concur in this Court's order denying leave to appeal, given that the Court of Appeals correctly held that the 180-day period in MCL 780.131(1) does not begin to run until the prosecutor has received formal notice from the Michigan Department of Corrections (MDOC) regarding a pending warrant against an inmate. *People v Williams*, 475 Mich 245, 259 (2006). I write separately only to note that the statute neither places any time limitation on when the MDOC must communicate formal notice regarding a pending warrant against an inmate, nor provides a defendant a remedy if the MDOC fails to communicate such notice. The lack of such provisions arguably undermines the apparent purpose of the statute.

Here, the MDOC did not communicate formal notice to the prosecutor that a warrant was pending against defendant—who was incarcerated at the time the complaint was filed—until approximately 16 months after the complaint against defendant was filed, by which time defendant was no longer incarcerated. This Court has recognized that the potential benefits of the 180-day period in MCL 780.131(1) include "protecting concurrent sentences, minimizing obstructions to prison rehabilitation, aiding in preventing untried charges from affecting early release, and clearing court dockets and prosecutors' offices of stale

charges." *People v Woodruff*, 414 Mich 130, 137 (1982), overruled on other grounds by *People v Smith*, 438 Mich 715 (1991). Each of these purposes is arguably undermined when, as in this case, the MDOC does not timely communicate notice to the prosecutor after a complaint against an inmate has been filed, because communication of such notice is a precondition to the running of the 180-day notification period. I write only to call this matter to the Legislature's attention so that it might, if it so chooses, take action to address this concern.

MCCORMACK and BERNSTEIN, JJ., joined the statement of MARKMAN, C.J.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v SCOTTY CHANDLER, No. 155630; Court of Appeals No. 330217.

PEOPLE v PRZYSUCHA, No. 155699; Court of Appeals No. 335272.

Summary Disposition September 29, 2017:

PEOPLE v BARRITT, No. 155607; reported below: 318 Mich App 662. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the judgment of the Court of Appeals holding that the defendant was subjected to custodial interrogation. Although the Court of Appeals properly concluded that the trial court erred by failing to apply the correct legal standards, the Court of Appeals should have remanded this case to the trial court for application of those standards in the first instance. Accordingly, we remand this case to the Genesee Circuit Court to determine, in light of all of the objective circumstances surrounding the interrogation: (1) whether a reasonable person would have felt that he was not at liberty to terminate the interrogation and leave; and (2) whether the environment presented the same inherently coercive pressures as the type of station house questioning at issue in *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). See *Howes v Fields*, 565 US 499, 509; 132 S Ct 1181; 182 L Ed 2d 17 (2012); *Yarborough v Alvarado*, 541 US 652, 663; 124 S Ct 2140; 158 L Ed 2d 938 (2004); *People v Elliott*, 494 Mich 292, 308 (2013). We do not retain jurisdiction.

Leave to Appeal Granted September 29, 2017:

In re ERWIN ESTATE, Nos. 153980 and 153981; Court of Appeals Nos. 323387 and 329264. The parties shall address: (1) whether the "willfully absent" provision in MCL 700.2801(2)(e)(*i*) is defined exclusively by physical separation, or whether it includes consideration of the emotional bonds and connections between spouses, compare *In re Estate of Erwin*, unpublished per curiam opinion of the Court of Appeals, issued May 10, 2016 (Docket Nos. 323387 and 329264), at 5, with *In re Peterson Estate*, 315 Mich App 423, 432 (2016); and (2) whether MCL 700.2801(2)(e)(*i*) requires proof that a spouse intends to abandon his or

her marital rights, compare *Matter of Estate of Harris*, 151 Mich App 780, 786 (1986), with *In re Peterson Estate*, 315 Mich App at 433.

The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

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.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered September 29, 2017:

PEOPLE v HEWITT-EL, No. 155239; Court of Appeals No. 332946. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether: (1) the defendant's alleged grounds for relief were decided against him on direct appeal; (2) the Court of Appeals failed to defer to the Wayne Circuit Court's credibility determinations; and (3) the defendant has established entitlement to relief under MCR 6.508(D). In addition to the brief, the appellant shall electronically file an appendix containing the items listed at MCR 7.312(D)(2). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied September 29, 2017:

In re ERWIN ESTATE, No. 154370; Court of Appeals No. 331846.

Summary Disposition October 3, 2017:

PEOPLE v BRIAN THOMPSON, No. 150010; Court of Appeals No. 313524. By order of April 28, 2015, the application for leave to appeal the July 15, 2014 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Lockridge* (Docket No. 149073), and by order of January 31, 2017, the case was held in abeyance pending the decision in *People v Comer* (Docket No. 152713). On order of the Court, the cases having been decided on July 29, 2015 and June 23, 2017, respectively, *People v Lockridge*, 498 Mich 358 (2015), and *People v Comer*, 500 Mich 278 (2017), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the Court of Appeals judgment holding that the trial court's failure to impose lifetime electronic monitoring, as statutorily mandated by MCL 750.520b(2)(d), was a clerical error that could be corrected by the trial court on its own initiative. In *Comer*, we held that such an error results in an invalid sentence, but that the error is substantive and may only be corrected by the trial court on its own initiative before judgment

is entered. MCR 6.435; MCR 6.429. In this case, the trial court did not have authority to amend the judgment of sentence after entry to add a provision for lifetime electronic monitoring. Therefore, we vacate the December 14, 2012 amended judgment of sentence, and we remand this case to the Midland Circuit Court to reinstate the November 19, 2012 judgment of sentence.

In addition, the Midland Circuit Court shall determine whether the court would have imposed a materially different sentence under the sentencing procedure described in Part VI of our opinion in *Lockridge*. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE V ALBERT ROBINSON, Nos. 151028 and 151029; Court of Appeals Nos. 311356 and 314604. By order of January 31, 2017, the application for leave to appeal the December 16, 2014 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Comer* (Docket No. 152713). On order of the Court, the case having been decided on June 23, 2017, 500 Mich 278 (2017), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the Court of Appeals judgment addressing the Macomb Circuit Court's *sua sponte* order for resentencing, we vacate the January 22, 2013 order of correction of the judgment of sentence, issued in Macomb Circuit Court No. 2011-002189-FC, and we remand this case to the trial court to reinstate the June 27, 2012 judgment of sentence. In *Comer*, we held that correcting an invalid sentence by adding a statutorily mandated term is a substantive correction that a trial court may make on its own initiative only before judgment is entered. In this case, the trial court did not have authority to amend the judgment of sentence after entry to add a provision for lifetime electronic monitoring under MCL 750.520b(2)(d) and MCL 750.520n. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE V ALSTAIR RICHARDSON, No. 151808; Court of Appeals No. 326518. By order of June 28, 2016, the application for leave to appeal the June 10, 2015 order of the Court of Appeals was held in abeyance pending the decision in *People v Comer* (Docket No. 152713). The case having been decided on June 23, 2017, 500 Mich 278 (2017), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the March 4, 2014 amended judgment of sentence and remand this case to the Wayne Circuit Court to reinstate the October 17, 2008 judgment of sentence. In *Comer*, we held that correcting an invalid sentence by adding a statutorily mandated term is a substantive correction that a trial court may make on its own initiative only before judgment is entered. In this case, the trial court did not have authority to amend the judgment of sentence after

entry regarding a provision for lifetime electronic monitoring under MCL 750.520b(2)(d) and MCL 750.520n. We do not retain jurisdiction.

CHIROPRACTORS REHABILITATION GROUP, PC v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and ELITE HEALTH CENTER, INC v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Nos. 152807 and 152808; reported below: 313 Mich App 113. By order of July 26, 2016, the application for leave to appeal the October 29, 2015 judgment of the Court of Appeals was held in abeyance pending the decision in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co* (Docket No. 152758). On order of the Court, the case having been decided on May 25, 2017, 500 Mich 191 (2017), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand these cases to that court for reconsideration in light of *Covenant*. We do not retain jurisdiction.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v NOTTE, No. 152975; Court of Appeals No. 328957. By order of September 6, 2016, the application for leave to appeal the December 22, 2015 order of the Court of Appeals was held in abeyance pending the decisions in *People v Steanhouse* (Docket No. 152849) and *People v Masroor* (Docket Nos. 152946, 152947, and 152948). On order of the Court, the cases having been decided on July 24, 2017, 500 Mich 453 (2017), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand the case to the Court of Appeals for consideration of whether the departure sentence imposed by the trial court was reasonable under the standard set forth in *Steanhouse*.

PEOPLE v VIDRO, No. 153766; Court of Appeals No. 331250. By order of October 26, 2016, the application for leave to appeal the March 29, 2016 order of the Court of Appeals was held in abeyance pending the decisions in *People v Steanhouse* (Docket No. 152849) and *People v Masroor* (Docket Nos. 152946, 152947, and 152948). On order of the Court, the cases having been decided on July 24, 2017, 500 Mich 453 (2017), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the March 29, 2016 order of the Court of Appeals, and we remand this case to the Court of Appeals for reconsideration in light of *Steanhouse*.

PEOPLE v LUCKER, No. 153961; Court of Appeals No. 331986. By order of November 30, 2016, the application for leave to appeal the April 25, 2016 order of the Court of Appeals was held in abeyance pending the decisions in *People v Steanhouse* (Docket No. 152849) and *People v Masroor* (Docket Nos. 152946, 152947, and 152948). On order of the Court, the cases having been decided on July 24, 2017, 500 Mich 453 (2017), the application is again considered and, pursuant to MCR 7.305(H)(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 the defendant's sentence is reasonable under the standard set forth in *Steanhouse*.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE V JAMAL WILLIAMS, No. 154888; Court of Appeals No. 321355. By order of March 7, 2017, the application for leave to appeal the August 9, 2016 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Comer* (Docket No. 152713). The case having been decided on June 23, 2017, 500 Mich 278 (2017), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the Court of Appeals judgment addressing the trial court's *sua sponte* order for resentencing, vacate the June 11, 2014 judgment of sentence, and remand this case to the Macomb Circuit Court to reinstate the April 2, 2014 judgment of sentence. In *Comer*, we held that correcting an invalid sentence by adding a statutorily mandated term is a substantive correction that a trial court may make on its own initiative only before judgment is entered. In this case, the trial court did not have authority to *sua sponte* order resentencing to impose a mandatory minimum habitual offender sentence under MCL 769.12. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE V GUZMAN, No. 154918; Court of Appeals No. 334427. By order of June 27, 2017, the prosecuting attorney was directed to answer Issue VI of the application for leave to appeal the October 14, 2016 order of the Court of Appeals. On August 15, 2017, the parties filed with the Clerk a stipulation to dismiss Issue VI, only, of the defendant's application and to permit resentencing consistent with the circuit court's ruling on the record. On order of the Court, the stipulation having been received, the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Hillsdale Circuit Court for further proceedings consistent with the stipulation of the parties. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE V MERCER, No. 155068; Court of Appeals No. 335181. Pursuant to MCR 7.305(H)(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 the defendant's sentence is reasonable under the standard set forth in *People v Steanhouse*, 500 Mich 453 (2017).

PEOPLE V STEVEN SMITH, No. 155393; Court of Appeals No. 328736. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals remanding this case to the trial court for proportionality review and for a hearing pursuant to *People v Lockridge*, 498 Mich 358 (2015), and we remand this case to the Court of Appeals for plenary review of the defendant's claim that his sentence was disproportionate under the standard set forth in *People v Milbourn*, 435 Mich 630, 636 (1990). See

People v Steanhouse, 500 Mich 453, 459-460 (2017). In all other respects, leave to appeal is denied. We do not retain jurisdiction.

Leave to Appeal Denied October 3, 2017:

PEOPLE v KUPRES, No. 150443; Court of Appeals No. 316044.

PEOPLE v GOGINS, No. 152264; Court of Appeals No. 325682.

PEOPLE v SCHLENKERMAN, No. 152271; Court of Appeals No. 320501.

PEOPLE v SIMPSON, No. 153803; Court of Appeals No. 331428.

PEOPLE v ARTHUR HUDSON, No. 153863; Court of Appeals No. 331834. WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v MCABEE, No. 153925; Court of Appeals No. 332351.

PEOPLE v LUCAS, No. 154170; Court of Appeals No. 332174.

PEOPLE v SIMON, No. 154195; Court of Appeals No. 326149. WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v KAVINA WARD, No. 154296; Court of Appeals No. 332861. WILDER, J., did not participate because he was on the Court of Appeals panel.

PREVO v JACKSON, No. 154375; Court of Appeals No. 330919.

PEOPLE v BEARD, No. 154412; Court of Appeals No. 332983.

PEOPLE v PABIAN, No. 154419; Court of Appeals No. 333333.

PEOPLE v WEST, No. 154473; Court of Appeals No. 333458.

PEOPLE v PEREZ, No. 154485; Court of Appeals No. 332688.

PEOPLE v DIETZEL, No. 154536; Court of Appeals No. 334037.

PEOPLE v GASPARETTO, No. 154559; Court of Appeals No. 334482.

PEOPLE v CARSWELL, No. 154590; Court of Appeals No. 334114.

BANKS v AAA INSURANCE COMPANY, No. 154640; Court of Appeals No. 327386.

PEOPLE v MAYCROFT, No. 154712; Court of Appeals No. 332194.

PEOPLE v KECKLER, No. 154741; Court of Appeals No. 328002.

PEOPLE v KINSLOW, No. 154756; Court of Appeals No. 333445.

PEOPLE v EADY, No. 154768; Court of Appeals No. 334393.

PEOPLE v FIRAVICH, No. 154827; Court of Appeals No. 334855.

PEOPLE v CROSKEY, No. 154870; Court of Appeals No. 327724.

ELECTRIC STICK, INC v PRIMEONE INSURANCE COMPANY, No. 154899; Court of Appeals No. 327421.

PEOPLE v MANZO, No. 154919; Court of Appeals No. 335137.

PEOPLE v FAVORS, No. 154960; Court of Appeals No. 333882.

FOSTERS SPORTSMEN'S CLUB v TAYMOUTH TOWNSHIP, No. 154995; Court of Appeals No. 333451.

PEOPLE v FRANK WELCH, No. 155006; Court of Appeals No. 335194.

PEOPLE v BEAL, No. 155009; Court of Appeals No. 333657.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v SUTHERBY, No. 155022; Court of Appeals No. 334983.

PEOPLE v ROBERT TURNER, No. 155026; Court of Appeals No. 333885.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v BAKER, No. 155031; Court of Appeals No. 334857.

PEOPLE v JAMES ROBINSON, No. 155048; Court of Appeals No. 333596.

PEOPLE v LANES, No. 155093; Court of Appeals No. 334215.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v COUCH, No. 155110; Court of Appeals No. 333610.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v RONALD JORDAN, No. 155112; Court of Appeals No. 333611.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v KENNETH TAYLOR, No. 155113; Court of Appeals No. 334833.

PEOPLE v JAMES WALKER, No. 155128; Court of Appeals No. 333770.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v BROWER, No. 155135; Court of Appeals No. 335431.

PEOPLE v COOLEY, No. 155136; Court of Appeals No. 335116.

PEOPLE v TYRONE ROBINSON, No. 155149; Court of Appeals No. 331920.

PEOPLE v LEONARD KEYS, No. 155154; Court of Appeals No. 333889.

PEOPLE v EUBANKS, No. 155173; Court of Appeals No. 335196.

PEOPLE v OTTO HARRIS, No. 155180; Court of Appeals No. 334008.

PEOPLE v COFFIN, No. 155181; Court of Appeals No. 334338.

SKANSKA-SCHWEITZER v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, No. 155186; Court of Appeals No. 328031.

PEOPLE v TERRY ADAMS, No. 155190; Court of Appeals No. 334808.

PEOPLE v DUSTIN GRIFFIN, No. 155210; Court of Appeals No. 335216.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v BRAUN, No. 155237; Court of Appeals No. 334312.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v ALPHONSO WALKER, No. 155264; Court of Appeals No. 328864.

PEOPLE v TILLERY, No. 155324; Court of Appeals No. 335946.

PEOPLE v MARCUS YOUNG, No. 155370; Court of Appeals No. 335553.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v WOODS, No. 155384; Court of Appeals No. 327083.

MAKI ESTATE v COEN, No. 155397; reported below: 318 Mich App 532.

BARKER v HURLEY MEDICAL CENTER and BARKER v THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, Nos. 155428 and 155429; Court of Appeals Nos. 328584 and 328997.

BERNSTEIN, J., did not participate.

SCHWARTZ v REAL ESTATE ONE, INC, No. 155430; Court of Appeals No. 328727.

HARDRICK v ALLSTATE INSURANCE COMPANY, No. 155449; Court of Appeals No. 334370.

WISNER v SB INDIANA LLC and DORR v WBM LLC, Nos. 155496 and 155497; Court of Appeals Nos. 328867 and 333045.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v STEVEN WHITE, No. 155534; Court of Appeals No. 335819.

PEOPLE v PAUL JONES, No. 155557; Court of Appeals No. 328816.

WILDER, J., did not participate because he was on the Court of Appeals panel.

In re BANSALI LIVING TRUST, No. 155569; Court of Appeals No. 330515.

GUST v LENAWEE COUNTY ROAD COMMISSION, No. 155578; Court of Appeals No. 329062.

WILDER, J., did not participate because he was on the Court of Appeals panel at an earlier stage of the proceedings.

PEOPLE v ERIC FLOWERS, No. 155587; Court of Appeals No. 336291.

PEOPLE v MATTHEW JONES, No. 155591; Court of Appeals No. 328901.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v JOHNNY MILLER, No. 155597; Court of Appeals No. 329317.

PEOPLE v ANDRE BROWN, No. 155601; Court of Appeals No. 335348.

MINIX v CHIPPEWA CORRECTIONAL FACILITY WARDEN, No. 155603; Court of Appeals No. 335867.

PEOPLE v JENNINGS, No. 155604; Court of Appeals No. 336249.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v DOMANSKI, No. 155605; Court of Appeals No. 328154.

PEOPLE v LATOYNA MITCHELL, No. 155608; Court of Appeals No. 336230.

PEOPLE v JENNINGS, No. 155609; Court of Appeals No. 335203.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v DARNELL JONES, No. 155620; Court of Appeals No. 336441.

PEOPLE v EMMANUEL BROWN, No. 155626; Court of Appeals No. 328737.

PEOPLE v KOWALSKI, No. 155635; Court of Appeals No. 330431.

BENFORD v SUTTON PLACE PROPERTY TT, LLC, No. 155637; Court of Appeals No. 334767.

PEOPLE v BARKOVICH, No. 155641; Court of Appeals No. 336110.

PEOPLE v VOLKE, No. 155645; Court of Appeals No. 329263.

RAY v ALLSTATE INSURANCE COMPANY, No. 155648; Court of Appeals No. 335908.

PEOPLE v CLIFTON WITHERSPOON, No. 155655; Court of Appeals No. 329964.

TIPPINS v DEPARTMENT OF CORRECTIONS, No. 155658; Court of Appeals No. 336975.

TIPPINS v DEPARTMENT OF CORRECTIONS, No. 155660; Court of Appeals No. 336747.

PEOPLE v DARRELL DAVIS, No. 155670; Court of Appeals No. 336395.

PEOPLE v HARTWELL, No. 155685; Court of Appeals No. 335737.

PEOPLE v KINARD, No. 155686; Court of Appeals No. 336360.

PEOPLE v CATO, No. 155692; Court of Appeals No. 336823.
WILDER, J., did not participate because he was on the Court of Appeals panel.

In re YOUSSEF, No. 155701; Court of Appeals No. 330222.

PEOPLE v BURKS, No. 155713; Court of Appeals No. 329696.

PEOPLE v JOYCE, No. 155723; Court of Appeals No. 329973.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v HATTER, No. 155726; Court of Appeals No. 335633.

HAJJI v ESHO, No. 155727; Court of Appeals No. 329737.

PEOPLE v MCMILLION, No. 155742; Court of Appeals No. 330128.

MCCOURT v FOWLER, No. 155750; Court of Appeals No. 330766.

PEOPLE v CLAY, No. 155754; Court of Appeals No. 329692.

PEOPLE v BISKNER, No. 155756; Court of Appeals No. 335026.

PEOPLE v HARVEY, No. 155757; Court of Appeals No. 329800.

PEOPLE v GROSS, No. 155760; Court of Appeals No. 336367.

SPARROW HOSPITAL & HEALTH SYSTEM v OCHEN, No. 155762; Court of Appeals No. 335681.

PEOPLE v SCHMOTZER, No. 155770; Court of Appeals No. 336523.

PEOPLE v PATRICK JOHNSON, No. 155772; Court of Appeals No. 336677.

PEOPLE v CHARLES RAY JONES, No. 155779; Court of Appeals No. 330659.

RUSTER v KOON, No. 155781; Court of Appeals No. 330328.

PEOPLE v SIMKINS, No. 155787; Court of Appeals No. 329561.

PEOPLE v VLIETSTRA, No. 155799; Court of Appeals No. 337158.

PEOPLE v WHITSON, No. 155801; Court of Appeals No. 330446.

PEOPLE v LAMBERT, No. 155803; Court of Appeals No. 336534.

PEOPLE v BURKETT, No. 155804; Court of Appeals No. 337040.

PEOPLE v TILTON, Nos. 155823 and 155824; Court of Appeals Nos. 330137 and 332329.

PEOPLE v JOSHUA MANN, No. 155826; Court of Appeals No. 336126.

PEOPLE v BUD BRYANT, No. 155830; reported below: 319 Mich App 207.

PEOPLE v GUTIERREZ, No. 155838; Court of Appeals No. 336627.

PEOPLE v RYAN, No. 155844; Court of Appeals No. 330450.

MCCORMACK, J., did not participate because of her prior involvement in a related case.

PEOPLE v TOMASZYCKI, No. 155848; Court of Appeals No. 329224.

LANDRY-CHAN v CHAN, No. 155862; Court of Appeals No. 331977.

PEOPLE v CUMMINGS, No. 155868; Court of Appeals No. 336942.

WILDER, J., did not participate because he was on the Court of Appeals panel.

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN v PROGRESSIVE MICHIGAN INSURANCE CO, No. 155870; Court of Appeals No. 331215.

PEOPLE v CARICO, No. 155955; Court of Appeals No. 336863.

PEOPLE v JASON JOHNSON, No. 155968; Court of Appeals No. 337339.

PEOPLE v BURKETT, No. 155978; Court of Appeals No. 337271.

PEOPLE v CLIFTON WITHERSPOON, No. 156033; Court of Appeals No. 331533.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v SADLER, No. 156233; Court of Appeals No. 333409.

Superintending Control Denied October 3, 2017:

THOMPKINS v ATTORNEY GRIEVANCE COMMISSION, No. 155755.

Reconsideration Denied October 3, 2017:

PEOPLE v REEVES, No. 154761; Court of Appeals No. 332224. Leave to appeal denied at 500 Mich 1021.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v LOUIS, No. 154917; Court of Appeals No. 333226. Leave to appeal denied at 500 Mich 1021.

PEOPLE v ELLIS, No. 154920; Court of Appeals No. 333619. Leave to appeal denied at 500 Mich 1058.

PEOPLE v TIPPINS, No. 154987; Court of Appeals No. 333602. Leave to appeal denied at 500 Mich 1059.

PEOPLE v STOCKS, No. 155179; Court of Appeals No. 335352. Leave to appeal denied at 500 Mich 1003.

Summary Disposition October 5, 2017:

PEOPLE v NEHMEH, No. 151310; Court of Appeals No. 324096. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court to reappoint attorney Arthur Landau, if feasible, to represent the defendant as on direct appellate review. If this appointment is not feasible, the trial court shall appoint

other counsel to represent the defendant. See *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005). Based on our review of the record, the circuit court granted original appointed appellate counsel's motion to withdraw and appointed substitute appellate counsel, who failed to act on the defendant's behalf within the time for direct appeal before the circuit court appointed attorney Landau in his stead. Thus, through no fault of the defendant, he lost the right to direct review of his convictions and sentences. On remand, substitute appellate counsel, once appointed, may file an application for leave to appeal in the Court of Appeals for consideration under the standard for direct appeals, and/or any appropriate postconviction motions in the circuit court, within six months of the date of the circuit court's order appointing or reappointing counsel. Counsel may include among the issues raised, but is not required to include, the issues that he raised on behalf of the defendant in his motion for relief from judgment that was filed in 2014. We do not retain jurisdiction.

WILDER, J., did not participate because he was on the Court of Appeals panel.

WOODRING V PHOENIX INSURANCE COMPANY, No. 151414; Court of Appeals No. 324128. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Among the issues to be considered, the Court of Appeals shall address whether the causal connection between the plaintiff's injuries and the maintenance of a motor vehicle as a motor vehicle is more than incidental, fortuitous, or "but for." *Thornton v Allstate Ins Co*, 425 Mich 643, 659 (1986).

PEOPLE V JUSTIN BAILEY, No. 156099; Court of Appeals No. 336685. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered October 5, 2017:

PEOPLE V OROS, No. 156241; reported below: 320 Mich App 146. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the Court of Appeals properly viewed the trial record for sufficient evidence of premeditation and deliberation in the light most favorable to the prosecution, including drawing all reasonable inferences in favor of the jury verdict, and whether the record evidence is sufficient to sustain defendant's conviction for first-degree premeditated murder. *People v Gonzalez*, 468 Mich 636, 640-641 (2003). In addition to the brief, the appellant shall electronically file an appendix containing the items listed at MCR 7.312(D)(2). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days

of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied October 5, 2017:

CASTRO v GOULET, No. 152383; reported below: 312 Mich App 1.

VIVIANO, J. (*concurring*). I concur with the denial order because the Court of Appeals reached the correct result for the right reasons. Its decision reflects the guarantee in MCL 600.2912d(2) that a medical malpractice plaintiff complying with that provision's terms will receive an additional 28 days to file his or her affidavit of merit (AOM). I write separately, however, because I believe our Court should, in an appropriate case, reconsider our opinion in *Scarsella v Pollak*.[1] That case held that the plaintiff's failure to file an AOM with his complaint, as required by MCL 600.2912d(1), meant that the statutory limitations period continued to run after the complaint was filed.[2] That conclusion, I believe, may rest on a flawed premise that has roiled our medical malpractice jurisprudence.[3]

A close contextual analysis of the relevant statutes casts doubt on *Scarsella*'s conclusion that filing the AOM is necessary to toll the limitations period. This analysis begins with the generally applicable timing provisions in the Revised Judicature Act of 1961.[4] Under MCL 600.1901 of that act, "[a] civil action is commenced by filing a complaint with the court."[5] The commencement must conform to the limitations periods prescribed by statute; a person cannot "bring or maintain an action . . . unless . . . the action is commenced within the period of time prescribed by" MCL 600.5805.[6] Because this provision "pertains only to the filing of the complaint . . . [,] one must then turn to [MCL 600.]5856 to determine the effect of the statute of limitations once the complaint has been filed."[7] MCL 600.5856, in turn, tolls the running of the statutory limitations period in the following circumstances:

> (a) At the time the complaint is filed, if a copy of the summons and complaint are served on the defendant . . . .

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[1] *Scarsella v Pollak*, 461 Mich 547 (2000).

[2] *Id*. at 549-550.

[3] Indeed, the Court of Appeals long ago requested that we "revisit or distinguish *Scarsella* so that clearly inadvertent [clerical] errors" would not bar a plaintiff's claim. *Young v Sellers*, 254 Mich App 447, 453 (2002).

[4] MCL 600.101 *et seq*.

[5] See also MCR 2.101(B) ("A civil action is commenced by filing a complaint with a court.").

[6] MCL 600.5805(1). The limitations period for malpractice claims generally is two years. MCL 600.5805(6).

[7] *Gladych v New Family Homes, Inc*, 468 Mich 594, 598 (2003).

> (b) At the time jurisdiction over the defendant is otherwise acquired.
>
> (c) At the time notice is given in compliance with the applicable notice period under [MCL 600.2912b], if during that period a claim would be barred by the statute of limitations or repose . . . .

Scarsella concluded that these general timing requirements do not apply in medical malpractice cases.[8] It reached this result on the basis of § 2912d(1), which states that "the plaintiff . . . shall file with the complaint an affidavit of merit signed by a health professional . . . ." In *Scarsella*, the plaintiff filed his malpractice complaint a few weeks before the two-year limitations period would have barred his claim.[9] He did not, however, file an accompanying AOM, and the defendant moved to dismiss for the plaintiff's failure to comply with § 2912d(1).[10] Shortly before the trial court ruled on the motion, but well after the statutory limitations period would have elapsed, plaintiff filed the AOM.

The Court of Appeals held that the plaintiff's case was time-barred because he filed the AOM after the period expired. We adopted its opinion, which purported to distinguish the general rules in § 5856 from those applicable to medical malpractice cases. In particular, it found that the "[u]se of the word 'shall' " in § 2912d(1) "indicates that an affidavit accompanying the complaint is mandatory and imperative."[11] Consequently, the opinion "conclude[d] that, for statute of limitations purposes in a medical malpractice case, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit."[12] Accordingly, an AOM must be filed to commence the suit.[13] We have elsewhere justified this result by observing that § 2912d gives specific instruction in medical malpractice cases that must trump the usual rules detailed in § 1901 and § 5856.[14]

It is true that general statutory provisions must give way to more specific provisions.[15] This interpretative canon typically applies either

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[8] *Scarsella*, 461 Mich at 549.

[9] *Id*.

[10] *Id*.

[11] *Id*.

[12] *Id*.

[13] *Id*. at 550.

[14] See *Ligons v Crittenton Hosp*, 490 Mich 61, 82-84 (2011); see also *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68, 93-94 (2015). Contrary to the dissent's suggestion below, *Tyra* did not involve the AOM requirement, but rather the notice of intent (NOI) requirement in § 2912b(1); thus any mention of the AOM requirement in *Tyra* was clearly dicta.

[15] *Gebhardt v O'Rourke*, 444 Mich 535, 542-543 (1994). However, "[i]n order to determine which provision is truly more specific and, hence,

when the general and specific provisions conflict, or when applying the general provision would render the specific one superfluous.[16] But § 5856 and § 2912d do not conflict, and the latter would not be nullified if the former's general tolling rules applied to medical malpractice claims. Section 2912d says absolutely nothing about the limitations period and does not explicitly condition tolling on a timely filed AOM. All the statute requires is that the plaintiff file the AOM with the complaint, or later if an exception applies. No one has yet offered a convincing argument why it would be inconsistent to mandate the AOM filing in § 2912d(1) while at the same time permitting § 5856(1) to toll the running of the statutory limitations period. Tolling in these circumstances would not appear to vitiate the requirements of § 2912d(1): plaintiffs would still have to file the AOM and their claims might be dismissed when they failed to do so, just not on statute of limitations grounds. In other words, § 2912d(1) has its own work to do—namely, forcing plaintiffs to provide medical opinion evidence that their claims are not frivolous—and it need not take on the additional task of tolling the limitations period, especially when it nowhere mentions that period.[17]

A review of the broader statutory context challenges *Scarsella*'s conclusion that the Legislature intended § 2912d to affect the limitations period. We have already rejected the only imaginable interpretation linking § 2912d to the general statute of limitations. In *Ligons v Crittenton Hosp*, the plaintiff argued that "for *Scarsella* to be consistent with MCL 600.1901 and MCL 600.5856(a), an AOM must be 'part and parcel' of the complaint."[18] We explained to the contrary that "*Scarsella* . . . did not rule that an AOM is a complaint or is 'part and parcel' of the complaint. Rather, the Court consistently referred to the complaint and the AOM as distinct documents."[19] We must treat them as distinct because § 2912d does so. Accordingly, because § 5856(a) refers to the complaint but not the AOM, a persuasive argument can be made that the Legislature did not intend for the AOM to play any role in tolling.

Absent any explicit textual indication that filing the AOM is a condition to tolling, *Scarsella*'s contrary conclusion is questionable

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controlling, we consider which provision applies to the more narrow realm of circumstances, and which to the more broad realm." *Miller v Allstate Ins Co*, 481 Mich 601, 613 (2008).

[16] *RadLAX Gateway Hotel, LLC v Amalgamated Bank*, 566 US 639, 645 (2012); *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28, 43-44 (2015); Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul: Thomson/West, 2012), p 183.

[17] Further, the AOM's purpose does not to relate to the limitations period or tolling; rather, "[t]he purpose of the affidavits of merit is to deter frivolous medical malpractice claims by verifying through the opinion of a qualified health professional that the claims are valid." *Barnett v Hidalgo*, 478 Mich 151, 163-164 (2007).

[18] *Ligons*, 490 Mich at 82 (emphasis omitted).

[19] *Id*. at 82-83.

because we must be cautious "not [to] read into the statute what is not within the Legislature's intent as derived from the language of the statute."[20] And we certainly may not do so when the Legislature has already spoken on the subject. The Legislature clearly knows how to start and stop the running of the limitations period in medical malpractice cases. For example, the supposedly more "general" tolling provisions in § 5856 explicitly address medical malpractice cases. Section 5856 tolls the running of the statutory limitations period if the plaintiff provided the notice of intent to sue (NOI) required in § 2912b.[21] This is meaningful because "the expression of one thing suggests the exclusion of all others . . . ."[22] That the Legislature provided for the NOI's tolling effect, but not the AOM's, suggests the AOM may not be needed for tolling to occur. The same implication arises from the Legislature's inclusion of "complaint" as a tolling mechanism, but not the AOM. In short, the Legislature knows how to tweak the limitations period in the medical malpractice context, but does not appear to have done so for AOMs.[23]

Even more directly, an argument can be made that the Legislature expressly applied the general tolling provisions in § 5805 and § 5856 to

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[20] *AFSCME v Detroit*, 468 Mich 388, 400 (2003). The two cases *Scarsella* cited were not on point, given that each dealt with court rules not at issue in *Scarsella* and neither addressed statutes of limitations or tolling. See *Stephenson v Union Guardian Trust Co*, 289 Mich 237 (1939); *Hadley v Ramah*, 134 Mich App 380 (1984).

[21] MCL 600.5856(c).

[22] *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 712 (2003).

[23] It is worth noting that the legislative history is in accord with the above analysis. We have found bills considered by the Legislature to be useful in elucidating statutory provisions. See *In re Certified Question*, 468 Mich 109, 115 n 5 (2003). In 1993 the Legislature considered a proposed version of § 2912d that would have made the filing of an AOM a prerequisite to tolling the limitations period. It would have required a plaintiff to file a certificate with his or her complaint "reflecting that the person has complied with section 2912f. If the complaint is not accompanied by the certificate required under this subsection, the complaint does not toll the statute of limitations . . . ." 1993 HB 4067. Proposed § 2912f, in turn, contained the AOM requirement, although it made the plaintiff serve the AOM on the defendant with the precomplaint notice of intent to sue rather than with the complaint. See 1993 HB 4067. Under this proposal, the failure to serve the AOM would prevent the plaintiff from certifying compliance with § 2912f, and without that certification the statutory limitations period would continue to run. In other words, the AOM requirements were keyed to the statute of limitations. Yet the Legislature never enacted this proposal, which would have been at least one way to make filing the AOM a condition to tolling if the Legislature so desired.

medical malpractice claims. This argument starts with MCL 600.5838(2), which establishes the framework for the limitations period:

> Except as otherwise provided in [MCL 600.5838a or 600.5838b], an action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later.

Unpacking this section suggests that the normal limitations-period rules control in medical malpractice cases. As an initial matter, § 5805, referred to in the statute quoted above, establishes the general two-year limitations period for malpractice claims. Sections 5851 to 5856, also mentioned, provide for accrual dates and tolling in various specific circumstances. Relevant here, § 5856(a) states that the action is tolled when the complaint is filed and served. The only specified exceptions to that rule come in § 5838a and § 5838b. The latter regards legal malpractice claims and is not relevant here. The former defines a medical malpractice claim and also establishes the limitations framework for those claims, largely mirroring § 5838(2):

> An action involving a claim based on medical malpractice under circumstances described in subsection (2)(a) or (b) may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. . . . A medical malpractice action that is not commenced within the time prescribed by this subsection is barred.[24]

Sections 5838 and 5838a thus state that the normal rules in § 5805 and § 5856(1) "prescribe[]" the commencement of medical malpractice cases. Further, neither § 5838 nor § 5838a includes § 2912d(1) in the list of statutes "prescrib[ing]" when to commence an action. Thus, none of these provisions suggests that the AOM requirement in § 2912d(1) has any bearing on when an action commences. Under this interpretation the usual tolling regime would apply to medical malpractice cases, i.e., under § 5856(1), the running of the statutory limitations period would be tolled when the complaint is filed and served.

Scarsella's contrary conclusion has given rise to a series of workability problems. The present case, for example, would not have raised even a colorable question without *Scarsella*'s holding. The issue resolved below was whether all the elements of the "good cause" exception to the AOM filing requirement had to be met before the limitations period expires. The exception provides that a plaintiff has "an additional 28 days in which to file the affidavit" if he or she can demonstrate "good

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[24] MCL 600.5838a(3).

cause" for the delay.[25] Defendants contended that the trial court needed to grant the extension before the expiration of the limitations period. They premised this argument on Court of Appeals caselaw holding that the trial court's grant of a plaintiff's extension motion, and not the mere filing of that motion, tolls the running of the statutory limitations period.[26] The Court of Appeals majority in the present case properly read the grant of an "additional 28 days" to mean a full 28 days and not "up to 28 days *if* the trial court gets around to deciding the motion before the claim is time-barred."[27] And because plaintiffs filed their complaint and motion within the limitations period, filed their AOM within 28 days of their complaint, and the trial court ultimately granted the extension, they complied with all the requirements of § 2912d(2).

This holding gives effect to the statute's plain meaning. But the outcome would be beyond dispute if *Scarsella* were not on the books. Defendants argued that the "good cause" exception does not toll the running of the statutory limitations period because it says nothing about tolling. If *Scarsella* is incorrect, then the fact that § 2912d(2) is silent regarding the statute of limitations makes perfect sense: the AOM has no effect on commencing a lawsuit for purposes of the statute of limitations. As a result, the Legislature would not need to mention tolling when providing an AOM-filing extension period. Instead, the general tolling provisions would apply, and a plaintiff's filing and service of the complaint would halt the limitations period.[28]

Scarsella likewise confuses the rules pertaining to affirmative defenses. As I explained in my partial dissent in *Tyra v Organ Procurement Agency of Mich*, the reasoning of *Scarsella* undergirds the rule "that if a complaint is ineffective at commencing the action, the defendant has no

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[25] MCL 600.2912d(2).

[26] See *Barlett v North Ottawa Comm Hosp*, 244 Mich App 685, 690-692 (2001).

[27] Consider the difficulties that the Court of Appeals' dissent would create. A plaintiff could, for example, file his or her complaint, along with a § 2912d(2) extension motion, with 10 days to spare in the limitations period. The AOM could be filed within 28 days and the trial court could ultimately grant the extension. But if the trial court's order came even a day after the limitations period would have expired, plaintiff's claim would be time-barred despite compliance with every requirement in § 2912d(2). In that scenario, the plaintiff would have had only 10 additional days to file the AOM, not 28. Such a result could deprive an otherwise deserving plaintiff of the statutorily guaranteed extension simply because the court was busy with other cases. The difficulty is even more pronounced when considering the § 2912d(3) exception, which permits an additional 91 days to file the AOM if a defendant fails to allow access to medical records as required by MCL 600.2912b.

[28] See MCL 600.5856(a).

obligation to file affirmative defenses, or an answer for that matter."[29] This broad proposition arises from our order in *Auslander v Chernick*.[30] There, we held that defendants could forgo raising a statute of limitations defense when the plaintiffs failed to timely file an AOM because the action never properly commenced.[31]

As I posited in *Tyra*, *Auslander* engages in "circular reasoning" to reach its conclusion: "a defendant is relieved of its obligation to allege and establish that a complaint is legally deficient because the complaint is legally deficient."[32] This problem results from *Scarsella* because the defendant is relieved from its obligation only by virtue of *Scarsella*'s holding that the case has not yet commenced. This makes a hash of the normal rule that the statute of limitations defense is waivable.[33] The typical rules, then, do not apply to medical malpractice cases; and this is for no other reason than *Scarsella*'s holding that such lawsuits are not commenced "for statute of limitations purposes" without tendering an AOM.[34]

There may be reasons *Scarsella* reached the correct result, and even if not, *stare decisis* might counsel retaining it. I do not, of course, decide those questions here. But given its shaky legal foundation and the continuing dislocations in our law it has caused, I would reconsider that decision in an appropriate future case.

MARKMAN, C.J. (*dissenting*). I would not deny leave to appeal, but would reverse the judgment of the Court of Appeals and reinstate the trial court's order granting defendants' motion for summary disposition. I would do so for the reasons set forth in the Court of Appeals' dissenting opinion as well as for the reasons set forth in this statement.

The statutory period of limitations in a medical malpractice action is two years. MCL 600.5805(6). The statute of limitations is tolled at the time the complaint is filed. MCL 600.5856(a). In order to commence a medical malpractice action, the plaintiff must file an affidavit of merit with the complaint. Specifically, MCL 600.2912d(1) provides:

> [T]he plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney *shall file* with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably be-

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[29] *Tyra*, 498 Mich at 101 (VIVIANO, J., dissenting in part).

[30] *Auslander v Chernick*, 480 Mich 910, 910 (2007).

[31] *Id*., adopting *Auslander v Chernick*, unpublished per curiam opinion of the Court of Appeals, issued May 1, 2007 (Docket No. 274079) (JANSEN, J., dissenting).

[32] *Tyra*, 498 Mich at 102 (VIVIANO, J., dissenting in part).

[33] *Id*. at 104, citing MCR 2.111(F)(3)(a) and *Walters v Nadell*, 481 Mich 377, 389 (2008).

[34] *Scarsella*, 461 Mich at 549.

> lieves meets the requirements for an expert witness under section 2169. [Emphasis added.]

Because an affidavit of merit has to be filed with the complaint in order to commence a medical malpractice action, MCL 600.2912d(1), a complaint and an affidavit of merit have to be filed to toll the statute of limitations under MCL 600.5856(a). *Scarsella v Pollak*, 461 Mich 547, 550 (2000) ("[B]ecause the complaint without an affidavit [is] insufficient to commence plaintiff's malpractice action, it [also does] not toll the period of limitation.") (quotation marks and citation omitted); see also *Ligons v Crittenton Hosp*, 490 Mich 61, 72-73 (2011); *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68, 79-80 & n 8, 93-94 (2015).[1] The contrary "interpretation would undo the Legislature's clear statement that an affidavit of merit 'shall' be filed with the complaint." *Scarsella*, 461 Mich at 552.

"MCL 600.2912d(2) provides a measure of relief when an affidavit of merit cannot be filed with the plaintiff's complaint." *Id*. at 548 (quotation marks and citations omitted). "That subsection allows, on motion for good cause shown, an additional twenty-eight days in which to file the required affidavit." *Id*. at 548-549 (quotation marks and citation omitted). Specifically, MCL 600.2912d(2) provides:

> Upon motion of a party for *good cause* shown, the court in which the complaint is filed *may* grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1). [Emphasis added.]

Importantly, a plaintiff is not automatically entitled to an additional 28 days in which to file an affidavit of merit. Instead, the trial court "may" grant the plaintiff's motion for an additional 28 days "for good cause shown." See *Barlett v North Ottawa Comm Hosp*, 244 Mich App 685,

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[1] In *Tyra* the plaintiff asserted that *Scarsella* should be overruled because MCL 600.1901 states that "[a] civil action is commenced by filing a complaint with the court." The *Tyra* Court rejected that assertion, explaining: "[M]ore specific statutory provisions control over more general statutory provisions, and thus the specific requirements of [MCL 600.2912b(1)] regarding 'commenc[ing] an action alleging medical malpractice' prevail over the general requirements of MCL 600.1901 regarding the commencing of civil actions." Although a civil action is generally commenced by filing a complaint, a medical malpractice action can only be commenced by filing a timely [notice of intent to sue] and then filing a complaint and an affidavit of merit after the applicable notice period has expired, but before the period of limitations has expired. [*Tyra*, 498 Mich at 94, quoting *Boodt v Borgess Med Ctr*, 482 Mich 1001, 1002 (MARKMAN, J., concurring) (some alterations in original; citation omitted).]

691-692, lv den 465 Mich 907 (2001) ("[The mere filing of a motion to extend the time for filing [an affidavit of merit] is [not] sufficient to toll the period of limitation" because "[t]he plain language of subsection 2912d(2) indicates that the granting of an additional twenty-eight-day period in which to file an affidavit of merit is not automatic. Rather, the trial court, by virtue of the permissive ('may') and conditional language ('good cause') has discretion to either grant or deny a plaintiff's motion.").

In addition, MCL 600.2912d(2) does not say anything about tolling the statute of limitations. Compare MCL 600.5856(c), which expressly states that the filing of a notice of intent tolls the statute of limitations. See also *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 581-582, 593 (2005), which held that this Court lacks the authority to read into a statute a tolling rule that is not itself found in the statute. MCL 600.2912d(2) simply states that the trial court may grant the plaintiff "an additional 28 days in which to file the affidavit." In other words, with the trial court's permission, the plaintiff can file the complaint without the affidavit of merit and then file the affidavit of merit within 28 days of the complaint. However, this provision says nothing about tolling the statute of limitations. Therefore, it appears that the purpose of MCL 600.2912d(2) is not principally to toll the statute of limitations, but to allow a plaintiff to file an affidavit of merit within 28 days of the complaint even though MCL 600.2912d(1) ordinarily requires that the affidavit be filed with the complaint. That is, MCL 600.2912d(2) simply sets forth an exception to the general requirement of MCL 600.2912d(1) that the affidavit of merit be filed with the complaint.

Nonetheless, even assuming that MCL 600.2912d(2) *does* have a tolling effect on the statute of limitations, as this Court has stated in dicta, see *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 229 (1997),[2] this tolling cannot possibly begin until the trial court has *granted* the plaintiff's motion for an extension because MCL 600.2912d(2) expressly states that the trial court "may" grant the plaintiff an additional 28 days to file the affidavit of merit "for good cause shown." If we were to read this provision as allowing the filing of the motion to toll the running of the period of limitations, we would be rewriting the provision to state that a plaintiff can always file the affidavit of merit within 28 days of filing the complaint, i.e., the plaintiff effectively never has to file the affidavit of merit with the complaint, which would be contrary to both MCL 600.2912d(1) and (2).

Finally, because the trial court in the instant case did not grant the motion for an additional 28 days until *after* the statutory period of

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[2] Specifically, *Solowy*, 454 Mich at 229, opined: MCL 600.2912d(2) . . . allows, upon a showing of good cause, an additional twenty-eight days to obtain the required affidavit of merit. During this period, the statute will be tolled and summary disposition motions on the ground of failure to state a claim should not be granted. This was dicta because the plaintiff in *Solowy* did not file a motion for an additional 28 days under MCL 600.2912d(2).

limitations expired, the trial court's order granting the motion could not have possibly tolled the running of the already-expired period of limitations, as the trial court *itself* recognized. There is simply no authority for the proposition that a belated grant of an extension of time can retroactively resurrect an expired cause of action. Rather, MCL 600.5805(1) provides, "A person *shall not* bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section." (Emphasis added.) There is no dispute that the action at issue here accrued on February 9, 2011, and that plaintiff did not file the affidavit of merit until February 26, 2013, which was *after* the two-year period of limitations expired. Pursuant to MCL 600.5805(1), plaintiff therefore cannot bring or maintain his medical malpractice cause of action.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v RALPH WOODARD, No. 154968; Court of Appeals No. 334739.

TAYLOR SCHOOL DISTRICT v RHATIGAN, No. 155116; reported below: 318 Mich App 617.

BERNSTEIN, J., would grant leave to appeal.

PEOPLE v DUDLEY, No. 155364; Court of Appeals No. 328568.

PEOPLE v LONDELL WILLIAMS, No. 155421; Court of Appeals No. 328521.

PEOPLE v ANTONIO ANDERSON, No. 155425; Court of Appeals No. 336153.

PEOPLE v GOOD, No. 155653; Court of Appeals No. 329177.

PEOPLE v LITTLETON, No. 155813; Court of Appeals No. 337748.

In re SANDOVAL REINSTATEMENT PETITION, No. 155992.

HOLT v USHE, No. 156035; Court of Appeals No. 330076.

Summary Disposition October 6, 2017:

PEOPLE v JOSIAH JOHNSON, No. 150799; Court of Appeals No. 324333. By order of January 31, 2017, the application for leave to appeal the December 19, 2014 order of the Court of Appeals was held in abeyance pending the decision in *People v Comer* (Docket No. 152713). On order of the Court, the case having been decided on June 23, 2017, 500 Mich 278 (2017), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the August 6, 2013 amended judgment of sentence, and we remand this case to the Wayne Circuit Court to reinstate the October 31, 2007 judgment of sentence. In *Comer*, we held that correcting an invalid sentence by adding a statutorily mandated term is a substantive correction that a trial court may make on its own initiative only before judgment is entered. In this case, the trial court did not have authority to amend the

judgment of sentence after entry to add a provision for lifetime electronic monitoring under MCL 750.520b(2)(d) and MCL 750.520n. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

ZAHRA, J., states as follows:

Consistently with my opinion in *People v Comer*, 500 Mich 278, 301-303 (2017) (ZAHRA, J., concurring in part and dissenting in part), I disagree with the majority's chosen remedy to reinstate the very sentence it properly concluded was invalid. Instead of reinstating an invalid sentence that is predicated on an invalid plea, I would conclude that the appropriate remedy in this case is to "give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea." MCR 6.310(C); cf. *People v Cobbs*, 443 Mich 276 (1993).[1]

PEOPLE v GUZIKOWSKI, No. 152026; Court of Appeals No. 324583. By order of September 27, 2016, the application for leave to appeal the April 14, 2015 order of the Court of Appeals was held in abeyance pending the decision in *People v Comer* (Docket No. 152713). On order of the Court, the case having been decided on June 23, 2017, 500 Mich 278 (2017), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the May 23, 2014 amended judgment of sentence of the Osceola Circuit Court, and we remand this case to the trial court for reinstatement of the August 27, 2007 judgment of sentence. In *Comer*, we held that correcting an invalid sentence by adding a statutorily mandated term is a substantive correction that a trial court may make on its own initiative only before judgment is entered. In this case, the trial court did not have authority to amend the judgment of sentence after entry to add a provision for lifetime electronic monitoring under MCL 750.520b(2)(d) and MCL 750.520n. We do not retain jurisdiction.

ZAHRA, J., states as follows:

Consistently with my opinion in *People v Comer*, 500 Mich 278, 301-303 (2017) (ZAHRA J., concurring in part and dissenting in part), I disagree with the majority's chosen remedy to reinstate the very sentence it properly concluded was invalid. Instead of reinstating an invalid sentence that is predicated on an invalid plea, I would conclude that the appropriate remedy in this case is to "give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea." MCR 6.310(C); cf. *People v Cobbs*, 443 Mich 276 (1993).

PEOPLE v GUZIKOWSKI, No. 152028; Court of Appeals No. 324584. By order of September 27, 2016, the application for leave to appeal the April 14, 2015 order of the Court of Appeals was held in abeyance pending the decision in *People v Comer* (Docket No. 152713). On order of the Court, the case having been decided on June 23, 2017, 500 Mich 278 (2017), the

[1] Although defendant's motion is titled a motion for relief from judgment under MCR 6.508(D), defendant is entitled to direct review of the August 6, 2013 amended judgment of sentence.

application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the June 27, 2014 amended judgment of sentence of the Mecosta Circuit Court, and we remand this case to the trial court for reinstatement of the August 27, 2007 judgment of sentence. In *Comer*, we held that correcting an invalid sentence by adding a statutorily mandated term is a substantive correction that a trial court may make on its own initiative only before judgment is entered. In this case, the trial court did not have authority to amend the judgment of sentence after entry to add a provision for lifetime electronic monitoring under MCL 750.520b(2)(d) and MCL 750.520n. We do not retain jurisdiction.

ZAHRA, J., states as follows:

Consistently with my opinion in *People v Comer*, 500 Mich 278, 301-303 (2017) (ZAHRA, J., concurring in part and dissenting in part), I disagree with the majority's chosen remedy to reinstate the very sentence it properly concluded was invalid. Instead of reinstating an invalid sentence that is predicated on an invalid plea, I would conclude that the appropriate remedy in this case is to "give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea." MCR 6.310(C); cf. *People v Cobbs*, 443 Mich 276 (1993).

PEOPLE v LUKE, No. 152570; Court of Appeals No. 328693. By order of September 6, 2016, the application for leave to appeal the September 15, 2015 order of the Court of Appeals was held in abeyance pending the decision in *People v Comer* (Docket No. 152713). On order of the Court, the case having been decided on June 23, 2017, 500 Mich 278 (2017), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the March 5, 2015 amended judgments of sentence, and we remand this case to the Monroe Circuit Court to reinstate the June 6, 2014 judgments of sentence. In *Comer*, we held that correcting an invalid sentence by adding a statutorily mandated term is a substantive correction that a trial court may make on its own initiative only before judgment is entered. In this case, the trial court did not have authority to amend the judgment of sentence after entry to add a provision for consecutive sentencing under MCL 768.7a(2). We do not retain jurisdiction.

ZAHRA, J., states as follows:

Consistently with my opinion in *People v Comer*, 500 Mich 278, 301-303 (2017) (ZAHRA, J., concurring in part and dissenting in part), I disagree with the majority's chosen remedy to reinstate the very sentences it properly concluded were invalid. Instead of reinstating an invalid sentence that is predicated on an invalid plea, I would conclude that the appropriate remedy in this case is to "give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea." MCR 6.310(C); cf. *People v Cobbs*, 443 Mich 276 (1993).

Leave to Appeal Denied October 6, 2017:

PEOPLE v DIMAMBRO, Nos. 155193 and 155194; reported below: 318 Mich App 204.

ZAHRA, J. (*dissenting*). I respectfully dissent from this Court's order denying the prosecutor's application for leave to appeal. I write separately because I would vacate the judgment of the Court of Appeals addressing whether defendant demonstrated the materiality of 32 suppressed autopsy photographs. The Court of Appeals failed to assess the materiality of the photographs in relation to the totality of the evidence presented in this case. I would remand this case to the Court of Appeals for reconsideration of the materiality of the photographs in relation to the totality of the evidence presented at trial.

To establish that suppressed evidence was material under *Brady v Maryland*, 373 US 83 (1963), "a defendant must show that 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *People v Chenault*, 495 Mich 142, 150 (2014), quoting *United States v Bagley*, 473 US 667, 682 (1985). See also *Cone v Bell*, 556 US 449, 469-470 (2009) ("[E]vidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. In other words, favorable evidence is subject to constitutionally mandated disclosure when it 'could reasonably be taken to put *the whole case* in such a different light as to undermine confidence in the verdict.' "), quoting *Kyles v Whitley*, 514 US 419, 435 (1995) (emphasis added). Notably, courts must view the evidence "in its totality," *Chenault*, 495 Mich at 155, and "consider the suppressed evidence collectively, rather than piecemeal," when "assessing the materiality of the evidence," *id.* at 151. See also *Strickler v Greene*, 527 US 263, 290-294 (1999) (petitioner failed to demonstrate a reasonable probability of a different result for purposes of materiality in light of other evidence); accord *Thomas v Westbrooks*, 849 F3d 659, 663 (CA 6, 2017) ("Evidence is 'material' for *Brady* purposes when, *in view of all relevant evidence*, its absence deprives the defendant of a fair trial, understood as a trial resulting in a verdict worthy of confidence.") (quotation marks and citations omitted; emphasis added); *Henness v Bagley*, 644 F3d 308, 325 (CA 6, 2011) ("The evidence supporting the defendant's conviction also must be considered when determining potential prejudice from a *Brady* violation."), citing *Towns v Smith*, 395 F3d 251, 260 (CA 6, 2005). Although the Court of Appeals majority concluded that the suppression of the photographs was material, *People v Dimambro*, 318 Mich App 204, 220 (2016), it failed to view the suppressed evidence in relation to the totality of all the other relevant evidence, including evidence supporting defendant's conviction, in reaching that conclusion. Moreover, notwithstanding that the materiality analysis tests " 'the result of *the proceeding*,' " *Chenault*, 495 Mich at 150, quoting *Bagley*, 473 US at 682 (emphasis added), that is, the original trial, I believe that the Court of Appeals majority may have failed to afford due consideration to the assertion of the Court of Appeals dissent that, by presenting the testimony of a different expert during the posttrial *Brady* proceedings than had been presented during the trial itself, defendant failed to "establish that the testimony presented *at trial* would have been different had the defense received the 32 photographs," *Dimambro*, 318 Mich App at 228 (JANSEN, J., dissenting).

Accordingly, I would vacate the portion of the judgment of the Court of Appeals dealing with materiality and remand to that court for reconsideration of the materiality of the photographs in relation to the totality of the evidence presented at trial.

MARKMAN, C.J., and WILDER, J., joined the statement of ZAHRA, J.

PEOPLE v SMALE, No. 155506; Court of Appeals No. 336361.

Superintending Control Denied October 6, 2017:

TINDALL v ATTORNEY DISCIPLINE BOARD, No. 156516.

Reconsideration Denied October 6, 2017:

In re GIBSON, No. 156202; Court of Appeals No. 334443. Leave to appeal denied at 501 Mich 851.

Summary Disposition October 11, 2017:

PEOPLE v HEARN, No. 156569; Court of Appeals No. 339279. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the May 25, 2017 order of the Wayne Circuit Court granting a new trial. The court failed to articulate how the defendant was prejudiced by trial counsel's errors. See *People v Trakhtenberg*, 493 Mich 38, 55-56 (2012). We remand this case to the Wayne Circuit Court for further articulation of how the defendant was prejudiced by counsel's errors or to explain why a showing of prejudice was unnecessary. The motion for stay is denied as moot. We do not retain jurisdiction.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

Summary Disposition October 13, 2017:

PEOPLE v HARBISON, No. 155501; Court of Appeals No. 326105. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment concerning the testimony of Dr. N. Debra Simms, and we remand this case to that court for reconsideration in light of *People v Peterson*, 450 Mich 349 (1995). In all other respects, leave to appeal is denied. We do not retain jurisdiction.

Leave to Appeal Denied October 13, 2017:

PEOPLE v JAMAL ADAMS, No. 155802; Court of Appeals No. 329385.

WILDER, J., did not participate because he was on the Court of Appeals panel.

DALY v WARD, No. 155852; Court of Appeals No. 333425. On order of the Court, the application for leave to appeal the April 18, 2017

judgment of the Court of Appeals is considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court.

However, we take this opportunity to emphasize how critical it is that trial courts fully comply with MCL 722.27(1)(c) before entering an order that alters a child's established custodial environment.

"The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." *Id*. A court "shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." *Id*. This heightened evidentiary burden for altering a child's established custodial environment recognizes the commonsense proposition that a child benefits from the permanence and stability of an established custodial environment, and therefore that such an environment should not lightly be altered. Importantly, MCL 722.27(1)(c) does not limit this heightened evidentiary burden to orders that expressly alter a child's established custodial environment. Rather, while a trial court has the authority to enter an *ex parte* interim order concerning parenting time, see MCL 722.27a(12), it may not enter such an order if it also alters the child's established custodial environment without first making the findings required by MCL 722.27(1)(c). E.g., *Powery v Wells*, 278 Mich App 526, 528 (2008); *Brown v Loveman*, 260 Mich App 576, 595 (2004).

An order altering a child's established custodial environment has serious consequences for all the parties involved, as it deprives both the child and one parent of precious time together and alters that parent's evidentiary burdens at any *subsequent* custody hearing. See *Hayes v Hayes*, 209 Mich App 385, 388-389 (1995) ("[A]n error by the court in granting defendant temporary custody of the children pending the permanent custody trial [does] not affect the trial court's analysis of whether an established custodial environment existed."). In many instances, it is difficult—if not altogether impossible—to effectively remedy on appeal, and to restore the *status quo ante*, following an erroneous order altering a child's established custodial environment without causing undue harm to the child. Thus, to restate, it is critical that trial courts, in the *first* instance, carefully and fully comply with the requirements of MCL 722.27(1)(c) before entering an order that alters a child's established custodial environment. Any error in this regard may have lasting consequences yet effectively be irreversible.

KIMBALL v PEARSON, No. 156417; Court of Appeals No. 335639.

In re ALLEN, No. 156434; Court of Appeals No. 336285.

Reconsideration Denied October 13, 2017:

In re DOWNING, No. 156264; Court of Appeals No. 334925. Leave to appeal denied at 501 Mich 852.

Leave to Appeal Denied October 18, 2017:

PEOPLE v BOND, No. 156603; Court of Appeals No. 340484.

Leave to Appeal Granted October 20, 2017:

PEOPLE v SHARPE, Nos. 155747 and 155748; reported below: 319 Mich App 153. The parties shall address: (1) whether evidence related to the complainant's pregnancy, abortion, and lack of other sexual partners was within the scope of the rape-shield statute, MCL 750.520j(1), i.e., whether this evidence constituted "[e]vidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, [or] reputation evidence of the victim's sexual conduct . . ."; (2) if the evidence was within the scope of the rape-shield statute, whether it was nonetheless admissible under one of the exceptions set forth at MCL 750.520j(1); and (3) if the evidence was not within the scope of the rape-shield statute, whether it was admissible under general rules governing the admissibility of evidence, see MRE 402 and MRE 403. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

We further order the Wayne Circuit Court to appoint attorney Syed Ahmadul Huda (P76498) to represent the defendant pro bono in this Court.

Leave to Appeal Denied October 20, 2017:

NL VENTURES VI FARMINGTON, LLC v CITY OF LIVONIA, No. 153110; reported below: 314 Mich App 222.

MENARD, INC v CITY OF ESCANABA, No. 154062; reported below: 315 Mich App 512.

In re HEARD, No. 156526; Court of Appeals No. 339727.

In re JONES, No. 156558; Court of Appeals No. 336271

Summary Disposition October 24, 2017:

PEOPLE v CLARENCE ROSS, No. 153058; Court of Appeals No. 321353. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the judgment of the Court of Appeals holding that evidence of the Dutton Street robbery was admissible under the "res gestae exception" to MRE 404(b) and that the prosecuting attorney was not required, pursuant to MRE 404(b)(2), to provide notice of his intent to admit that evidence. We remand this case to the Court of Appeals for reconsideration in light of this Court's decision in *People v Jackson, 498 Mich 246 (2015). In all other respects, leave to appeal is denied.*

PEOPLE v TOWNE, No. 154019; Court of Appeals No. 322820. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the

judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *People v Frederick*, 500 Mich 228 (2017).

PEOPLE v COWAN, No. 154444; Court of Appeals No. 331947. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court to conduct an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), to determine: (1) whether the defendant's trial counsel was ineffective for failing to call witnesses who may have provided exculpatory information; and (2) whether the defendant is entitled to relief from judgment based on these claims.

We further order the trial court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint counsel to represent the defendant at the evidentiary hearing. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v HAYS, No. 155027; Court of Appeals No. 335094. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Chippewa Circuit Court, and we remand this case to the circuit court for resentencing. The circuit court erred by assigning 25 points to Offense Variable 11 (OV 11), MCL 777.41(1)(b), when the record evidence does not support a finding that the second sexual penetration arose from the same sexual penetration that gave rise to the requisite sentencing offense. See *People v Johnson*, 474 Mich 96 (2006). That error resulted in the alteration of defendant's minimum sentencing guidelines range, entitling him to a resentencing hearing. See *People v Francisco*, 474 Mich 82 (2006). On resentencing, the circuit court shall assign zero points to OV 11.

KOHLOFF v CHRYSLER GROUP, LLC, No. 155606; Court of Appeals No. 335124. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

ARHEIT v PHEASANT RUN CO-PHASE I, No. 155808; Court of Appeals No. 335598. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we 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 Entered October 24, 2017:

TRINITY HEALTH-WARDE LAB, LLC v PITTSFIELD CHARTER TOWNSHIP, No. 154952; Court of Appeals No. 328092. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the Court of Appeals erred when it held that the petitioner for-profit limited liability company—a wholly owned subsidiary of tax-exempt Trinity Health Michigan—was not entitled to a property tax exemption under MCL 211.7o and MCL 211.7r. In addition to the brief, the

appellant shall electronically file an appendix containing the items listed at MCR 7.312(D)(2). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

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.

TM v MZ, No. 155398; Court of Appeals No. 329190. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether an appeal from a personal protection order is necessarily rendered moot by the fact of its expiration. In addition to the brief, the appellant shall electronically file an appendix containing the items listed at MCR 7.312(D)(2). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Family Law 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.

Leave to Appeal Denied October 24, 2017:

PEOPLE v KEITH SMITH, No. 154109; Court of Appeals No. 331894.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v KONSDORF, No. 154596; Court of Appeals No. 333881.

MACOMB v FARMERS INSURANCE EXCHANGE, No. 154667; Court of Appeals No. 327572.

DAWSON v CITY OF GRAND HAVEN, No. 155272; Court of Appeals No. 329154.

PEOPLE v GONZALES, No. 155292; Court of Appeals No. 328060.

PEOPLE v NASEMAN, No. 155387; Court of Appeals No. 328576.

WADDELL v TALLMAN, No. 155483; Court of Appeals No. 328926.

WILDER, J., did not participate because he was on the Court of Appeals panel.

COLLINS v CITY OF FLINT, VALE v CITY OF FLINT, MORRIS v GLASGOW, TEAT v GLASGOW, MARSHALL v GLASGOW, STRILER v GLASGOW, and BUSH v GLASGOW, Nos. 155571, 155572, 155573, 155574, 155575, 155576, and 155577; Court of Appeals Nos. 334792, 334793, 334794, 334795, 334796, 334797, and 334798.

MARKMAN, C.J., and ZAHRA and WILDER, JJ., would remand this case to the Court of Appeals.

PEOPLE v MARSHA SPRINGER, No. 155687; Court of Appeals No. 335522.

BERNSTEIN, J., would grant leave to appeal.

PEOPLE v ANTHONY SPRINGER, No. 155753; Court of Appeals No. 335554.

BERNSTEIN, J., would grant leave to appeal.

PEOPLE v BRANDON BENSON, No. 156003; Court of Appeals No. 333084.

PEOPLE v HUBBERT, No. 156080; Court of Appeals No. 336289.

WILDER, J., did not participate because he was on the Court of Appeals panel.

Leave to Appeal Denied October 25, 2017:

PEOPLE v DEMARCUS SMITH, No. 156412; Court of Appeals No. 338953. On order of the Court, the application for leave to appeal the August 23, 2017 order of the Court of Appeals is considered, and it is denied. We note, however, that the Jackson Circuit Court's order, from which the defendant appeals, only denied the defendant's motion for preliminary jury instructions. That order did not rule on any request for final instructions. Therefore, the order does not prohibit the defendant from presenting evidence at trial and requesting final jury instructions on affirmative defenses. Before closing arguments, the trial court must evaluate whether the defendant has produced "some evidence from which the jury can conclude that the essential elements" of affirmative defenses are present and determine if the jury must be instructed on the defenses. *People v Lemons*, 454 Mich 234, 246 (1997); see also MCR 2.512(D)(2) and MCR 2.513(N)(1).

PEOPLE v TIMOTHY GRAY, No. 156636; Court of Appeals No. 337645.

Summary Disposition October 27, 2017:

PEOPLE v PIPPEN, No. 153324; Court of Appeals No. 321487. On October 12, 2017, the Court heard oral argument on the application for leave to appeal the January 14, 2016 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we reverse that part of the Court of Appeals judgment holding that the defendant's trial counsel's performance was objectively reasonable. Defense counsel

failed to interview a witness who may have had information concerning his client's innocence prior to trial. The witness gave exculpatory statements to the defense investigator, and defense counsel was aware the witness spoke with the investigator. Failure to investigate such a witness is not a strategic decision entitled to deference. See *Wiggins v Smith*, 539 US 510; 123 S Ct 2527; 156 L Ed 2d 471 (2003); and *Towns v Smith*, 395 F3d 251 (CA 6, 2005). We also vacate that part of the Court of Appeals judgment holding that the defendant was not prejudiced by defense counsel's performance, and we remand this case to the Wayne Circuit Court for a determination whether, considering the totality of the evidence presented, there is a reasonable probability that the outcome of the trial was affected. See *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). We do not retain jurisdiction.

WILDER, J., did not participate because he was on the Court of Appeals panel.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered October 27, 2017:

BLACKWELL v FRANCHI, No. 155413; reported below: 318 Mich App 573. The appellants shall file a supplemental brief within 42 days of the date of this order addressing whether the appellants owed a duty to warn the appellee of the condition on the land at issue, given the general rule that "[a] landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved," *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596 (2000). In addition to the brief, the appellants shall electronically file an appendix containing the items listed at MCR 7.312(D)(2). The appellee shall file a supplemental brief within 21 days of being served with the appellants' brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellants. A reply, if any, must be filed by the appellants within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Reconsideration Denied October 27, 2017:

In re SNOW, No. 156326; Court of Appeals No. 335536. Leave to appeal denied at 501 Mich 870.

Summary Disposition October 31, 2017:

PEOPLE v JAMES TERRELL, No. 152470; reported below: 312 Mich App 450. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the Court of Appeals judgment that remands this case to the Wayne Circuit Court for proceedings under *People v Lockridge*, 498 Mich 358 (2015). As the parties agree, the Court of Appeals

erroneously concluded that relief is warranted under *Lockridge* even where the defendant's guidelines range was not enhanced by judicial fact-finding. See *Lockridge*, 498 Mich at 394-395. In all other respects, leave to appeal is denied.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE V SHERBURNE, No. 152680; Court of Appeals No. 329174. By order of October 26, 2016, the application for leave to appeal the October 14, 2015 order of the Court of Appeals was held in abeyance pending the decisions in *People v Steanhouse* (Docket No. 152849) and *People v Masroor* (Docket Nos. 152946-8). On order of the Court, the cases having been decided on July 24, 2017, 500 Mich 453 (2017), the application is again considered and, pursuant to MCR 7.305(H)(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 the defendant's sentence is reasonable under the standards set forth in *People v Steanhouse*.

PEOPLE V SHANK, No. 153000; reported below: 313 Mich App 221. By order of July 26, 2016, the application for leave to appeal the November 17, 2015 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Steanhouse* (Docket No. 152849) and *People v Masroor* (Docket Nos. 152946-8). On order of the Court, the cases having been decided on July 24, 2017, 500 Mich 453 (2017), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals remanding this case to the trial court for proportionality review and for a hearing pursuant to *People v Lockridge*, 498 Mich 358 (2015), and we remand this case to the Court of Appeals for plenary review of the defendant's sentencing claims, including that his sentence was disproportionate under the standard set forth in *People v Milbourn*, 435 Mich 630, 636 (1990). See *People v Steanhouse*, 500 Mich at 460-461.

PEOPLE V SALAMI, No. 153131; Court of Appeals No. 323073. By order of July 26, 2016, the application for leave to appeal the December 10, 2015 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Steanhouse* (Docket No. 152849) and *People v Masroor* (Docket Nos. 152946-8). On order of the Court, the cases having been decided on July 24, 2017, 500 Mich 453 (2017), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals remanding this case to the trial court for proportionality review and for a hearing pursuant to *People v Lockridge*, 498 Mich 358 (2015), and we remand this case to the Court of Appeals for plenary review of the prosecutor's claim that the defendant's sentence was disproportionate, applying the standard set forth in *People v Milbourn*, 435 Mich 630, 636 (1990). See *People v Steanhouse*, 500 Mich at 460-461.

PEOPLE V DICKEN, No. 153242; Court of Appeals No. 322998. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals remanding this case to the trial court for proportionality review and for a hearing pursuant to

People v Lockridge, 498 Mich 358 (2015), and we remand this case to the Court of Appeals for plenary review of the defendant's claim that her sentence was disproportionate under the standard set forth in *People v Milbourn*, 435 Mich 630, 636 (1990). In all other respects, leave to appeal is denied.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v MARIO WILLIS, No. 153374; Court of Appeals No. 320659. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the order of the Court of Appeals remanding this case to the trial court for proportionality review and for a hearing pursuant to *People v Lockridge*, 498 Mich 358 (2015), and we remand this case to the Court of Appeals for plenary review of whether the defendant's sentence was disproportionate under the standard set forth in *People v Milbourn*, 435 Mich 630, 636 (1990). See *People v Steanhouse*, 500 Mich at 460-461.

PEOPLE v FARREN, No. 154089; Court of Appeals No. 326593. By order of May 2, 2017, the application for leave to appeal the May 17, 2016 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Steanhouse* (Docket No. 152849) and *People v Masroor* (Docket Nos. 152946-8). On order of the Court, the cases having been decided on July 24, 2017, 500 Mich 453 (2017), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals remanding this case to the trial court for a hearing pursuant to *People v Lockridge*, 498 Mich 358 (2015), and we remand this case to the Court of Appeals for plenary review of the defendant's claim that his sentence was disproportionate under the standard set forth in *People v Milbourn*, 435 Mich 630, 636 (1990). See *Steanhouse*, 500 Mich 453, 460-461 (2017). In all other respects, leave to appeal is denied.

PEOPLE v GAILEY, No. 154718; Court of Appeals No. 333811. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v ELLEN, No. 154805; Court of Appeals No. 325627. By order of May 2, 2017, the application for leave to appeal the September 27, 2016 judgment of the Court of Appeals and the application for leave to appeal as cross-appellant were held in abeyance pending the decisions in *People v Steanhouse* (Docket No. 152849) and *People v Masroor* (Docket Nos. 152946-8). On order of the Court, the cases having been decided on July 24, 2017, 500 Mich 453 (2017), the application and the cross application are again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals remanding this case to the trial court for proportionality review and for a hearing pursuant to *People v Lockridge*, 498 Mich 358 (2015), and we remand this case to the Court of Appeals for plenary review of the defendant's sentencing claims, including that his sentence was disproportionate under the standard set forth in *People v Milbourn*, 435 Mich 630, 636 (1990). See *People v Steanhouse*, 500 Mich at 460-461. In all other respects, leave to appeal is denied.

PEOPLE v KEJUAN DOUGLAS, No. 155141; Court of Appeals No. 326666. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v YASMEEN TAYLOR, No. 155704; Court of Appeals No. 329849. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals remanding this case to the trial court for proportionality review and for a hearing pursuant to *People v Lockridge*, 498 Mich 358 (2015), and *United States v Crosby*, 397 F3d 103 (CA 2, 2005). We remand this case to the Court of Appeals for plenary review of the defendant's claim that her sentence for second-degree murder was disproportionate under the standard set forth in *People v Milbourn*, 435 Mich 630, 636 (1990). See *People v Steanhouse*, 500 Mich 453, 460-461 (2017). In all other respects, the applications for leave to appeal are denied. We do not retain jurisdiction.

Leave to Appeal Denied October 31, 2017:

PEOPLE v PYLE, No. 152426; Court of Appeals No. 328492.

PEOPLE v MICHAEL TERRELL, No. 152809; Court of Appeals No. 323201.

PEOPLE v BLAIN, No. 153108; Court of Appeals No. 330314.

PEOPLE v JUSTIN THOMAS, No. 153181; Court of Appeals No. 330187.

PEOPLE v MANNING, No. 153464; Court of Appeals No. 331059.

PEOPLE v BOWDITCH, No. 153709; Court of Appeals No. 331788.

PEOPLE v HARRIS-JAMES, No. 153946; Court of Appeals No. 332195.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v EUGENE THOMAS, No. 154093; Court of Appeals No. 332492.

PEOPLE v GLENN DAVIS, No. 154120; Court of Appeals No. 330531.

PEOPLE v DOEZEMA, No. 154127; Court of Appeals No. 331623.

PEOPLE v LYONS, No. 154129; Court of Appeals No. 332308.

PEOPLE v VIEL, No. 154137; Court of Appeals No. 332667.

PEOPLE v BUTCHER, No. 154239; Court of Appeals No. 332775.

PEOPLE v KUCHARCZYK, No. 154306; Court of Appeals No. 333078.

PEOPLE v CHARLES SMITH, No. 154395; Court of Appeals No. 331547.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v FALQUET, No. 154477; Court of Appeals No. 333549.

PEOPLE v BERNARD DANIELS, No. 154519; Court of Appeals No. 333734.

PEOPLE v TORRES, No. 154532; Court of Appeals No. 333684.

PEOPLE v TOWER, No. 154573; Court of Appeals No. 333999.

PEOPLE v TERRY WILLIAMS, No. 154726; Court of Appeals No. 332360.

PEOPLE v NUTTING, No. 154823; Court of Appeals No. 334803.

PEOPLE v CHARLES DOUGLAS, No. 154824; Court of Appeals No. 327354.
WILDER, J., did not participate because he was on the Court of Appeals panel.

KARMANOS v COMPUWARE CORPORATION and COMPUWARE CORPORATION v KARMANOS, Nos. 154852 and 154853; Court of Appeals Nos. 327476 and 327712.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v DYER, No. 154931; Court of Appeals No. 333178.

PEOPLE v PLATER, No. 154962; Court of Appeals No. 333742.

STARK v KLUNGLE, Nos. 155036 and 155037; Court of Appeals Nos. 329434 and 329882.

PEOPLE v SANDOVAL, No. 155051; Court of Appeals No. 333774.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v RANDALL HENRY, No. 155064; Court of Appeals No. 333577.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v STRONG, No. 155069; Court of Appeals No. 335079.

PEOPLE v ROBERT ANDERSON, No. 155072; Court of Appeals No. 334029.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v RANDY R SMITH, No. 155073; Court of Appeals No. 335033.

PEOPLE v GRIFFEN, No. 155080; Court of Appeals No. 333285.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v LARA, No. 155097; Court of Appeals No. 335285.

PEOPLE v MULLER, No. 155109; Court of Appeals No. 335311.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v JESS HAWKINS, No. 155114; Court of Appeals No. 335462.

PEOPLE v NATALIE FOSTER, No. 155126; Court of Appeals No. 334292.

PEOPLE v DRABLOWSKI, No. 155133; Court of Appeals No. 335138.

PEOPLE v LOVELACE, No. 155167; Court of Appeals No. 334688.

PEOPLE v ZAMORA, No. 155199; Court of Appeals No. 334019.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v HENRY BROWN, No. 155235; Court of Appeals No. 335013.

PEOPLE v ALLEN CAIN, No. 155247; Court of Appeals No. 333772.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v LESEARS, No. 155279; Court of Appeals No. 335993.

PEOPLE v BRADDOCK, No. 155285; Court of Appeals No. 334710.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v BREEDING, No. 155295; Court of Appeals No. 334103.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v PEIKERT, No. 155298; Court of Appeals No. 335526.

CASSIDY v CASSIDY, Nos. 155318, 155319, and 155320; Court of Appeals Nos. 328004, 328024, and 333319.

CASSIDY v CASSIDY, Nos. 155342, 155343, and 155344; reported below: 318 Mich App 463.

PEOPLE v BOSTIC, No. 155491; Court of Appeals No. 335997.

PEOPLE v JAMES WHITE, No. 155492; Court of Appeals No. 329108.

PEOPLE v STAHLHOOD, No. 155502; Court of Appeals No. 336521.

PEOPLE v SHEPERD, No. 155524; Court of Appeals No. 336091.

MADSEN v HOLLAND ALANO ASSOCIATION, No. 155537; Court of Appeals No. 330899.

KIM v CITY OF IONIA, No. 155558; Court of Appeals No. 334981.

PEOPLE v KENNETH WARD, No. 155581; Court of Appeals No. 335889.

FIFAREK HOUSE TRUST v LONG LAKE TOWNSHIP, No. 155585; Court of Appeals No. 330489.

PEOPLE v SHERRON WHITE, No. 155616; Court of Appeals No. 336490.

PEOPLE v DAMIEN SMITH, No. 155627; Court of Appeals No. 330125.

PEOPLE v SCHRAM, No. 155650; Court of Appeals No. 329169.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v RILEY, No. 155654; Court of Appeals No. 336387.

PEOPLE v STEENBERGH, No. 155678; Court of Appeals No. 330071.

CHATEAU v AUTO CLUB GROUP, No. 155729; Court of Appeals No. 336115.

WILDER, J., did not participate because he was on the Court of Appeals panel.

FISHMAN-PIKU v PIKU, No. 155731; Court of Appeals No. 328023.

EMERY v MICHIGAN CIVIL SERVICE COMMISSION, No. 155733; Court of Appeals No. 335411.

PEOPLE v SEAN CLARK, No. 155735; Court of Appeals No. 336678.

PEOPLE v OLIVER, No. 155736; Court of Appeals No. 336381.

PEOPLE v TREVOR ROBINSON, No. 155738; Court of Appeals No. 336721.

PEOPLE v SCHMIDT, No. 155741; Court of Appeals No. 336792.

PEOPLE v ABRAHAM, No. 155743; Court of Appeals No. 337296.

VILLAGE OF PENTWATER v BATES, No. 155749; Court of Appeals No. 328528.

PEOPLE v JUSTIN EDMONDS, No. 155776; Court of Appeals No. 324869.

GHANAM v ALEXANDER, No. 155791; Court of Appeals No. 335837.

HOBBS v HOBBS, No. 155794; Court of Appeals No. 325835.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v RIAS, No. 155816; Court of Appeals No. 328999.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PRIORITY PATIENT TRANSPORT, LLC v FARMERS INSURANCE EXCHANGE, No. 155828; Court of Appeals No. 329420.

In re BASSETT, No. 155831; Court of Appeals No. 336731.

PEOPLE v LESTER DIXON, No. 155839; Court of Appeals No. 331113.

In re PETITION OF ISABELLA COUNTY TREASURER, No. 155846; Court of Appeals No. 329858.

BABCOCK v BUFKIN, No. 155850; Court of Appeals No. 335928.

SATGUNAM v HACKNEY GROVER HOOVER & BEAN and SATGUNAM v MICHIGAN STATE UNIVERSITY, Nos. 155853 and 155854; Court of Appeals Nos. 330454 and 330660.

PEOPLE v SWANIGAN, No. 155866; Court of Appeals No. 330271.

PEOPLE v ROSAS, No. 155875; Court of Appeals No. 330296.

PEOPLE v RICARDO STANFORD, No. 155879; Court of Appeals No. 329388.

LEWIS v CAMERON, No. 155883; Court of Appeals No. 330743.

BERNSTEIN, J., did not participate due to his prior relationship with the Sam Bernstein Law Firm.

ROTH v CRONIN, No. 155887; Court of Appeals No. 329018.

PEOPLE v HUMES, No. 155891; Court of Appeals No. 330780.

PEOPLE v WILLIE GRAHAM, No. 155893; Court of Appeals No. 331592.

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA v XL INSURANCE AMERICA, INC, No. 155898; Court of Appeals No. 329277.

PEOPLE v FEENEY, No. 155900; Court of Appeals No. 337350.

PEOPLE v BLACKMAN, No. 155918; Court of Appeals No. 337372.

PEOPLE v STOCKERO, No. 155919; Court of Appeals No. 336944.

PEOPLE v FINN, No. 155925; Court of Appeals No. 336886.

PEOPLE v GRIMSLEY, No. 155927; Court of Appeals No. 336814.

NICHOLS v MAYS, No. 155930; Court of Appeals No. 335709.

PEOPLE v SAILS, No. 155931; Court of Appeals No. 330192.

PEOPLE v ARIC HOLLOWAY, No. 155932; Court of Appeals No. 331114.

WILDER, J., did not participate because he was on the Court of Appeals panel.

DEPARTMENT OF TRANSPORTATION v RIVERVIEW-TRENTON RAILROAD COMPANY, No. 155935; Court of Appeals No. 337664.

DEPARTMENT OF TRANSPORTATION v CROWN ENTERPRISES, INC, Nos. 155937, 155938, 155939, 155940, 155941, 155942, 155943, 155944, 155945, and

155946; Court of Appeals Nos. 337669, 337677, 337679, 337685, 337687, 337690, 337692, 337693, 337694, and 337696.

DEPARTMENT OF TRANSPORTATION v DIBDETROIT, LLC, Nos. 155948, 155949, 155950, 155951, and 155952; Court of Appeals Nos. 337673, 337678, 337680, 337683, and 337688.

DEPARTMENT OF TRANSPORTATION v DETROIT INTERNATIONAL BRIDGE COMPANY, No. 155954; Court of Appeals No. 337691.

PEOPLE v RACHELLE GREEN, No. 155959; Court of Appeals No. 337466.

PEOPLE v TRAVIS HUDSON, No. 155966; Court of Appeals No. 330603.

PEOPLE v DUMAS, No. 155970; Court of Appeals No. 337382.

BELLINGER v KRAM, No. 155982; reported below: 319 Mich App 653.

PEOPLE v ANDRITSIS, No. 155993; Court of Appeals No. 331191.

PEOPLE v HULETT, No. 156011; Court of Appeals No. 336393.

STEVENS v GUS HARRISON CORRECTIONAL FACILITY WARDEN, No. 156013; Court of Appeals No. 335476.

PEOPLE v ELIJAH WRIGHT, No. 156020; Court of Appeals No. 337552.

PEOPLE v MARION, No. 156045; Court of Appeals No. 330580.

PEOPLE v PELTON, No. 156049; Court of Appeals No. 337521.

PEOPLE v DEVONTE JOHNSON, No. 156050; Court of Appeals No. 337232.

PEOPLE v GEORGE WRIGHT, No. 156068; Court of Appeals No. 330827.

PEOPLE v NIX, No. 156071; Court of Appeals No. 331936.

WILDER, J., did not participate because he was on the Court of Appeals panel.

JONES v JONES, No. 156246; reported below: 320 Mich App 248.

DEPARTMENT OF HEALTH AND HUMAN SERVICES v BIRMINGHAM, No. 156263; Court of Appeals No. 336553.

PEOPLE v HENRY BROWN, No. 156285; Court of Appeals No. 337650.

DEPARTMENT OF HEALTH AND HUMAN SERVICES v BIRMINGHAM, No. 156305; Court of Appeals No. 336553.

HEDRICK v DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 156306; Court of Appeals No. 336904.

PEOPLE v FREDRIC HAYNES, No. 156371; Court of Appeals No. 337738.

GRIEVANCE ADMINISTRATOR v WHITAKER, No. 156386.

PEOPLE v TERRANCE, No. 156394; Court of Appeals No. 338938.

PEOPLE v HU, No. 156472; Court of Appeals No. 339979.

PEOPLE v ALMOND, No. 156510; Court of Appeals No. 338692.

Superintending Control Denied October 31, 2017:

SMITH v ATTORNEY GRIEVANCE COMMISSION, No. 155933.

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 156207.

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 156209.

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 156211.

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 156269.

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 156271.

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 156273.

BURGESS v ATTORNEY GRIEVANCE COMMISSION, No. 156276.

Reconsideration Denied October 31, 2017:

PEOPLE v TENELSHOF, Nos. 154721 and 154722; Court of Appeals Nos. 328176 and 327177. Leave to appeal denied at 500 Mich 1058.

PEOPLE v TERRY COOPER, No. 154801; Court of Appeals No. 333563. Leave to appeal denied at 500 Mich 1058.

KEYBANK NATIONAL ASSOCIATION v LAKE VILLA OXFORD ASSOCIATES, LLC, No. 154900; Court of Appeals No. 327469. Leave to appeal denied at 500 Mich 1058.

In re FOSTER ATTORNEY FEES, No. 154977; Court of Appeals No. 327707. Leave to appeal denied at 500 Mich 1059.

PEOPLE v COTTRELL, No. 155176; Court of Appeals No. 335229. Leave to appeal denied at 500 Mich 1059.

NIEDOLIWKA v INGLIN, No. 155195; Court of Appeals No. 327576. Leave to appeal denied at 500 Mich 1022.

BEACH FOREST SUBDIVISION ASSOCIATION, INC v OMRAN, No. 155226; Court of Appeals No. 326976. Leave to appeal denied at 500 Mich 1022.

WILDER, J., did not participate because he was on the Court of Appeals panel.

FEDERAL HOME LOAN MORTGAGE CORPORATION v MITAN, No. 155327; Court of Appeals No. 333386. Leave to appeal denied at 500 Mich 1060.

Summary Disposition November 1, 2017:

SHELBY TOWNSHIP v COMMAND OFFICERS ASSOCIATION OF MICHIGAN, No. 153074; Court of Appeals No. 323491. On order of the Court, leave to

appeal having been granted and the Court having considered the briefs and oral arguments of the parties, the judgment of the Court of Appeals is affirmed by equal division of the Court.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v ELISAH THOMAS, No. 155245; Court of Appeals No. 326311. On October 25, 2017, the Court heard oral argument on the application for leave to appeal the December 8, 2016 judgment of the Court of Appeals. On order of the Court, the application for leave to appeal is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals.

Due process concerns arise when law enforcement officers use an identification procedure that is both suggestive and unnecessary. *Perry v New Hampshire*, 565 US 228, 238-239 (2012). But a defendant's right to due process of law is not violated unless the photographic identification procedure is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification. *People v Gray*, 457 Mich 107, 111 (1998); *Simmons v United States*, 390 US 377, 384 (1968). A police officer showing a victim just a single photograph "is one of the most suggestive photographic identification procedures that can be used." *Gray*, 457 Mich at 111 (quotation marks and citation omitted). In this case, the police officer's presentation of a single photograph to the victim accompanied by the question "was this the guy who shot you?" was highly suggestive. Moreover, insufficient record evidence exists to conclude that the trial court erred when, in determining whether the suggestive procedure was necessary under the circumstances, it found this case distinguishable from the mortal exigency present in *Stovall v Denno*, 388 US 293, 301-302 (1967).[1] Specifically, the trial court did not find that exigency required an expedited identification procedure or that a less suggestive identification procedure would have been too burdensome to conduct; and our review of the record reveals insufficient evidence from which to draw such conclusions.

The United States Supreme Court has held that reliability is the ultimate touchstone for admissibility of an identification. See *Manson v Brathwaite*, 432 US 98, 114 (1977). Accordingly, even an unnecessarily suggestive identification may be admitted if it is sufficiently reliable. *Perry*, 565 US at 238-239. The trial court determined that the identification was unreliable under the totality of circumstances. See *People v Kurylczyk*, 443 Mich 289, 306 (1993) (opinion by GRIFFIN, J.); *Neil v Biggers*, 409 US 188, 199 (1972). The parties do not dispute the facts relating to the identification: the victim viewed the assailant's partially obscured face for no more than seven seconds on a dark city street with no streetlights while a gun was pointed at him. The description the victim gave to police officers was generic and could have described many young men in the area; moreover the victim's description of the assailant changed between his first interview and his follow-up inter-

[1] *Stovall* was abrogated on other grounds by *Griffith v Kentucky*, 479 US 314, 326 (1987) (discussing retroactivity).

view at the hospital. Accordingly, the trial court determined that the single photograph identification was sufficiently unreliable that it should be suppressed.

We agree with the trial court's assessment of reliability based on the relevant totality of the circumstances. Similarly, the trial court did not err in determining that the victim's in-court identification lacked an independent basis sufficient to "purge the taint caused by the illegal" identification procedure used here. *People v Kachar*, 400 Mich 78, 97 (1977); *Gray*, 457 Mich at 114-117. We reinstate the Wayne Circuit Court's February 6, 2015 judgment dismissing charges. The motion to remand is denied. We do not retain jurisdiction.

Leave to Appeal Granted November 1, 2017:

PEOPLE v JUSTLY JOHNSON, No. 154128; Court of Appeals No. 311625. The parties shall address: (1) whether the trial court abused its discretion by declining to grant a new trial on grounds of newly discovered evidence, in light of the testimony of Charmous Skinner, Jr., at the postconviction evidentiary hearing; (2) whether, even if the defendant's previous claims of new evidence are barred under MCR 6.508(D)(2), the evidence on which those claims were based must still be considered in determining if the new evidence from Charmous Skinner, Jr., makes a different result probable on retrial, see *People v Cress*, 468 Mich 678, 692 (2003); and (3) whether trial counsel rendered constitutionally ineffective assistance by failing to interview Charmous Skinner, Jr., or call him as a witness at trial.

We further order that this case be argued and submitted to the Court together with the case of *People v Scott* (Docket No. 154130), at such future session of the Court as both cases are ready for submission. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

MCCORMACK, J., did not participate because of her prior involvement in this case as counsel for a party.

WILDER, J., did not participate because he was on the Court of Appeals panel that decided the defendant's motion for peremptory reversal.

PEOPLE v KENDRICK SCOTT, No. 154130; Court of Appeals No. 317915. The parties shall address: (1) whether the trial court abused its discretion by declining to grant a new trial on grounds of newly discovered evidence, and (2) whether trial counsel rendered constitutionally ineffective assistance by failing to interview Charmous Skinner, Jr., or call him as a witness at trial.

We further order that this case be argued and submitted to the Court together with the case of *People v Johnson* (Docket No. 154128), at such future session of the Court as both cases are ready for submission. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

MCCORMACK, J., did not participate because of her prior involvement in this case as counsel for a codefendant.

WILDER, J., did not participate because he was on the Court of Appeals panel that decided the defendant's motion for peremptory reversal.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered November 1, 2017:

PEOPLE v BENTZ, No. 155361; Court of Appeals No. 329016. The appellant shall file a supplemental brief within 42 days of the date of this order addressing the defendant's claims of ineffective assistance of counsel, including whether defense counsel's failure to object to the testimony of Dr. N. Debra Simms fell below an objective standard of reasonableness, and whether there is a reasonable probability that the outcome of the defendant's trial would have been different. In addition to the brief, the appellant shall electronically file an appendix containing the items listed at MCR 7.312(D)(2). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied November 1, 2017:

REID v WALKER, No. 155484; Court of Appeals No. 328587.

REID v WALKER, No. 155739; Court of Appeals No. 328587.

In re DETMER, No. 156506; reported below: 321 Mich App 49.

Reconsideration Denied November 1, 2017:

In re CAW, No. 155835; Court of Appeals No. 333682. Leave to appeal denied at 501 Mich 865.

WILDER, J., did not participate because he was on the Court of Appeals panel.

Summary Disposition November 9, 2017:

DILLON v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 153936; reported below: 315 Mich App 339. On October 11, 2017, the Court heard oral argument on the application for leave to appeal the May 3, 2016 judgment of the Court of Appeals. On order of the Court, the application for leave to appeal is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment analyzing MCL 500.3145 and concluding that a claimant can satisfy the statute by merely providing notice of a physical injury.

When interpreting statutory language, we begin with the plain language of the statute. *Driver v Naini*, 490 Mich 239, 246-247 (2011). This is because courts must give effect to the Legislature's intent, and the best indicator of that intent is a statute's text. *Johnson v Pastoriza*, 491 Mich 417, 436 (2012). When construing the text, we " 'must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute.' " *Jesperson v Auto Club Ins Ass'n*, 499 Mich 29, 34 (2016), quoting *Hannay v Dep't of Transp*, 497 Mich 45, 57 (2014). "When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted." *Driver*, 490 Mich at 247, citing *Danse Corp v Madison Hts*, 466 Mich 175, 182 (2002).

In pertinent part, MCL 500.3145(1) states that "[a]n action for recovery of personal protection insurance benefits . . . may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident . . . ." The statute later provides the "herein," stating that "[t]he notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury."

When interpreting the statute, the Court of Appeals focused on the words "notice of injury." It reasoned that the decision to omit the definite article from this phrase demonstrated that the Legislature did not want to require notice of a specific injury. For that, the Legislature would have used the phrase "notice of the injury," and, therefore, the Court of Appeals concluded that notice of general physical injury would suffice. Then, observing that the statute also provided what the notice must include, the Court of Appeals turned to the phrase "nature of his injury." Yet here, too, it saw a reference to something quite general. As a result, the Court of Appeals concluded that the phrase "nature of his injury" did not demand anything more specific from a claimant.

The Court of Appeals wrongly interpreted MCL 500.3145(1) by suggesting that a claimant can satisfy the statute by merely providing notice that she was *physically* injured. This holding ignores the requirement that the notice describe the "nature of [her] injury." Cf. *Tattan v Detroit*, 128 Mich 650, 650-652 (1901) (holding that a Detroit City Charter provision requiring written "notice . . . of such injury, and of the nature thereof," could not be satisfied by a notice simply stating that the plaintiff sustained "personal injuries" because "[b]eyond the fact that it is an injury to the person, . . . there is no attempt in this notice to state the nature of the injury at all"). If the Legislature had intended for notice of general physical injury to suffice, it would have stopped at "notice of injury." But the Legislature required "notice of injury as provided herein," and that "herein" includes, "in ordinary language," "the name of the person injured and the time, place and nature of his injury." The phrase "in ordinary language" indicates that the Legislature wanted claimants to be able to give notice of injury without recourse to specialist assistance, while the phrase "nature of his injury" refers to an injury's inherent characteristics. See *Corley v Detroit Bd of Ed*, 470 Mich 274, 279 (2004).

Taken together, MCL 500.3145(1) requires only the kind of notice that an ordinary layperson can provide. A description of symptoms that are traceable to a diagnosed injury is sufficient to constitute such notice. The statute does not require a claimant to provide a precise medical diagnosis, as this would not constitute "ordinary language." In the present case, after being involved in a motor vehicle accident, the claimant provided timely notice of injuries causing pain to her left shoulder and lower back. Years later, the claimant sought treatment for an injury to her left hip that, according to the jury, was caused by the same accident. Because, as the claimant's doctor pointed out, the hip injury could have created the lower back pain, her initial notice can be traced to the eventual injury and was sufficient for the purposes of MCL 500.3145(1).[1] For this reason, although we vacate the Court of Appeals analysis of MCL 500.3145, we affirm the Court of Appeals judgment on other grounds and deny leave to appeal in all other respects.

Leave to Appeal Denied November 9, 2017:

In re SKINNER, No. 156607; Court of Appeals No. 336650.

JPMORGAN CHASE BANK, NA v ELLIS, No. 156684; Court of Appeals No. 340143.

WILDER, J., did not participate because he was on the Court of Appeals panel at an earlier stage of the proceedings.

Summary Disposition November 15, 2017:

FOSTER v FOSTER, No. 154829; Court of Appeals No. 324853. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *Howell v Howell*, 581 US ___; 137 S Ct 1400; 197 L Ed 2d 781 (2017).

Leave to Appeal Denied November 15, 2017:

GRASS LAKE IMPROVEMENT BOARD v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 154364; reported below: 316 Mich App 356.

WILDER, J., did not participate because he was on the Court of Appeals panel.

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[1] Compare *Magness v Frankenmuth Mut Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued January 19, 2010 (Docket No. 287369), amended February 5, 2010 (concluding that insufficient notice had been given when a claimant sought benefits related to a traumatic brain injury, but had only provided specific notice of a left shoulder bone bruise some time earlier).

BAKER v INFINITY PRIMARY CARE, PLLC, No. 156717; Court of Appeals No. 340658.

LAWRENCE v BURDI, No. 156723; Court of Appeals No. 340181.

WILDER, J., did not participate because he was on the Court of Appeals panel at an earlier stage of the proceedings.

Summary Disposition November 16, 2017:

PEOPLE v SOUDERS, No. 151587; Court of Appeals No. 324817. By order of September 27, 2016, the application for leave to appeal the March 25, 2015 order of the Court of Appeals was held in abeyance pending the decision in *People v Comer* (Docket No. 152713). On order of the Court, the case having been decided on June 23, 2017, 500 Mich 278 (2017), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the October 20, 2014 order of the Kent Circuit Court revoking the amended judgment of sentence, and we remand this case to the trial court to reinstate the September 15, 2014 amended judgment of sentence. Any error in the entry of that judgment of sentence was substantive, not clerical. Therefore, the trial court did not have authority to revoke that judgment of sentence on its own initiative after entry. *Comer*, *supra*. In all other respects, leave to appeal is denied. We do not retain jurisdiction

PEOPLE v SCHWANDER, No. 152311; Court of Appeals No. 320768. By order of May 25, 2016, the application for leave to appeal the July 21, 2015 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Steanhouse* (Docket No. 152849) and *People v Masroor* (Docket Nos. 152946-8). On order of the Court, the cases having been decided on July 24, 2017, 500 Mich 453 (2017), the application is again considered and, pursuant to MCR 7.305(H)(1) and MCR 7.316(A)(7), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *Steanhouse* and *People v Lockridge*, 498 Mich 358 (2015). We do not retain jurisdiction.

PEOPLE v STOKES, No. 152500; reported below: 312 Mich App 181. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Part II.A. of the Court of Appeals opinion addressing jury deliberations. Assuming arguendo that the juror experiment constituted an improper extraneous influence on the jury, given that the juror did not share the results of his experiment with the other jurors, it did not create "a real and substantial possibility that [it] could have affected the jury's verdict." *People v Budzyn*, 456 Mich 77, 88-89 (1997). In all other respects, leave to appeal is denied.

WILDER, J., did not participate because he was on the Court of Appeals panel.

MARIK v MARIK, No. 154549; Court of Appeals No. 333687. On October 11, 2017, the Court heard oral argument on the application for leave to appeal the July 12, 2016 order of the Court of Appeals. The

motion to supplement oral argument is granted. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we vacate the order of the Court of Appeals and remand this case to that court for reconsideration of the question whether the Macomb Circuit Court's June 13, 2016 order denying the defendant father's request to change the children's school enrollment and modifying parenting time was "a postjudgment order affecting the custody of a minor" and therefore, a "final order" under MCR 7.202(6)(a)(iii) and appealable by right under MCR 7.203(A)(1). In doing so, the court shall apply the standard applicable prior to *Ozimek v Rodgers (On Remand)*, 317 Mich App 69 (2016), which we overrule. *Ozimek* erred in concluding that the term "custody" in MCR 7.202(6)(a)(iii) does not comprise the concept of legal custody. We further note that this Court has opened an administrative file, ADM File No. 2017-20, to consider amending MCR 7.202(6)(a)(iii).

PEOPLE v STUMPMIER, No. 155981; Court of Appeals No. 330145. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the Court of Appeals judgment holding that the defendant failed to raise an effective challenge to the information contained in his presentence investigation report (PSIR), where defendant asserts a lack of record evidence that he distributed child sexually abusive material. We remand this case to the Monroe Circuit Court for consideration of the defendant's challenge to the accuracy of information contained in the PSIR. In all other respects, leave to appeal is denied.

Leave to Appeal Denied November 16, 2017:

PEOPLE v JOSEPH LEE, No. 153846; Court of Appeals No. 326209. By order of January 24, 2017, the application for leave to appeal the April 19, 2016 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Collins* (Docket No. 153952). On order of the Court, *Collins* having been decided on September 8, 2017, 501 Mich 851 (2017), the application is again considered, and it is denied, there being no majority in favor of granting leave to appeal or taking other action.

PEOPLE v WAUGH, No. 154285; Court of Appeals No. 332842.

WILDER, J., did not participate because he was on the Court of Appeals panel.

OZIMEK v RODGERS, No. 154776; reported below: 317 Mich App 69.

PEOPLE v DRAIN, No. 154897; Court of Appeals No. 327601.

MARKMAN, C.J. (*concurring*). I concur in this Court's decision to deny leave to appeal because I agree with the Court of Appeals' remand for resentencing on the ground that the trial court failed to adequately explain why the particular sentence here was reasonable. At the same time, however, I do not agree with the Court of Appeals that at this juncture any particular sentence should be ruled in, or ruled out, as reasonable or unreasonable.

WILDER, J., did not participate because he was on the Court of Appeals panel at an earlier stage of the proceedings.

PEOPLE v ANTHONY FRANK JONES, No. 155586; Court of Appeals No. 335882.

ROWE v AINSLIE, No. 155709; Court of Appeals No. 332566. On order of the Court, the application for leave to appeal the March 21, 2017 judgment of the Court of Appeals and the application for leave to appeal as cross-appellant are considered, and they are denied, there being no majority in favor of granting leave to appeal or taking other action.

PEOPLE v JERRY COLE, No. 155746; Court of Appeals No. 329969.

Motion to Waive Fees Denied November 22, 2017:

JOHNSON v LAKELAND CORRECTIONAL FACILITY WARDEN, No. 156772; Court of Appeals No. 339641.

Summary Disposition November 29, 2017:

PEOPLE v WARRICK, No. 152938; Court of Appeals No. 329137. By order of May 24, 2016, the application for leave to appeal the November 12, 2015 order of the Court of Appeals was held in abeyance pending the decision in *People v Comer* (Docket No. 152713). On order of the Court, the case having been decided on June 23, 2017, 500 Mich 278 (2017), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the March 5, 2015 amended judgment of sentence, and we remand this case to the Macomb Circuit Court to reinstate the February 12, 2015 judgment of sentence. In *Comer*, we held that correcting an invalid sentence by adding a statutorily mandated term is a substantive correction that a trial court may make on its own initiative only before judgment is entered. In this case, the trial court did not have authority to amend the judgment of sentence after entry to add a provision for consecutive sentencing under MCL 768.7a(2). In all other respects, leave to appeal is denied. We do not retain jurisdiction.

CLEMENT, J., did not participate.

PEOPLE v SHEPLER, No. 153216; Court of Appeals No. 323979. By order of September 6, 2016, the application for leave to appeal the December 29, 2015 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Steanhouse* (Docket No. 152849) and *People v Masroor* (Docket Nos. 152946-8). On order of the Court, the cases having been decided on July 24, 2017, 500 Mich 453 (2017), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals remanding this case to the trial court for a hearing pursuant to *People v Steanhouse*, 313 Mich App 1 (2015), and we remand this case to the Court of Appeals for plenary review of whether the defendant's sentence was disproportionate under the standard set forth in *People v Milbourn*, 435 Mich 630, 636 (1990). See *People v Steanhouse*, 500 Mich at 460-461. In all other respects, leave to appeal is denied.

CLEMENT, J., did not participate.

PEOPLE v LEONARD KING, No. 153313; Court of Appeals No. 324500. By

order of September 27, 2016, the application for leave to appeal the February 11, 2016 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Steanhouse* (Docket No. 152849) and *People v Masroor* (Docket Nos. 152946-8). On order of the Court, the cases having been decided on July 24, 2017, 500 Mich 453 (2017), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals remanding this case to the trial court for a hearing under *People v Lockridge*, 498 Mich 358 (2015), and we remand this case to the Court of Appeals for plenary review of whether the defendant's sentence was disproportionate under the standard set forth in *People v Milbourn*, 435 Mich 630, 636 (1990). See *People v Steanhouse*, 500 Mich at 473, 477. In all other respects, leave to appeal is denied.

CLEMENT, J., did not participate.

PEOPLE v ZARN, Nos. 153685 and 153686; Court of Appeals Nos. 323279 and 323280. By order of March 7, 2017, the application for leave to appeal the March 22, 2016 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Steanhouse* (Docket No. 152849) and *People v Masroor* (Docket Nos. 152946-8). On order of the Court, the cases having been decided on July 24, 2017, 500 Mich 453 (2017), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals remanding this case to the trial court for a hearing pursuant to *People v Lockridge*, 498 Mich 358 (2015), and we remand this case to the Court of Appeals for plenary review of the defendant's claim that his sentence was disproportionate under the standard set forth in *People v Milbourn*, 435 Mich 630, 636 (1990). See *People v Steanhouse*, 500 Mich at 460-461. In all other respects, leave to appeal is denied.

CLEMENT, J., did not participate.

PEOPLE v RICHARDS, No. 153694; reported below: 315 Mich App 564. By order of January 31, 2017, the application for leave to appeal the April 26, 2016 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Steanhouse* (Docket No. 152849) and *People v Masroor* (Docket Nos. 152946-8). On order of the Court, the cases having been decided on July 24, 2017, 500 Mich 453 (2017), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals remanding this case to the trial court for proportionality review, and we remand this case to the Court of Appeals for plenary review of whether the defendant's sentence was disproportionate under the standard set forth in *People v Milbourn*, 435 Mich 630, 636 (1990). See *People v Steanhouse*, 500 Mich at 460-461. In all other respects, leave to appeal is denied.

CLEMENT, J., did not participate.

PEOPLE v BEATY, No. 153858; Court of Appeals No. 331942. By order of October 26, 2016, the application for leave to appeal the April 15, 2016 order of the Court of Appeals was held in abeyance pending the decisions in *People v Steanhouse* (Docket No. 152849) and *People v Masroor*

(Docket Nos. 152946-8). On order of the Court, the cases having been decided on July 24, 2017, 500 Mich 453 (2017), the application is again considered and, pursuant to MCR 7.305(H)(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 the defendant's sentence is reasonable under the standard set forth in *Steanhouse*. In all other respects, leave to appeal is denied.

WILDER, J., did not participate because he was on the Court of Appeals panel.

CLEMENT, J., did not participate.

PEOPLE v MALONE, No. 154475; Court of Appeals No. 333852. By order of March 7, 2017, the application for leave to appeal the August 23, 2016 order of the Court of Appeals was held in abeyance pending the decisions in *People v Steanhouse* (Docket No. 152849) and *People v Masroor* (Docket Nos. 152946-8). On order of the Court, the cases having been decided on July 24, 2017, 500 Mich 453 (2017), the application is again considered and, pursuant to MCR 7.305(H)(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 the defendant's sentence is reasonable under the standard set forth in *Steanhouse*.

CLEMENT, J., did not participate.

PEOPLE v JOEL WILSON, No. 154592; Court of Appeals No. 327375. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals remanding this case to the trial court for a hearing pursuant to *People v Lockridge*, 498 Mich 358 (2015), and we remand this case to the Court of Appeals for plenary review of the defendant's claim that his sentence was disproportionate under the standard set forth in *People v Milbourn*, 435 Mich 630, 636 (1990). See *People v Steanhouse*, 500 Mich 453, 460-461 (2017). In all other respects, leave to appeal is denied. We do not retain jurisdiction.

CLEMENT, J., did not participate.

PEOPLE v WILCOX, No. 155213; Court of Appeals No. 335474. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Oakland Circuit Court, and we remand this case to the circuit court for resentencing because there was only one victim for each offense. The prosecuting attorney concedes that the circuit court erroneously assigned 10 points to Offense Variable 9 (OV 9), MCL 777.39. On resentencing, the circuit court shall assign zero points to OV 9 and impose a sentence that is proportional to the nature of the offense and the background of the offender in accordance with *People v Milbourn*, 435 Mich 630, 651 (1990). The motion for extension of time to file a reply brief is granted. We do not retain jurisdiction.

CLEMENT, J., did not participate.

PEOPLE v DEQUAN HARRIS, No. 155236; Court of Appeals No. 334394. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals. That court shall treat the defendant's delayed application for leave to appeal as having

been filed within the deadline set forth in MCR 7.205(G) and shall decide whether to grant, deny, or order other relief, in accordance with MCR 7.205(E)(2). The defendant made a timely request for the appointment of appellate counsel, but his request was not processed by the Wayne Circuit Court until more than six months later, contrary to MCR 6.425(G). Accordingly, the defendant was deprived of his direct appeal as a result of the trial court's error. We do not retain jurisdiction.

WILDER, J., did not participate because he was on the Court of Appeals panel.

CLEMENT, J., did not participate.

PEOPLE v ETHAN CALLOWAY, No. 155707; Court of Appeals No. 336563. Pursuant to MCR 7.305(H)(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 the defendant's sentence is reasonable under the standard set forth in *People v Steanhouse*, 500 Mich 453 (2017).

WILDER, J., did not participate because he was on the Court of Appeals panel.

CLEMENT, J., did not participate.

Leave to Appeal Denied November 29, 2017:

PEOPLE v DAVENPORT, No. 152848; Court of Appeals No. 329136.

WILDER, J., did not participate because he was on the Court of Appeals panel.

CLEMENT, J., did not participate.

PEOPLE v REEDY, No. 152977; Court of Appeals No. 329783.

CLEMENT, J., did not participate.

PEOPLE v TRAVIS BRYANT, No. 154000; Court of Appeals No. 331955.

CLEMENT, J., did not participate.

PEOPLE v CABBIL, No. 154149; Court of Appeals No. 326335.

CLEMENT, J., did not participate.

PEOPLE v RODNEY JOHNSON, No. 154518; Court of Appeals No. 333373.

CLEMENT, J., did not participate.

PEOPLE v JAKEEM GRIFFIN, No. 154796; Court of Appeals No. 325275.

CLEMENT, J., did not participate.

PEOPLE v FINLEY, No. 154872; Court of Appeals No. 333446.

CLEMENT, J., did not participate.

PEOPLE v SOCK, No. 154874; Court of Appeals No. 334136.

CLEMENT, J., did not participate.

PEOPLE v RONALD COOPER, No. 154882; Court of Appeals No. 335012.

CLEMENT, J., did not participate.

PEOPLE v ROUSE, No. 154957; Court of Appeals No. 333701.

CLEMENT, J., did not participate.

PEOPLE v WISE, No. 155091; Court of Appeals No. 333743.

WILDER, J., did not participate because he was on the Court of Appeals panel.

CLEMENT, J., did not participate.

PEOPLE v JULIAN, No. 155101; Court of Appeals No. 334079.

WILDER, J., did not participate because he was on the Court of Appeals panel.

CLEMENT, J., did not participate.

PEOPLE v BLAHA, No. 155140; Court of Appeals No. 334996.

CLEMENT, J., did not participate.

WILLIAMSON v SULEIMAN, No. 155147; Court of Appeals No. 334456.

CLEMENT, J., did not participate.

PEOPLE v CORY NELSON, No. 155175; Court of Appeals No. 335200.

CLEMENT, J., did not participate.

PEOPLE v WILKENS, No. 155177; Court of Appeals No. 334218.

CLEMENT, J., did not participate.

PEOPLE v ALDRIDGE, No. 155201; Court of Appeals No. 334998.

CLEMENT, J., did not participate.

PEOPLE v BEY, No. 155216; Court of Appeals No. 335442.

CLEMENT, J., did not participate.

PEOPLE v ERVIN, No. 155220; Court of Appeals No. 335901.

CLEMENT, J., did not participate.

PEOPLE v DELL, No. 155232; Court of Appeals No. 333223.

CLEMENT, J., did not participate.

PEOPLE v DESMOND ROBINSON, No. 155233; Court of Appeals No. 334662.

WILDER, J., did not participate because he was on the Court of Appeals panel.

CLEMENT, J., did not participate.

PEOPLE v KRAMER, No. 155248; Court of Appeals No. 334229.

CLEMENT, J., did not participate.

PEOPLE v KELLEY, No. 155302; Court of Appeals No. 334239.

WILDER, J., did not participate because he was on the Court of Appeals panel.

CLEMENT, J., did not participate.

PEOPLE v BEAVER, No. 155305; Court of Appeals No. 334660.

WILDER, J., did not participate because he was on the Court of Appeals panel.

CLEMENT, J., did not participate.

PEOPLE v RAYMOND, No. 155337; Court of Appeals No. 336071.
CLEMENT, J., did not participate.

PEOPLE v CARL DIXON, No. 155338; Court of Appeals No. 336632.
CLEMENT, J., did not participate.

PEOPLE v ROSCOE, No. 155346; Court of Appeals No. 334281.
CLEMENT, J., did not participate.

PEOPLE v JEFFREY TRAVIS, No. 155350; Court of Appeals No. 335938.
CLEMENT, J., did not participate.

PEOPLE v BAFFORD, No. 155371; Court of Appeals No. 329971.
CLEMENT, J., did not participate.

PEOPLE v HAVILAND, No. 155373; Court of Appeals No. 335944.
CLEMENT, J., did not participate.

JACOBS v WALBRIDGE ALDINGER COMPANY, No. 155432; Court of Appeals No. 328589.
CLEMENT, J., did not participate.

PEOPLE v DEANGELO BENNETT, No. 155443; Court of Appeals No. 335568.
CLEMENT, J., did not participate.

PEOPLE v AMOR BASS, No. 155454; Court of Appeals No. 335186.
CLEMENT, J., did not participate.

PEOPLE v LORENZO SANDERS, No. 155468; Court of Appeals No. 335566.
CLEMENT, J., did not participate.

KIRK v OSTERBECK, No. 155529; Court of Appeals No. 329377.
WILDER, J., did not participate because he was on the Court of Appeals panel.
CLEMENT, J., did not participate.

SMITH v DEPARTMENT OF CORRECTIONS, No. 155633; Court of Appeals No. 335684.
CLEMENT, J., did not participate.

PEOPLE v MCCULLOUGH, No. 155640; Court of Appeals No. 336533.
CLEMENT, J., did not participate.

PEOPLE v MAHONE, No. 155643; Court of Appeals No. 335349.
CLEMENT, J., did not participate.

PEOPLE v TROY, No. 155651; Court of Appeals No. 329525.
CLEMENT, J., did not participate.

PEOPLE v WHITEUS, No. 155657; Court of Appeals No. 329456.
CLEMENT, J., did not participate.

PEOPLE v DEVON WILLIAMS, No. 155693; Court of Appeals No. 336733.
CLEMENT, J., did not participate.

PEOPLE v HUMPHREYS-MCPHERSON, No. 155696; Court of Appeals No. 330747.
CLEMENT, J., did not participate.

RADLER v RADLER, No. 155706; Court of Appeals No. 328025.
CLEMENT, J., did not participate.

REICHENBACH v REICHENBACH, No. 155715; Court of Appeals No. 326355.
CLEMENT, J., did not participate.

BRAZOS HIGHER EDUCATION SERVICE CORPORATION v STINNETT, No. 155732; Court of Appeals No. 329780.
CLEMENT, J., did not participate.

PEOPLE v POZDOL, No. 155778; Court of Appeals No. 330198.
CLEMENT, J., did not participate.

SIMMONS v DEPARTMENT OF HEALTH AND HUMAN SERVICES/OFFICE OF CHILD SUPPORT CENTRAL OPERATIONS, No. 155780; Court of Appeals No. 329955.
CLEMENT, J., did not participate.

PEOPLE v MARQUEZ-CUBANO, No. 155786; Court of Appeals No. 335519.
CLEMENT, J., did not participate.

PEOPLE v NOWLIN, No. 155789; Court of Appeals No. 337464.
CLEMENT, J., did not participate.

PEOPLE v JASON MILLS, No. 155792; Court of Appeals No. 336774.
WILDER, J., did not participate because he was on the Court of Appeals panel.
CLEMENT, J., did not participate.

PEOPLE v DAVID WALKER, No. 155796; Court of Appeals No. 336981.
CLEMENT, J., did not participate.

PEOPLE v PRESTON, No. 155800; Court of Appeals No. 336676.
CLEMENT, J., did not participate.

PEOPLE v YODER, No. 155815; Court of Appeals No. 337070.
CLEMENT, J., did not participate.

PEOPLE v TROY ANDERSON, No. 155840; Court of Appeals No. 329983.
CLEMENT, J., did not participate.

PEOPLE v PARM, No. 155858; Court of Appeals No. 336211.
CLEMENT, J., did not participate.

MCCORMICK v ACE AMERICAN INSURANCE COMPANY, No. 155861; Court of Appeals No. 330174.
CLEMENT, J., did not participate.

SMOKE v RAISIN CHARTER TOWNSHIP, No. 155864; Court of Appeals No. 332434.

CLEMENT, J., did not participate.

PEOPLE v MARSHALL, No. 155865; Court of Appeals No. 329362.

WILDER, J., did not participate because he was on the Court of Appeals panel.

CLEMENT, J., did not participate.

CITY OF EAST GRAND RAPIDS v VANDERHART, No. 155876; Court of Appeals No. 329259.

CLEMENT, J., did not participate.

PEOPLE v MARCEL ROBINSON, No. 155884; Court of Appeals No. 330304.

CLEMENT, J., did not participate.

PEOPLE v ROMERO BRYANT, No. 155923; Court of Appeals No. 337423.

CLEMENT, J., did not participate.

PEOPLE v VEAL, No. 155926; Court of Appeals No. 329651.

CLEMENT, J., did not participate.

PEOPLE v LETT, No. 155960; Court of Appeals No. 329386.

CLEMENT, J., did not participate.

PEOPLE v FARMER, No. 155963; Court of Appeals No. 331236.

CLEMENT, J., did not participate.

LERMAN CORPORATION v MOORE, No. 155964; Court of Appeals No. 337217.

CLEMENT, J., did not participate.

PEOPLE v PRITCHETT, No. 155965; Court of Appeals No. 329901.

CLEMENT, J., did not participate.

PEOPLE v MCDANIEL, No. 155972; Court of Appeals No. 336167.

CLEMENT, J., did not participate.

PEOPLE v SCHOLL, No. 155974; Court of Appeals No. 337520.

CLEMENT, J., did not participate.

NICAJ v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 155983; Court of Appeals No. 329485.

CLEMENT, J., did not participate.

PEOPLE v NEWELL, No. 155990; Court of Appeals No. 330577.

CLEMENT, J., did not participate.

PEOPLE v BLOCKTON, No. 155999; Court of Appeals No. 329608.

CLEMENT, J., did not participate.

PEOPLE v MARK HARRIS, No. 156007; Court of Appeals No. 330843.

CLEMENT, J., did not participate.

PEOPLE v JEFFRIES, No. 156008; Court of Appeals No. 330461.
CLEMENT, J., did not participate.

BURNS v WILLIAM BEAUMONT HOSPITAL, No. 156010; Court of Appeals No. 331347.
CLEMENT, J., did not participate.

PEOPLE v OUSLEY, No. 156024; Court of Appeals No. 330502.
CLEMENT, J., did not participate.

PEOPLE v TIMOTHY CLARK, No. 156034; Court of Appeals No. 337491.
CLEMENT, J., did not participate.

FLANAGIN v KALKASKA COUNTY ROAD COMMISSION, No. 156067; reported below: 319 Mich App 633.
CLEMENT, J., did not participate.

LATESSA v MICHIGAN INSTITUTE OF UROLOGY, PC, No. 156070; Court of Appeals No. 331476.
BERNSTEIN, J., did not participate due to his prior relationship with the Sam Bernstein Law Firm.
CLEMENT, J., did not participate.

ABBONIZIO v BANK OF AMERICA, NA, No. 156072; Court of Appeals No. 330022.
CLEMENT, J., did not participate.

PEOPLE v JOE REYNOLDS, No. 156073; Court of Appeals No. 337859.
CLEMENT, J., did not participate.

PEOPLE v DAVID KING, No. 156074; Court of Appeals No. 332757.
CLEMENT, J., did not participate.

PEOPLE v SPYKER, No. 156075; Court of Appeals No. 337107.
CLEMENT, J., did not participate.

PEOPLE v THERRIAN, No. 156076; Court of Appeals No. 331717.
CLEMENT, J., did not participate.

PEOPLE v VILLANUEVA, No. 156087; Court of Appeals No. 332366.
CLEMENT, J., did not participate.

PEOPLE v HOWLAND, No. 156090; Court of Appeals No. 337725.
CLEMENT, J., did not participate.

PEOPLE v LANAVILLE, No. 156095; Court of Appeals No. 331531.
CLEMENT, J., did not participate.

PEOPLE v MAGLINGER, No. 156097; Court of Appeals No. 331040.
CLEMENT, J., did not participate.

PEOPLE v STEINER, No. 156100; Court of Appeals No. 330513.
CLEMENT, J., did not participate.

PEOPLE v POOLE, No. 156105; Court of Appeals No. 330735.
CLEMENT, J., did not participate.

PEOPLE v RUIZ, No. 156111; Court of Appeals No. 337768.
CLEMENT, J., did not participate.

POWELL v OAKS CORRECTIONAL FACILITY WARDEN, No. 156114; Court of Appeals No. 337498.
CLEMENT, J., did not participate.

PEOPLE v PEOPLES, No. 156118; Court of Appeals No. 331639.
CLEMENT, J., did not participate.

PEOPLE v BATH, No. 156147; Court of Appeals No. 337794.
CLEMENT, J., did not participate.

PEOPLE v ETHEN CALLOWAY, No. 156155; Court of Appeals No. 338128.
CLEMENT, J., did not participate.

PEOPLE v BOYD, No. 156156; Court of Appeals No. 337983.
CLEMENT, J., did not participate.

PEOPLE v ROZENGARD, No. 156169; Court of Appeals No. 331140.
CLEMENT, J., did not participate.

PEOPLE v TREADWELL, No. 156186; Court of Appeals No. 331310.
CLEMENT, J., did not participate.

PEOPLE v SPILLMAN, No. 156187; Court of Appeals No. 338532.
CLEMENT, J., did not participate.

VALENCIA v SHERWIN-WILLIAMS COMPANY, No. 156188; Court of Appeals No. 336544.
CLEMENT, J., did not participate.

PEOPLE v ANTHONY BRIDGES, No. 156266; Court of Appeals No. 337803.
CLEMENT, J., did not participate.

LEAGON v LEAGON, No. 156315; Court of Appeals No. 334922.
CLEMENT, J., did not participate.

PEOPLE v ZHANG, No. 156320; Court of Appeals No. 339156.
CLEMENT, J., did not participate.

PEOPLE v ROBERT KIRBY, No. 156435; Court of Appeals No. 336920.
CLEMENT, J., did not participate.

PEOPLE v FLETCHER, No. 156486; Court of Appeals No. 338050.
CLEMENT, J., did not participate.

PEOPLE v JOEL WILSON, No. 156504; Court of Appeals No. 332124.
CLEMENT, J., did not participate.

PEOPLE v ARBUCKLE, No. 156517; Court of Appeals No. 337249.
CLEMENT, J., did not participate.

HALE v KLASK, No. 156551; Court of Appeals No. 339230.

CLEMENT, J., did not participate.

Reconsideration Denied November 29, 2017:

PEOPLE v ORRICK, No. 149789; Court of Appeals No. 321499. Case remanded for further proceedings at 498 Mich 902.

CLEMENT, J., did not participate.

PEOPLE v MONIZ, No. 154243; Court of Appeals No. 331418. Leave to appeal denied at 501 Mich 859.

WILDER, J., did not participate because he was on the Court of Appeals panel.

CLEMENT, J., did not participate.

PEOPLE v STEPHEN YOUNG, No. 154539; Court of Appeals No. 332577. Leave to appeal denied at 501 Mich 859.

WILDER, J., did not participate because he was on the Court of Appeals panel.

CLEMENT, J., did not participate.

ALTMAN v PAROLE BOARD, No. 155203; Court of Appeals No. 334371. Reconsideration granted at 501 Mich 858.

CLEMENT, J., did not participate.

PEOPLE v TEVIN SUTTON, No. 155412; Court of Appeals No. 328692. Leave to appeal denied at 501 Mich 861.

CLEMENT, J., did not participate.

THOMAS v ATTORNEY GRIEVANCE COMMISSION, No. 155415. Superintending control denied at 501 Mich 865.

CLEMENT, J., did not participate.

CITY OF DETROIT v CITY OF HIGHLAND PARK, No. 155427; Court of Appeals No. 327448. Leave to appeal denied at 501 Mich 861.

CLEMENT, J., did not participate.

ALLEN v ALLSTATE INSURANCE COMPANY, No. 155683; Court of Appeals No. 330808. Leave to appeal denied at 501 Mich 864.

CLEMENT, J., did not participate.

SHORELINE EAST CONDOMINIUM ASSOCIATION v GRAY, No. 155740; Court of Appeals No. 329403. Leave to appeal denied at 501 Mich 864.

CLEMENT, J., did not participate.

GOLDMAN v DEPARTMENT OF CORRECTIONS, No. 155758; Court of Appeals No. 337156. Leave to appeal denied at 501 Mich 870.

CLEMENT, J., did not participate.

Order Granting a Joint Motion to Clarify the Scope of Remand Entered December 6, 2017:

PEOPLE v RYAN LEWIS, No. 155224; Court of Appeals No. 328044. Order granting a joint motion to remand entered at 501 Mich 858. On order of the Court, the joint motions for immediate consideration and to expand or clarify the scope of remand are granted. On remand, the Wayne Circuit Court shall consider the parties' joint stipulation to grant a new trial. If the circuit court accepts the stipulation, it may enter an order vacating the defendant's convictions and granting a new trial; if it enters such an order, the circuit court will not need to hold the evidentiary hearing required by this Court's September 12, 2017 order. The application for leave to appeal the December 6, 2016 judgment of the Court of Appeals remains pending.

Leave to Appeal Denied December 8, 2017:

PEOPLE v HORACEK, No. 152567; Court of Appeals No. 317527.

MARKMAN, C.J. (*concurring*). I concur in this Court's order denying leave to appeal. I write separately only to emphasize that in determining whether there are exigent circumstances that justify a warrantless entry into a residence to arrest a suspect, the determinative question is "whether a law enforcement officer was faced with an emergency that justified acting without a warrant . . . ." *Missouri v McNeely*, 569 US 141, 149 (2013). While this Court has laid out factors for a court to consider in making this determination, see *People v Oliver*, 417 Mich 366 (1983), courts should avoid assessing these factors in a mechanical manner that distracts from this determinative question.

In *Oliver*, this Court recognized that "the validity of a warrantless arrest in a motel room is not without limitations in that it depends upon the reasonableness of the officer's response to the situation perceived as requiring immediate action. The question is whether a reasonable person would have perceived a need to immediately secure the motel room." *Oliver*, 417 Mich at 383.[1] This Court then went on to set forth "a number of factors [that] have been identified which are used in determining whether an exigency exists." *Id*. at 384. These factors include:

> (1) whether a serious offense, particularly a crime of violence, is involved; (2) whether the suspect is reasonably believed to be armed; (3) whether there is clear showing of probable cause; (4) whether strong reason exists to believe the suspect is in the premises being entered; (5) whether there is a likelihood that the suspect will escape if not swiftly apprehended; (6) whether the entry is forcible or peaceful; and (7) whether the entry is at night.

[1] While *Oliver* considered this issue in the context of a warrantless entry into a motel room, this reasoning applies with equal, if not greater, force to a warrantless entry of a private home.

> . . . In addition to these factors, there are other factors such as: (1) preventing the destruction of evidence, (2) ensuring the safety of law enforcement personnel, (3) ensuring the safety of citizens, and (4) the ability to secure a warrant. In short, all these factors weigh in allowing action without warrants by police. Each case, however, must be judged on its own facts. [*Id*. (citation omitted).]

While all these factors are relevant to making a determination of exigent circumstances, they are not all relevant in the same way and they are not all relevant in every case. See, e.g., *People v Blasius*, 435 Mich 573, 589 (1990) (stating that the *Oliver* "factors (at best) provide *guidance* in cases of arrests without warrants") (emphasis added). Indeed, some are also confusingly imprecise. For example, "whether there is a clear showing of probable cause" and "whether strong reason exists to believe the suspect is in the premises being entered" are effectively *threshold* inquiries—an officer must have probable cause and a strong reason to believe that the suspect is on the premises being entered *before* the officer can enter onto the premises in the first place in order to arrest without a warrant—but these do not necessarily support a conclusion that "immediate action" is required. See, e.g., *In re Forfeiture of $176,598*, 443 Mich 261, 266 (1993) (noting that the exigent-circumstances exception to the warrant requirement "still requires reasonableness and probable cause"); *United States v Vasquez-Algarin*, 821 F3d 467, 480 (CA 3, 2016) (holding that "law enforcement . . . may not force entry into a home based on anything less than probable cause to believe an arrestee . . . is then present within the residence"). Similarly, whether the entry is forcible or peaceful and whether the entry is during the day or during the night may be relevant to the overall reasonableness of an officer's warrantless entry to arrest a suspect, but these considerations again are not necessarily relevant to whether "immediate action" was required. See, e.g., *People v Burrill*, 391 Mich 124, 134 n 18 (1974) (explaining that courts consider whether "the entry can be made peaceably although in proper circumstances forcible entry might be justified"); *Wilson v Arkansas*, 514 US 927, 934 (1995) (holding that "the method of an officer's entry into a dwelling [is] among the factors to be considered in assessing the reasonableness of a search or seizure"); *United States v Kelley*, 652 F3d 915, 917 (CA 8, 2011) (stating that "we have little doubt that in some circumstances an officer's night-time entry into a home might be unreasonable under the Fourth Amendment").

Other factors listed in *Oliver* are likely to be *dispositive* on their own. If officers have probable cause to believe that evidence would be destroyed, or that law enforcement personnel or the public are presently endangered, a warrantless entry might well be justified on the basis of those facts alone. See, e.g., *Kentucky v King*, 563 US 452, 460 (2011). On the other hand, if officers have the "ability to secure a warrant" before entering the premises without suffering an adverse consequence, a warrantless entry might well be unjustified by those facts alone. See, e.g., *Birchfield v North Dakota*, 579 US___; 136 S Ct 2160, 2173 (2016)

("The exigent circumstances exception allows a warrantless search when an emergency leaves police insufficient time to seek a warrant."); *Michigan v Tyler*, 436 US 499, 509 (1978).

In sum, in determining whether exigent circumstances justify a warrantless entry to arrest a suspect, courts should only use the *Oliver* factors as tools to determine whether, under the totality of the circumstances, exigent circumstances required immediate action, rather than examining each factor individually and then balancing them in some uncertain manner. *Blasius*, 435 Mich at 589; *United States v Moreno*, 701 F3d 64, 73 (CA 2, 2012) (holding that similar factors "are not germane in every exigent circumstances situation," that they "are merely illustrative, not exhaustive," and that "[t]he core question is whether the facts, as they appeared at the moment of entry, would lead a reasonable, experienced officer to believe that there was an urgent need to render aid or take action") (quotation marks and citations omitted). Once again, the assessment of the totality of the circumstances must be undertaken pursuant to the following ultimate standard: "whether a law enforcement officer was faced with an emergency that justified acting without a warrant[.]" *McNeely*, 569 US at 149.

WILDER, J., did not participate because he was on the Court of Appeals panel.

CLEMENT, J., did not participate.

LYMON v FREEDLAND, No. 153701; reported below: 314 Mich App 746. By order of November 30, 2016, the application for leave to appeal the March 29, 2016 judgment of the Court of Appeals was held in abeyance pending the decision in *Fowler v Menard, Inc* (Docket No. 152519). On order of the Court, leave to appeal having been denied in *Fowler* on June 30, 2017, 500 Mich 862 (2017), the application is again considered, and it is denied, there being no majority in favor of granting leave to appeal or taking other action.

MARKMAN, C.J., (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal. I would grant leave to consider whether the hazard here was "effectively unavoidable" and to provide greater clarity concerning the circumstances in which an "open and obvious" condition contains a "special aspect."

Plaintiff Joyanna Lymon worked as a nursing aide for an elderly woman who required around-the-clock home care. On January 4, 2013, plaintiff walked up the steep and icy driveway to reach the home. Unfortunately, she fell and suffered a fractured leg. Four other people who had approached the home at around the same time successfully traversed the snow-covered grass to the left of the driveway leading to the front door, although they acknowledged that there was a large bush on the grass that partially obstructed that path and that one would eventually need to walk on the uppermost part of the driveway to reach the door. Plaintiff sued the homeowners, alleging that they negligently maintained the driveway, and defendants moved for summary disposition on the grounds that the danger was "open and obvious" and therefore that they had no duty to protect against that danger. The trial

court denied defendants' motion, and the Court of Appeals affirmed. *Lymon v Freedland*, 314 Mich App 746, 749 (2016).

A premises owner generally owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609 (1995). This duty does not extend to hazards that are "open and obvious." *Id*. at 610-612. If, however, despite its openness and obviousness, the risk involves some "special aspect" of dangerousness, the premises owner is required to undertake reasonable precautions. *Id*. at 614. This Court has specifically recognized that a special aspect of an open and obvious condition that renders it effectively unavoidable may give rise to liability. *Lugo v Ameritech Corp*, 464 Mich 512, 518 (2001). "[T]he standard for 'effective unavoidability' is that a person, for all practical purposes, must be required or compelled to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a choice whether to confront a hazard cannot truly be unavoidable, or even effectively so." *Hoffner v Lanctoe*, 492 Mich 450, 469 (2012) (emphasis omitted).

First, I am not yet persuaded that the "hazard" here—defendants' steep and icy driveway—was effectively unavoidable. Even assuming that plaintiff could not have avoided approaching the home because she needed to care for her patient,[1] plaintiff could have approached the home by walking up the snow-covered grass to the left of the driveway. Although there was a bush that obstructed part of this route, a mere inconvenience is not the equivalent of something being "effectively unavoidable." *Id*. Additionally, while there was snow on the grass, I question whether snow-covered grass can reasonably be considered a "hazard" that is the equivalent of walking on ice.[2] Finally, even though one would have to walk on the uppermost part of the driveway to reach the door, it appears undisputed that this part of the driveway was flat and not nearly as icy as the lower part of the driveway. Accordingly, I would grant leave to consider whether defendants' steep and icy

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[1] But see *Hoffner*, 492 Mich at 470-471 ("Michigan caselaw does not support providing special protection to those invitees who have paid memberships or another existing relationship to the businesses or institutions that they frequent above and beyond that owed to any other type of invitee. Neither possessing a right to use services, nor an invitee's subjective need or desire to use services, heightens a landowner's duties to remove or warn of hazards or affects an invitee's choice whether to confront an obvious hazard. To conclude otherwise would impermissibly shift the focus from an objective examination of the *premises* to an examination of the subjective beliefs of the *invitee*.").

[2] That four other people safely approached the home by walking up the snow-covered grass arguably suggests that this route was less hazardous than walking up the driveway and that it constituted a reasonable alternative path to the front door.

driveway was truly an "effectively unavoidable" condition or whether the term is effectively being redefined.

Second, I would grant leave to clarify the proper analysis for determining under what circumstances an open and obvious condition contains a "special aspect." In *Hoffner*, this Court described situations "in which the special aspects of an open and obvious hazard could give rise to liability: when the danger is *unreasonably dangerous* or when the danger is *effectively unavoidable*." *Id*. at 463. The Court of Appeals—not altogether unreasonably—interpreted this language to mean that there is a special aspect if a condition is *either* unreasonably dangerous or effectively unavoidable. *Lymon*, 314 Mich App at 758-759. However, I believe that a fuller reading of *Hoffner* and this Court's previous decisions discussing "special aspects" may reveal a more nuanced view.

"The touchstone of the 'special aspects' analysis is that the condition must be characterized by its *unreasonable risk of harm*." *Hoffner*, 492 Mich at 455; see also *Lugo*, 464 Mich at 517 ("[T]he critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly 'special aspects' of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm[.]"); *Bertrand*, 449 Mich at 611 ("[I]f the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions."). "An 'unreasonably dangerous' hazard must be just that—not just a dangerous hazard, but one that is unreasonably so." *Hoffner*, 492 Mich at 455-456. This Court has further recognized that "an open and obvious condition might be unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm," i.e., the condition creates "a substantial risk of death or severe injury . . . ." *Lugo*, 464 Mich at 518. In this latter regard, we used as an example "an unguarded thirty foot deep pit in the middle of a parking lot." *Id*. A hazard that creates a substantial risk of death or severe injury appears to be, ipso facto, a condition that is unreasonably dangerous, even if the hazard is not effectively unavoidable. This conclusion makes sense, as such a condition is unreasonably dangerous in that the potential *severity* of the injury that the condition could cause is fairly understood as unreasonable.

By contrast, if a condition is "effectively unavoidable," it may yet be unreasonably dangerous because of the *likelihood* that an injury will occur. However, it is certainly indisputable that not every effectively unavoidable condition also creates an unreasonable risk of harm. For example, this Court has embraced the general rule that "steps and differing floor levels [are] not ordinarily actionable unless unique circumstances surrounding the area in issue made the situation unreasonably dangerous." *Bertrand*, 449 Mich at 614 (emphasis omitted). It seems unlikely that an otherwise reasonably constructed step that is effectively unavoidable contains a "special aspect" because—unlike the standing water covering the only exit to a retail store that this Court in *Lugo* said "might" constitute a special aspect—"steps are the type of everyday occurrence that people encounter, [and] under most circum-

stances, a reasonably prudent person will look where he is going, will observe the steps, and will take appropriate care for his own safety." *Id*. at 616. In other words, in contrast to a condition that creates a substantial risk of death or severe bodily harm, a condition that is effectively unavoidable *may* constitute an unreasonably dangerous condition, but this would not seem to be so in every case.

That is, when read together, our decisions appear to indicate that the *central inquiry* is whether an open and obvious condition gives rise to an unreasonable risk of harm despite its open and obvious nature and that a hazard may pose an unreasonable risk of harm if: (1) the condition creates a substantial risk of death or severe injury, or (2) the condition is effectively unavoidable. While the first category would seem almost necessarily to give rise to an unreasonable risk of harm—as any potential injury caused by the condition would likely be severe—a condition fitting within the second category would not seem necessarily to have the same impact. I would grant leave to consider this issue further and more generally to provide greater guidance to the bench and bar in assessing premises-liability claims of the present sort.

CLEMENT, J., did not participate.

ATLANTIC CASUALTY INSURANCE COMPANY v GUSTAFSON, No. 154026; reported below: 315 Mich App 533. On November 7, 2017, the Court heard oral argument on the application for leave to appeal the May 26, 2016 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, there being no majority in favor of granting leave to appeal or taking other action.

MARKMAN, C.J. (*dissenting*). I agree with Justice WILDER's dissenting statement to the extent it would reverse the judgment of the Court of Appeals. As Justice WILDER observes, that Court erred by concluding that the term "any property owner" was ambiguous without ever showing that the term was "equally susceptible to more than a single meaning." *Barton-Spencer v Farm Bureau Life Ins Co of Mich*, 500 Mich 32, 40 (2017). However, I would reinstate the trial court's order granting plaintiff's motion for summary disposition rather than remand for further proceedings. In my judgment, the term is unambiguous and when read in context the trial court's interpretation sets forth the most reasonable meaning.

A true ambiguity rarely occurs because "a diligent application of the rules of interpretation will normally yield a 'better,' albeit perhaps imperfect, interpretation" of the term at issue. *Nat'l Pride at Work v Governor*, 481 Mich 56, 80 n 21 (2008) (quotation marks and citation omitted). As the trial court held, when "any property owner" is read in the context of the commercial general liability policy at issue, it is best understood as referring to any owner of property having a connection to the commercial project. *Wilkie v Auto-Owners*, 469 Mich 41, 50 n 11 (2003) (noting that contracts are read as a whole); *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 533 (2005) (explaining that the associated-words canon "is premised on the notion that the meaning of statutory language, plain or not, depends on context") (quotation marks and citation omitted). The Court of Appeals restricted "any property owner" to only those individuals who had a *commercial* interest in being

on the worksite. Such a restriction is overly narrow in the context of this policy exclusion, which broadly excludes "*any* property owner." And interpreting "any property owner" to include *anyone anywhere* who owns any sort of property similarly overlooks the necessary context of the term. For these reasons, I would reinstate the trial court's order granting summary disposition to plaintiff.

ZAHRA, J., would grant leave to appeal.

WILDER, J. (*dissenting*). I dissent from the order denying leave to appeal. Instead, I would reverse the judgment of the Court of Appeals and remand for further proceedings. The lower courts erred by concluding that the phrase "any property owner" contained in plaintiff's insurance policy was ambiguous, resorting to various tools of construction in order to reach the conclusion that the plain language of the policy exclusion could not possibly mean what it so obviously says. In my opinion, the phrase "any property owner" is clear, is unambiguous, and should be enforced as written. Insurance policies are construed using the same contractual construction principles that apply to any other species of contract. *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 367 (2012); *Rory v Continental Ins Co*, 473 Mich 457, 461 (2005). The Court's primary obligation when interpreting a contract is to give effect to the parties' intent at the time they entered into the contract. *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 507 (2016). If a contractual provision is unambiguous, then courts must interpret and enforce the provision *as written*, unless the provision as written would violate the law or public policy. *Rory*, 473 Mich at 469-470.

A contractual term is ambiguous when the term "is equally susceptible to more than a single meaning." *Barton-Spencer v Farm Bureau*, 500 Mich 32, 40 (2017). Of interest, neither the trial court nor the Court of Appeals concluded that the plain and ordinary meaning of "any property owner" was equally susceptible to more than one meaning. Rather, interpreting "any property owner" to mean something less than "any property owner" was deemed necessary in order to avoid rendering the policy provision illusory, a result deemed unreasonable or absurd. However, this Court has emphatically stated that "[j]udicial notions of reasonableness are not clearly rooted in the law and are therefore not a valid basis for refusing to enforce an unambiguous contract provision." *DeFrain*, 491 Mich at 373 (quotation marks and citations omitted). See also *Rory*, 473 Mich at 468 ("Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract."). I would apply the clear and unambiguous precedent of this Court and reverse and remand for enforcement of the plain language of the policy provision drafted by plaintiff.

In summary, I would conclude that the lower courts erred by failing to give the phrase "any property owner" its plain and ordinary meaning. Accordingly, I dissent from the order denying leave to appeal. I would instead reverse the judgment of the Court of Appeals and remand for further proceedings.

CLEMENT, J., did not participate.

PEOPLE V CARLISLE, No. 156770; Court of Appeals No. 336125.

Application for Leave to Appeal Dismissed on Stipulation December 8, 2017:

TRINITY HEALTH-WARDER LAB, LLC v PITTSFIELD CHARTER TOWNSHIP, No. 154952; reported below: 317 Mich App 629.

Order to Close File Entered December 14, 2017:

JOHNSON v LAKELAND CORRECTIONAL FACILITY WARDEN, No. 156772; Court of Appeals No. 339641. On order of the Chief Justice, plaintiff-appellant having failed to pay the partial filing fee as required by the order of November 22, 2017, the Clerk of the Court is hereby directed to close this file.

Summary Disposition December 15, 2017:

WALTERS v FALIK, No. 154489; Court of Appeals No. 319016. On December 6, 2017, the Court heard oral argument on the application for leave to appeal the August 16, 2016 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the order of the Eaton Circuit Court granting the defendants' motion in limine to exclude the plaintiffs' expert's testimony on causation. The trial court did not abuse its discretion in finding that the plaintiffs' proposed expert witness's opinion was unreliable, especially since the scientific articles presented by the plaintiffs indicated that the etiology of Wegener's granulomatosis ("Wegener's") is unknown and that no study has referred to an association between phosphoric acid and Wegener's. Further, the plaintiff's proposed expert failed to explain why phosphoric acid was analogous to other environmental factors potentially associated with Wegener's. The trial court thus did not abuse its discretion when it held that his testimony was not sufficiently reliable to proceed to the jury because it amounted to speculation. See *Elher v Misra*, 499 Mich 11 (2016); *Edry v Adelman*, 486 Mich 634, 639 (2010). Defendants' motion for leave to file a response to amicus curiae brief of the Michigan Association for Justice is granted.

BERNSTEIN, J. (*dissenting*). I would affirm for the reasons stated in the Court of Appeals majority opinion. I believe the Court of Appeals majority reached the right result for the right reasons.

Order Remanding Case for Settlement of the Record Entered December 15, 2017:

PEOPLE v TRAVER, No. 154494; reported below: 316 Mich App 588. We remand this case to the Mackinac Circuit Court for appropriate proceedings to settle the record as to the content of the written jury instructions on the elements of the charged crimes. The trial court shall make written findings of fact and shall forward its findings to the Clerk of the Supreme Court within 56 days of the date of this order. We retain jurisdiction.

Leave to Appeal Denied December 15, 2017:

In re MANNOR, Nos. 156645 and 156646; Court of Appeals Nos. 337115 and 338051.

Summary Disposition December 20, 2017:

PEOPLE v KEVIN BROWN, No. 153745; Court of Appeals No. 330917. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the October 27, 2009 amended judgment of sentence of the Wayne Circuit Court, and we remand this case to the trial court to reinstate the December 3, 2007 amended judgment of sentence. Because the December 3, 2007 amended judgment of sentence was valid, the Wayne Circuit Court lacked the authority to correct the sentence. See MCR 6.429(B) ("[T]he court may not modify a valid sentence after it has been imposed except as provided by law."). In all other respects, leave to appeal is denied. The motion for appointment of counsel is denied.

AFT MICHIGAN v STATE OF MICHIGAN, JOHNSON v PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM, and MCMILLAN v PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM, Nos. 154117, 154118, and 154119; reported below: 315 Mich App 602. 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 affirm the result reached by the June 7, 2016 judgment of the Court of Appeals for the reasons stated in Parts I and II of that opinion. Specifically, we affirm the holding that 2012 Public Act 300 is not retroactive and therefore has no application to funds collected from the plaintiffs before its enactment. Further, we affirm the holding that 2010 Public Act 75 violated the respective Contract Clauses of both the federal and state constitutions, US Const, art 1, § 10; Mich Const 1963, art 1, § 10, because it substantially impaired the plaintiffs' employment contracts by involuntarily reducing the plaintiffs' wages by 3%, and the state failed to demonstrate that this measure was reasonable and necessary to further a legitimate public purpose. See generally *Energy Reserves Group, Inc v Kansas Power & Light Co*, 459 US 400, 411-412; 103 S Ct 697; 74 L Ed 2d 569 (1983). Because these holdings fully resolve this case, it is unnecessary to address the other constitutional issues presented, and we therefore vacate Parts III and IV of the Court of Appeals opinion. Because 2010 Public Act 75 is unconstitutional, the funds collected pursuant to that act before the effective date of 2012 Public Act 300 must be refunded to the plaintiffs in accordance with the Court of Appeals judgment.

CLEMENT, J., did not participate.

PEOPLE v XILOJ-PEREZ, No. 155775; Court of Appeals No. 336849. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Kent Circuit Court to determine whether the defendant provided a completed Notice of Right to Appellate Review and Request for Appointment of Attorney form to a deputy to return to the court pursuant to MCR 6.425(F)(3). If the defendant did so, the trial court shall appoint appellate counsel to represent the defendant. See *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005). Substitute appellate counsel, once appointed, may file an application for leave to appeal in the Court of Appeals for consideration under the standard for direct appeals, and/or any appropriate postconviction motions in the circuit court, within six months of the date of the circuit

court's order appointing counsel. If the court finds that the defendant did not make a timely effort to request appellate counsel, it shall exercise its discretion in deciding whether to appoint appellate counsel.

EL-KHALIL v OAKWOOD HEALTH CARE, INC, No. 155785; Court of Appeals No. 329986. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration under the correct standard. The Court of Appeals erred in reviewing this case under MCR 2.116(C)(10), when the defendants filed a summary disposition motion under MCR 2.116(C)(7) and (8).

PEOPLE v ARNOLD, No. 156051; Court of Appeals No. 336817. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v VAZQUEZ, No. 156451; Court of Appeals No. 331181. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals that vacated the defendant's convictions and remanded this case to the trial court for further proceedings related to the trial court's denial of the defendant's request for an adjournment. The defendant has not established that he was denied the right to present a viable alibi defense by the trial court's denial of an adjournment. The documents that the defendant has submitted on appeal in support of his alibi defense do not, in fact, establish that defense. Thus, trial counsel was not ineffective in failing to obtain and present those documents at trial. We reinstate the December 17, 2015 judgment of sentence. In all other respects, leave to appeal is denied.

Leave to Appeal Granted December 20, 2017:

YU v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, No. 155811; Court of Appeals No. 331570. The parties shall address: (1) whether the plain language of the insurance policy precluded coverage; (2) if so, whether and under what circumstances the doctrine of equitable estoppel may be applied to require an insurer to expand coverage that is contrary to the express terms of an insurance contract; (3) whether an equitable estoppel claim requires that (a) a party against whom the doctrine of equitable estoppel is to be applied has full knowledge of the facts and circumstances involved, and (b) justifiable reliance on the part of the party seeking to invoke it is shown; and (4) whether the defendant-insurer should be equitably estopped from denying coverage in this case. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The Director of the Department of Insurance and Financial Services (DIFS) and the Insurance & Indemnity Law Section of the State Bar 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.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered December 20, 2017:

MICHIGAN GUN OWNERS, INC v ANN ARBOR PUBLIC SCHOOLS, No. 155196; reported below: 318 Mich App 338. The appellants shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether, in light of MCL 123.1102, it is necessary to consider the factors set forth in *People v Llewellyn*, 401 Mich 314 (1977), in order to determine whether the school district's policies are preempted; (2) if so, whether the Court of Appeals properly analyzed the *Llewellyn* factors; and (3) whether the Court of Appeals correctly held that the school district's policies are not preempted. In addition to the brief, the appellants shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellants' brief. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellants. A reply, if any, must be filed by the appellants within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers. We further direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *Mich Open Carry, Inc v Clio Area Sch Dist*, Docket No. 155204.

The Michigan Association of School Boards is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issues presented in these cases may move the Court for permission to file briefs amicus curiae. Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these cases should be filed in *Mich Gun Owners, Inc v Ann Arbor Pub Sch* (Docket No. 155196) only and served on the parties in both cases.

MICHIGAN OPEN CARRY, INC v CLIO AREA SCHOOL DISTRICT, No. 155204; reported below: 318 Mich App 356. The appellants shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether, in light of MCL 123.1102, it is necessary to consider the factors set forth in *People v Llewellyn*, 401 Mich 314 (1977), in order to determine whether the school district's policies are preempted; (2) if so, whether the Court of Appeals properly analyzed the *Llewellyn* factors; and (3) whether the Court of Appeals correctly held that the school district's policies are not preempted. In addition to the brief, the appellants shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellants' brief. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the

appellants. A reply, if any, must be filed by the appellants within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers. We further direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *Mich Gun Owners, Inc v Ann Arbor Pub Sch*, Docket No. 155196.

Persons or groups interested in the determination of the issues presented in these cases may move the Court for permission to file briefs amicus curiae. Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these cases should be filed in *Mich Gun Owners, Inc v Ann Arbor Pub Sch*, Docket No. 155196, only and served on the parties in both cases.

PEOPLE v TARONE WASHINGTON, No. 156283; Court of Appeals No. 330345. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the crime of maintaining a drug house, MCL 333.7405(1)(d), MCL 333.7506, a misdemeanor punishable by up to two years in prison, may serve as the predicate felony for a conviction of possessing a firearm during the commission of a felony, MCL 750.227b. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied December 20, 2017:

PEOPLE v BABBIE, No. 154752; Court of Appeals No. 334261.

PEOPLE v PIERRE TAYLOR, No. 155102; Court of Appeals No. 310771.

CROSS v BURHANS, Nos. 155161 and 155162; Court of Appeals Nos. 328019 and 328598.

PEOPLE v ATKINSON, No. 155256; Court of Appeals No. 335238.

In re CM, No. 155359; reported below: 315 Mich App 39.

WILDER, J., did not participate because he was on the Court of Appeals panel.

RIC-MAN CONSTRUCTION, INC v NEYER, TISEO & HINDO LTD, No. 155379; Court of Appeals No. 329159.

PEOPLE v PELLETIER, No. 155621; Court of Appeals No. 333465.

LYONS v KINSEL, Nos. 155872, 155873, and 155874; Court of Appeals Nos. 329584, 329597, and 329607.

LYONS v KINSEL, Nos. 155880, 155801, and 155802; Court of Appeals Nos. 329584, 329597, and 329607.

PEOPLE v MAYBERRY, No. 155922; Court of Appeals No. 331178.

LYONS v KINSEL, No. 156149; Court of Appeals No. 329597.

Reconsideration Denied December 20, 2017:

SHELBY TOWNSHIP v COMMAND OFFICERS ASSOCIATION OF MICHIGAN, No. 153074; Court of Appeals No. 323491. Order affirming the judgment of the Court of Appeals entered at 501 Mich 912.

WILDER, J., did not participate because he was on the Court of Appeals panel.

Summary Disposition December 27, 2017:

PEOPLE v STEVEN ALEXANDER, No. 155045; Court of Appeals No. 334868. By order of May 2, 2017, the application for leave to appeal the November 8, 2016 order of the Court of Appeals was held in abeyance pending the decisions in *People v Steanhouse* (Docket No. 152849) and *People v Masroor* (Docket Nos. 152946-8). On order of the Court, the cases having been decided on July 24, 2017, 500 Mich 453 (2017), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of: (1) whether offense variables (OV) 11 and 19 were misscored, and, if so, whether the defendant is entitled to resentencing, despite the trial court's departure from the guidelines range; and (2) if the defendant is not entitled to resentencing on the grounds that OVs 11 and 19 were misscored, whether the defendant's sentence is reasonable under the standard set forth in *Steanhouse*. In all other respects, leave to appeal is denied.

PEOPLE v SALOWICH, No. 155188; Court of Appeals No. 335404. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v JASZCZOLT, No. 155377; Court of Appeals No. 336131. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. On remand, while retaining jurisdiction, the Court of Appeals shall remand this case to the Oakland Circuit Court for further proceedings. The circuit court's December 1, 2016 decision is inadequate for appellate review because it fails to make any findings of fact or conclusions of law that relate to the three charges against the defendant or to draw any conclusions regarding application of the retroactive amendments to the Michigan Medical Marihuana Act (MMMA), MCL

333.26421 *et seq.*, in 2016 PA 281-283 to any of the defendant's marijuana-related conduct, including but not limited to his claim that he planned to transfer a portion of the marijuana in his possession to a third-party to make a "marihuana-infused product." See 2016 PA 283, MCL 333.26423(f); 2016 PA 281, § 102(k). A single act by the defendant that is outside the parameters of the MMMA does not per se taint all of the defendant's marijuana-related conduct. *People v Hartwick*, 498 Mich 192, 241-242 (2015). The circuit court shall forward its findings and conclusions to the Court of Appeals, which shall resolve the issues presented by the defendant. We do not retain jurisdiction.

PEOPLE V MCCLINTON, No. 155487; Court of Appeals No. 336320. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Calhoun Circuit Court for consideration of the defendant's motion for relief from judgment filed on October 14, 2016. The motion for relief from judgment is based in part on an affidavit that was not previously presented to the trial court. Therefore, the motion is not procedurally barred under MCR 6.502(G)(1) because it is "based on . . . a claim of new evidence that was not discovered before the first" motion for relief from judgment. MCR 6.502(G)(2); *People v Swain*, 499 Mich 920 (2016). We do not retain jurisdiction.

Leave to Appeal Granted December 27, 2017:

DYE V ESURANCE PROPERTY & CASUALTY INSURANCE COMPANY, No. 155784; Court of Appeals No. 330308. The plaintiff's application for leave to appeal as cross-appellant is granted in part, limited to the issue whether an owner or registrant of a motor vehicle involved in an accident may be entitled to personal protection insurance benefits for accidental bodily injury where no owner or registrant of the motor vehicle maintains security for payment of benefits under personal protection insurance. See MCL 500.3101(1); MCL 500.3113(b); *Barnes v Farmers Ins Exch*, 308 Mich App 1 (2014). The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1). The application for leave to appeal and GEICO Indemnity Company's application for leave to appeal as cross-appellant are denied.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered December 27, 2017:

PEOPLE V STRAUGHTER, No. 156198; Court of Appeals No. 328956. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the harmless error tests articulated in MCR 2.613 and MCL 769.26 apply to violations of the habitual offender notice requirements set forth in MCL 769.13, compare *People v Cobley*, 463 Mich 893 (2000), with *People v Johnson*, 495 Mich 919 (2013); (2) whether the prosecutor may establish that a defendant received a habitual offender notice at any time before the 21-day time limit in MCL 769.13 by any means other than a proof of service; and (3)

whether providing a habitual offender notice in district court satisfies the requirement set forth in MCL 769.13 that the habitual offender notice be served within 21 days after the defendant's arraignment on the information. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied December 27, 2017:

PEOPLE v AGRO, No. 152772; Court of Appeals No. 320927.

PEOPLE v CARRUTHERS, No. 153489; Court of Appeals No. 309987. On order of the Court, the application for leave to appeal the March 29, 2016 order of the Court of Appeals is considered, and it is denied. The defendant's motion to add issues is denied; however, this denial is without prejudice to the defendant filing a motion in the circuit court, on remand as ordered by the Court of Appeals, to raise these new issues.

PEOPLE v VALLADOLID, No. 154758; Court of Appeals No. 334069.

PEOPLE v DEREK WORTHY, No. 154884; Court of Appeals No. 334040.

PEOPLE v KARES, No. 155286; Court of Appeals No. 332673.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v ELZER, No. 155301; Court of Appeals No. 334143.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v HARD, No. 155313; Court of Appeals No. 334462.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v TRE JACKSON, No. 155331; Court of Appeals No. 335281.

PEOPLE v DERRICK SMITH, No. 155334; Court of Appeals No. 335215.

PEOPLE v BYNUM, No. 155335; Court of Appeals No. 334548.

WILDER, J., did not participate because he was on the Court of Appeals panel at an earlier stage of the proceedings.

PEOPLE v EDWARD TAYLOR, No. 155355; Court of Appeals No. 335749.

PEOPLE v ROBERT FOSTER, No. 155365; Court of Appeals No. 334826.

PEOPLE v PROPHET, No. 155368; Court of Appeals No. 335563.

PEOPLE v WIECZOREK, No. 155391; Court of Appeals No. 334282. On order of the Court, the application for leave to appeal the February 2, 2017 order of the Court of Appeals is considered, and it is denied. For purposes of MCR 6.502(G)(1), the Court notes that, although the defendant's motion has been styled as a motion for relief from judgment by the Macomb Circuit Court, it should not be regarded as a motion for relief from judgment in any future case. The defendant actually filed a motion for a new trial under MCL 770.1, which was properly denied by the trial court for lack of merit. The application for leave to appeal was properly denied by the Court of Appeals.

PEOPLE v FREEMAN, No. 155410; Court of Appeals No. 335347.

PEOPLE v LEROY SCOTT, No. 155414; Court of Appeals No. 336219.

PEOPLE v CARLYLE, No. 155444; Court of Appeals No. 335809.

PEOPLE v PARSONS, No. 155455; Court of Appeals No. 336012.

PEOPLE v FETTIG, No. 155466; Court of Appeals No. 336165.

PEOPLE v JEFFERY PAYNE, No. 155507; Court of Appeals No. 335711.

PEOPLE v WILLIAM JONES, No. 155508; Court of Appeals No. 335276.

PEOPLE v BROGAN, No. 155513; Court of Appeals No. 335280.

PEOPLE v EMERY, No. 155517; Court of Appeals No. 334494.

PEOPLE v AIDEN, No. 155536; Court of Appeals No. 335234.

PEOPLE v LEONARD, No. 155539; Court of Appeals No. 334477.

PEOPLE v ELY, No. 155542; Court of Appeals No. 334658.

PEOPLE v MONTEZ, No. 155547; Court of Appeals No. 335611.

PEOPLE v PRATHER, No. 155551; Court of Appeals No. 336119.

PEOPLE v ANTHONY STANFORD, No. 155554; Court of Appeals No. 335826.

PEOPLE v POE, No. 155564; Court of Appeals No. 336290.

PEOPLE v DEVON BELL, No. 155584; Court of Appeals No. 335397.

PEOPLE v MICHAEL JOHNSON, No. 155602; Court of Appeals No. 335266.

PEOPLE v DELEON NELSON, No. 155639; Court of Appeals No. 336487. WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v DEANDRE HAWKINS, No. 155642; Court of Appeals No. 335636.

PEOPLE v MCLILLY, No. 155644; Court of Appeals No. 335694.

PEOPLE v FORD, No. 155659; Court of Appeals No. 335991.

PEOPLE v MARIO BROWN, No. 155667; Court of Appeals No. 336505.

PEOPLE v PHILLIP PAYNE, No. 155668; Court of Appeals No. 336002.

PEOPLE v MORTON, No. 155676; Court of Appeals No. 335937.

PEOPLE v STROH, No. 155680; Court of Appeals No. 335564.

PEOPLE v GAREL, No. 155691; Court of Appeals No. 337198.

In re BOWLING, No. 155790; Court of Appeals No. 335220.

PEOPLE v LUESING, No. 155795; Court of Appeals No. 330507.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v DAVID SUTTON, No. 155820; Court of Appeals No. 337068.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v ZAKER, No. 155822; Court of Appeals No. 336859.

PEOPLE v CAJAR, No. 155843; Court of Appeals No. 326890.

PEOPLE v BOOKER, No. 155855; Court of Appeals Nos. 326570 and 332975.

WILDER, J., did not participate because he was on the Court of Appeals panel.

HALE-BEY v WAYNE CIRCUIT COURT, No. 155894; Court of Appeals No. 336772.

PEOPLE v JUIDE, No. 155917; Court of Appeals No. 337393.

PEOPLE v HARRELL, No. 155924; Court of Appeals No. 337203.

PEOPLE v SINGH, No. 155929; Court of Appeals No. 337465.

PEOPLE v PLASENCIA, No. 155934; Court of Appeals No. 330498.

PEOPLE v SEBASTIAN WILSON, No. 155936; Court of Appeals No. 330883.

PEOPLE v DAILEY, No. 155975; Court of Appeals No. 329412.

PEOPLE v GREGORY WALKER, No. 155980; Court of Appeals No. 337591.

PEOPLE v FREESE, Nos. 155985 and 155986; Court of Appeals Nos. 329673 and 332141.

PEOPLE v GOSS, No. 155998; Court of Appeals No. 330236.

RENCO ELECTRONICS, INC v UUSI, LLC, No. 156002; Court of Appeals No. 331506.

PEOPLE v DELEON, No. 156012; Court of Appeals No. 337587.

PEOPLE v GEORGE, No. 156038; Court of Appeals No. 327812.

PEOPLE v ROSEBURGH, No. 156044; Court of Appeals No. 331356.

PEOPLE v AHMAD DAVIS, No. 156048; Court of Appeals No. 331718.

PEOPLE v DAVIDSON, No. 156054; Court of Appeals No. 332032.

PEOPLE v PERKINS, No. 156065; Court of Appeals No. 331827.

PEOPLE v HARPER, No. 156089; Court of Appeals No. 336362.

PEOPLE v ROSBARSKY, Nos. 156093 and 156094; Court of Appeals Nos. 331653 and 332251.

CITY OF RIVERVIEW v OPERATING ENGINEERS LOCAL 324 PENSION PLAN, No. 156096; Court of Appeals No. 331234.

WHALEY v A FOREVER RECOVERY, INC, No. 156101; Court of Appeals No. 331521.

PEOPLE v MCRORIE, No. 156102; Court of Appeals No. 330576.

PEOPLE v JEFFERY HOLLOWAY, No. 156103; Court of Appeals No. 337854.

PEOPLE v DONALD DAVIS, No. 156115; Court of Appeals No. 330280.

AUTO CLUB GROUP INSURANCE COMPANY v JOHNSON, Nos. 156122 and 156123; Court of Appeals Nos. 330669 and 330698.

PEOPLE v STRAUGHTER, No. 156157; Court of Appeals No. 328956.

Reconsideration Denied December 27, 2017:

PEOPLE v BLAIN, No. 153108; Court of Appeals No. 330314. Leave to appeal denied at 501 Mich 906.

PEOPLE v KAVINA WARD, No. 154296; Court of Appeals No. 332861. Leave to appeal denied at 501 Mich 877.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v FAVORS, No. 154960; Court of Appeals No. 333882. Leave to appeal denied at 501 Mich 878.

PEOPLE v JENNINGS, No. 155604; Court of Appeals No. 336249. Leave to appeal denied at 501 Mich 880.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v JENNINGS, No. 155609; Court of Appeals No. 335203. Leave to appeal denied at 501 Mich 880.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v GOOD, No. 155653; Court of Appeals No. 329177. Leave to appeal denied at 501 Mich 893.

PEOPLE v BISKNER, No. 155756; Court of Appeals No. 335026. Leave to appeal denied at 501 Mich 881.

LANDRY-CHAN v CHAN, No. 155862; Court of Appeals No. 331977. Leave to appeal denied at 501 Mich 882.

PEOPLE v DEMARCUS SMITH, No. 156412; Court of Appeals No. 338953. Leave to appeal denied at 501 Mich 902.

TINDALL v ATTORNEY DISCIPLINE BOARD, No. 156516. Superintending control denied at 501 Mich 897.

Summary Disposition January 3, 2018:

PEOPLE v KEVIN HILL, No. 154716; Court of Appeals No. 333566. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court to reappoint attorney Arthur J. Rubiner, if feasible, to represent the defendant as on direct appellate review. If this appointment is not feasible, the trial court shall appoint other counsel to represent the defendant. See *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005). The record reflects that defendant's former appellate counsel did not contact the defendant in a timely manner, did not adequately review the record and determine that nothing might arguably support an appeal, and did not move for substitution of counsel until the deadline for filing a direct appeal was imminent. Thus, through no fault of the defendant, he lost the right to seek leave to appeal to the Court of Appeals on direct review. On remand, appellate counsel, once appointed, may file an application for leave to appeal in the Court of Appeals for consideration under the standard for direct appeals, and/or any appropriate postconviction motions in the circuit court, within six months of the date of the circuit court's order appointing or reappointing counsel. Counsel may include among the issues raised, but is not required to include, the issues that were raised on behalf of the defendant in the motion for relief from judgment that was filed in 2016.

Costs are imposed against the attorney, Suzanna Kostovski, only, in the amount of $500, to be paid to the Clerk of this Court. We do not retain jurisdiction.

PEOPLE v MICHAEL WARD, No. 154990; Court of Appeals No. 333477. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the January 8, 2016 order of the Huron Circuit Court, which denied the defendant's application for leave to appeal, and we remand this case to that court for reconsideration by a different circuit court judge. The circuit judge committed an error when he reviewed on appeal, as a circuit judge, decisions that he rendered while acting as a district court judge. See *Williams v Pennsylvania*, 579 US ___; 136 S Ct 1899, 1905, 1906; 195 L Ed 2d 132 (2016); *Goldberg v Kelly*, 397 US 254, 271; 90 S Ct 1011; 25 L Ed 2d 287 (1970); and *In re Murchison*, 349 US 133; 75 S Ct 623; 99 L Ed 942 (1955). The motion for appointment of legal counsel

and to invite amicus briefing and the motion to hold in abeyance are denied. We do not retain jurisdiction.

PEOPLE v GALLOWAY, No. 156204; Court of Appeals No. 329480. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals, which did not address the defendant's argument that his trial counsel specifically failed to account for habitual offender enhancement when advising the defendant regarding the applicable minimum guidelines range and that, but for this error, the defendant would have accepted a plea offer with a sentencing agreement and the trial court would have accepted the agreement. We remand this case to the Court of Appeals, which, while retaining jurisdiction, shall remand this case to the Oakland Circuit Court to conduct a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973). On remand, the trial court shall determine whether the defendant was denied the effective assistance of trial counsel based on his claim that he would have accepted a plea offer with a sentencing agreement, but for counsel's error, and that the trial court would have accepted the agreement. At the conclusion of the hearing, the trial court shall reconsider the defendant's motion for relief from judgment under the prejudice analysis applicable to claims of ineffective assistance of counsel at the plea stage. See *People v Douglas*, 496 Mich 557 (2014). The trial court shall then forward the record and its findings to the Court of Appeals, which shall resolve the issues presented by the defendant. We do not retain jurisdiction.

WILDER, J., did not participate because he was on the Court of Appeals panel at an earlier stage of the proceedings.

PEOPLE v MATHEWS, No. 156542; Court of Appeals No. 339079. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The Court of Appeals is directed to consider whether either of the bases for suppression advanced by the defendant in the trial court rendered the warnings in this case deficient under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

KUHLGERT v MICHIGAN STATE UNIVERSITY, Nos. 156671 and 156672; Court of Appeals Nos. 332442 and 338363. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals, and we remand this case to that court, which shall hold these consolidated appeals in abeyance pending the decision of the Michigan Compensation Appellate Commission in *Ostendorf v Mich State Univ*, No. 17-0013. Michigan State University shall file a copy of that decision with the Court of Appeals Clerk's Office within seven days after it is issued.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered January 3, 2018:

NORTH AMERICAN BROKERS, LLC v HOWELL PUBLIC SCHOOLS, No. 155498; Court of Appeals No. 330126. The appellant shall file a supplemental

brief within 42 days of the date of this order addressing whether promissory estoppel is an exception to the statute of frauds. MCL 566.132. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

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. Motions for permission to file briefs amicus curiae and briefs amicus curiae must be filed within 14 days after the appellees' supplemental brief is filed with the Court.

Leave to Appeal Denied January 3, 2018:

PEOPLE v KEITH, No. 153541; Court of Appeals No. 331240.

PEOPLE v BOES, No. 154152; Court of Appeals No. 333066.

SHELTON v AUTO-OWNERS INSURANCE COMPANY, No. 155527; reported below: 318 Mich App 648.

WATKINS v AUTO CLUB INSURANCE ASSOCIATION, No. 155797; Court of Appeals No. 336113.

BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceeding.

JONES v MEEMIC INSURANCE COMPANY, No. 155851; Court of Appeals No. 337041.

PEOPLE v WALDEN, No. 155961; reported below: 319 Mich App 344.

PEOPLE v EL-AMIN, No. 156000; Court of Appeals No. 330635.

PEOPLE v JERRY ANDERSON, No. 156142; Court of Appeals No. 337773.

BRICKHAVEN CONDOMINIUM ASSOCIATION v HOGAN, No. 156163; Court of Appeals No. 335722.

PEOPLE v SHOFFNER, No. 156165; Court of Appeals No. 337896.

PEOPLE v CHRISTOPHER LAWRENCE, No. 156171; Court of Appeals No. 330762.

PEOPLE v TERREON SMITH, No. 156174; Court of Appeals No. 331305.

PEOPLE v BAZZI, No. 156176; Court of Appeals No. 338059.

JENKS v DEPARTMENT OF TREASURY, No. 156194; Court of Appeals No. 332787.

PEOPLE v RICHARD MILLS, No. 156196; Court of Appeals No. 338001.

PEOPLE v FINLAYSON, No. 156203; Court of Appeals No. 337887.

PEOPLE v KENNETH JACKSON, No. 156206; Court of Appeals No. 330429.

PEOPLE v RONALD TURNER, No. 156210; Court of Appeals No. 337202.

PEOPLE v STARLING, No. 156213; Court of Appeals No. 337651.

PEOPLE v ROBERT SMITH, No. 156215; Court of Appeals No. 338276.

KOVACS v ROBBINS, No. 156216; Court of Appeals No. 331448.

PEOPLE v MARCUM, No. 156219; Court of Appeals No. 330279.

PEOPLE v FREESE, No. 156226; Court of Appeals No. 330251.

PEOPLE v BRUCKNER, No. 156230; Court of Appeals No. 338119.

LOCKPORT TOWNSHIP v CITY OF THREE RIVERS, No. 156231; reported below: 319 Mich App 516.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v MOTLEY, No. 156232; Court of Appeals No. 337301.

SESI v DIMAGGIO, No. 156234; Court of Appeals No. 336270.

PEOPLE v KIRCHEN, No. 156237; Court of Appeals No. 332150.

MATOUK v MICHIGAN MUNICIPAL LEAGUE LIABILITY & PROPERTY POOL, No. 156239; reported below: 320 Mich App 402.

PEOPLE v HAIGHT, No. 156245; Court of Appeals No. 338545.

PEOPLE v HAIGHT, No. 156247; Court of Appeals No. 338546.

PEOPLE v NEELIS, No. 156250; Court of Appeals No. 338040.

EL-HAYEK v TRICO PRODUCTS CORPORATION, No. 156256; Court of Appeals No. 331283.

PEOPLE v RENIFF, No. 156257; Court of Appeals No. 335727.

PEOPLE v REYNALDO LOPEZ, No. 156259; Court of Appeals No. 337306.

PEOPLE v POSEY, No. 156261; Court of Appeals No. 338716.

ASHEN v ASSINK, No. 156265; Court of Appeals No. 331811.

PEOPLE v TRON ROBINSON, No. 156268; Court of Appeals No. 331817.

PEOPLE v PARRISH ROBINSON, No. 156278; Court of Appeals No. 332148.

PEOPLE v ABRO, No. 156282; Court of Appeals No. 338151.

PEOPLE v WEIMER, No. 156286; Court of Appeals No. 330100.

PEOPLE v WEIMER, No. 156288; Court of Appeals No. 335040.

PEOPLE v REGINALD COLEMAN, No. 156291; Court of Appeals No. 331425.

PEOPLE v JAMES WARD, No. 156292; Court of Appeals No. 338321.

PEOPLE v BEAVERS, No. 156293; Court of Appeals No. 330694.

PEOPLE v MARCUS HARRIS, No. 156296; Court of Appeals No. 330934.

PEOPLE v JAMON PRICE, No. 156300; Court of Appeals No. 338491.

PEOPLE v STEWARD, No. 156321; Court of Appeals No. 338304.

PEOPLE v MARSTON, No. 156329; Court of Appeals No. 338060.

PEOPLE v BEARDEN, No. 156330; Court of Appeals No. 338919.

PEOPLE v GRABIEC, No. 156350; Court of Appeals No. 337722.

PEOPLE v HAGON, No. 156365; Court of Appeals No. 338408.

PEOPLE v POINDEXTER, No. 156368; Court of Appeals No. 338486.

PEOPLE v CRESPO, No. 156377; Court of Appeals No. 338560.

PEOPLE v RENFROE, No. 156387; Court of Appeals No. 337730.

ELLISON v DEPARTMENT OF STATE, No. 156401; reported below: 320 Mich App 169.

PEOPLE v DEAUNDRAY ROSS, No. 156415; Court of Appeals No. 337295.

PEOPLE v MCDONALD, No. 156428; Court of Appeals No. 337671.

PEOPLE v FIELDS, No. 156436; Court of Appeals No. 338636.

NASH v DUNCAN PARK COMMISSION, NASH v DUNCAN PARK TRUST, and NASH v DEHARE, Nos. 156519, 156520, and 156521; Court of Appeals Nos. 331651, 331840, and 331842.

PEOPLE v CLEAVES, No. 156524; Court of Appeals No. 338394.

GRIEVANCE ADMINISTRATOR v MCCARTHY, No. 156555.

GRIEVANCE ADMINISTRATOR v DICKSON, No. 156641.

PEOPLE v WOFFORD, No. 156716; Court of Appeals No. 339929.

PEOPLE v MARSTON, No. 156771; Court of Appeals No. 339465.

Superintending Control Denied January 3, 2018:

MCKALPAIN v ATTORNEY GRIEVANCE COMMISSION, No. 156217.

Reconsideration Denied January 3, 2018:

PEOPLE v JAMAL WILLIAMS, No. 154888; Court of Appeals No. 321355. Summary disposition entered at 501 Mich 876.

Leave to Appeal Denied January 5, 2018:

In re HENDERSON, No. 156877; Court of Appeals No. 336561.

Application for Leave to Appeal Dismissed on Stipulation January 5, 2018:

PEOPLE v RYAN LEWIS, No. 155224; Court of Appeals No. 328044. Order granting a joint motion to remand entered at 501 Mich 858 and order granting a joint motion to clarify the scope of remand entered at 501 Mich 931.

Leave to Appeal Denied January 11, 2018:

MICHIGAN STATE UNIVERSITY STUDENT ID #A48212299 v MICHIGAN STATE UNIVERSITY, No. 156959; Court of Appeals No. 341151.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered January 12, 2018:

MCQUEER v PERFECT FENCE COMPANY, No. 153829; Court of Appeals No. 325619. The appellant shall file a supplemental brief within 35 days of the date of this order addressing: (1) whether the statutory employer provision of MCL 418.171 is applicable to the plaintiff's claims; and (2) if so, whether the plaintiff has established a genuine issue of material fact sufficient to avoid summary disposition; and (3) whether the Court of Appeals erred by reversing the Grand Traverse Circuit Court's order denying, on the basis of futility, the plaintiff's motion to amend his complaint to add an intentional tort claim. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

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. Motions for permission to file briefs amicus curiae and briefs amicus curiae must be filed within 14 days after the appellee's supplemental brief is filed with the Court.

JOHNSON v VANDERKOOI and HARRISON v VANDERKOOI, Nos. 156057 and 156058; reported below: 319 Mich App 589. The appellants shall file a supplemental brief within 35 days of the date of this order addressing whether any alleged violation of the plaintiffs' constitutional rights were

the result of a policy or custom instituted or executed by the defendant City of Grand Rapids. See *Monell v Dep't of Human Servs*, 436 US 658 (1978). In addition to the brief, the appellants shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellants' brief. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellants. A reply, if any, must be filed by the appellants within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

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. Motions for permission to file briefs amicus curiae and briefs amicus curiae must be filed within 14 days after the appellees' supplemental brief is filed with the Court.

Leave to Appeal Denied January 12, 2018:

PUCCI v NINETEENTH JUDICIAL DISTRICT COURT, No. 153893; Court of Appeals No. 325052. Leave to appeal granted at 500 Mich 979. 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 April 28, 2017. The application for leave to appeal the March 17, 2016 judgment of the Court of Appeals is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court.

MARKMAN, C.J. I would respectfully not deny leave to appeal, but would offer at least some guidance concerning what I view as the threshold issue in this case. While I reach the same result as the Court of Appeals, as well as that produced by this Court's denial of leave, the analysis of the Court of Appeals, in my judgment, is both flawed and incomplete while the issue presented is one of considerable significance for the financial management of Michigan's judicial system, deserving some greater clarification.

Plaintiff filed a federal action under 42 USC 1983 ("§ 1983") against Judge Mark Somers, the former chief judge of the 19th District Court in Dearborn, alleging that he had wrongfully terminated her court employment in violation of the First and Fourteenth Amendments.[1] Eight days before trial, Judge Somers, in his capacity as chief judge, instituted a policy that the district court would indemnify court employees for suits arising from discretionary administrative decisions made within the scope of their authority. A judgment was eventually entered against

[1] 42 USC 1983 sets forth a cause of action "to redress deprivations of civil rights by persons acting 'under color of any [state] statute, ordinance, regulation, custom, or usage.' " *Hafer v Melo*, 502 US 21, 27 (1991), quoting 42 USC 1983 (alteration in original).

Judge Somers in his personal capacity in excess of $1 million. Following the judgment, Judge Richard Wygonik, the successor chief judge of the district court, continued the indemnification policy that Judge Somers had implemented and submitted an affidavit attesting that the court would indemnify Judge Somers for the judgment entered against him.

Plaintiff subsequently brought suit in state court seeking to recover on the judgment from the district court in accordance with the indemnification policy. The trial court held that the court was required to indemnify Judge Somers, but the Court of Appeals reversed. *Pucci v Nineteenth Judicial Dist Court*, unpublished per curiam opinion of the Court of Appeals, issued March 17, 2016 (Docket No. 325052). The Court held that a chief judge possesses the authority to indemnify court employees, but only for liability incurred in their official capacity, not in their personal capacity. *Id*. at 8. Plaintiff appealed, and this Court granted leave, requesting the parties to "include among the issues to be briefed:"

> (1) whether the chief judge of a district court possesses the authority to adopt an employee indemnification policy on behalf of the district court, MCL 691.1408(1); MCR 8.110(C); (2) if a chief judge possesses such authority, whether the judge may adopt a policy that indemnifies employees for liability incurred in their individual capacities; and (3) whether the conduct of Judge Somers that gave rise to the judgment against him in the federal district court occurred "while in the course of employment and while acting within the scope of his . . . authority." MCL 691.1408(1). [*Pucci v Nineteenth Judicial Dist Court*, 500 Mich 979 (2017).]

In my judgment, the Court of Appeals erred when it conditioned a district court's authority to indemnify an employee on whether the employee incurred liability in an official or in a personal capacity. MCL 691.1408(1) contains no such distinction, stating only that a "governmental agency," which is defined to encompass a court,[2] may indemnify an employee for liability incurred "while in the course of employment and while acting within the scope of his or her authority." Further, an employee who is found liable under § 1983 in his or her personal capacity can incur liability "while in the course of employment and while acting within the scope of his or her authority . . . ." MCL 691.1408(1); see, e.g., *Shrader v Employers Mut Cas Co*, 907 So 2d 1026, 1033 (Ala, 2005) ("[Section 1983] imposes liability on state officials for conduct taken within, as well as without, the scope of their authority.") (alterations omitted); *Ritchie v Donnelly*, 324 Md 344, 364 (1991) ("Most actions taken by a government officer or employee 'under color of' law, governmental custom or usage will be actions in the scope of employment."). Moreover, a per se rule that a district court cannot indemnify an

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[2] MCL 691.1401(a) defines a "governmental agency" as "this state or a political subdivision," and MCL 691.1401(e) defines "political subdivision" to include a "court."

employee for liability incurred in his or her personal capacity would effectively preclude a court, without any legal warrant, from indemnifying an employee for liability incurred under § 1983. The United States Supreme Court has explained "the distinction between personal and official-capacity suits" under § 1983:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, generally represent only another way of pleading an action against an entity of which an officer is an agent. . . . Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself." *Kentucky v Graham*, 473 US 159, 165-166 (1985) (quotation marks and citations omitted).

That is, a government employee only incurs liability under § 1983 if a judgment is entered against that employee in his or her personal capacity. Accordingly, under the Court of Appeals' reasoning, a court would never be permitted to indemnify an employee who incurs liability under § 1983. While a district court's authority to indemnify an employee might be otherwise statutorily or constitutionally limited, there is no basis to conclude that a district court is categorically prohibited from indemnifying an employee for liability incurred in his or her personal capacity under § 1983. Because the Court of Appeals' reasoning here is in error and precludes without warrant a district court from indemnifying employees for liability incurred under § 1983, I would not sustain it.

Rather than denying leave, however, I would also address the *threshold* issue in this case, one that has only been perfunctorily addressed by the parties: assuming that Judge Somers had the authority to unilaterally adopt an indemnification policy on behalf of the 19th District Court—i.e., without the approval of that court's funding authority, the city of Dearborn—whether and to what extent that court now remains *bound* by that policy. Neither Judge Somers nor Judge Wygonik is the current chief judge of the district court, and obviously the court no longer wishes to indemnify Judge Somers; otherwise, presumably, it would not be challenging the instant lawsuit. If the court is no longer *bound* to indemnify Judge Somers, without regard to whether Judge Somers had the authority to *adopt* the indemnification policy in the first place, then it would be unnecessary to reach the additional questions posed in this Court's grant order.

In the Court of Appeals, plaintiff argued passingly as the *only* basis for the proposition that the indemnification policy remains enforceable, notwithstanding the district court's present opposition to the policy, this Court's decision in *Toussaint v Blue Cross & Blue Shield of Mich*, 408 Mich 579 (1980), in which we held that an agreement not to discharge an employee except for cause may effectively become part of an employment contract "as a result of an employee's legitimate expectations

grounded in an employer's policy statements." *Id*. at 598. In the 37 years since, *Toussaint* has been limited to the wrongful-discharge context, see, e.g., *Fischhaber v Gen Motors Corp*, 174 Mich App 450, 455 (1988), and a plurality opinion of this Court has expressly concluded that *Toussaint* is *properly* limited to such cases. *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 531 (1991) (opinion by RILEY, J.). Whatever the merits of *Dumas*, or of any other decision among *Toussaint*'s progeny, plaintiff here has barely undertaken to explain why the district court (or the city) should be required to *retain* an indemnification policy of which it has come to disapprove or why this should not be a matter of concern exclusively to the beneficiary of the policy, the employee being indemnified. In particular, plaintiff has not explained why *Toussaint* should now be understood for the first time to apply in any context outside the wrongful-discharge context, much less in the specific context of the instant case. Why, for example, is the *Dumas* plurality incorrect in asserting that "it is difficult to imagine the scope of difficulties and mischief that would be encountered if *Toussaint* were to be extended beyond wrongful discharge into every facet of the employment relationship"? *Id*. at 532 (quotation marks and citation omitted). That is not addressed by the plaintiff. Why, for example, is the *Dumas* plurality incorrect in concluding that the "fear of courting litigation [under an expansion of *Toussaint*] would result in a substantial impairment of a company's operations and its ability to formulate policy," in this case the policymaker being a public body beholden to taxpayers? *Id*. at 531. Again, there is not even a pretense of an argument offered by plaintiff in support of the proposition that an indemnification policy once adopted cannot be withdrawn.

In my judgment, the district court here is not bound by the indemnification policy to indemnify Judge Somers because it has *chosen* not to be so bound. Rather than allowing to remain undisturbed what I view as the erroneous reasoning of the Court of Appeals, I would affirm its judgment on the alternative ground that, even if Judge Somers had the authority to enact an indemnification policy on behalf of the court, the court equally had the authority to unbind itself from that policy. Moreover, if *Toussaint* or some other legal grounding should be understood to sustain a contrary result, I look forward to an actual argument being made on behalf of that proposition.

CLEMENT, J., did not participate.

JENDRUSINA v MISHRA, No. 154717; reported below: 316 Mich App 621.

MARKMAN, C.J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal. Largely for the reasons stated in the Court of Appeals dissent, I would reverse the Court of Appeals judgment and reinstate the trial court's order granting summary disposition in favor of defendants. As the dissent concluded, the limitations period here began to run on January 3, 2011, when plaintiff was diagnosed with kidney failure, and he thereafter failed to timely commence an action.

Plaintiff alleges that defendant Shyam Mishra, M.D., failed to properly manage and treat his kidney disease. According to plaintiff, defendant regularly monitored his kidney function, yet despite progres-

sively worsening kidney functions, defendant never referred him to a nephrologist or otherwise treated his condition. The statutory period of limitations for a claim based on medical malpractice is generally two years, MCL 600.5805(6), and it is undisputed that plaintiff failed to commence his action within this period. However, plaintiff asserts that his action was nevertheless timely under the "discovery rule" set forth in MCL 600.5838a(2), which provides in part as follows: "[A]n action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 . . . or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later." In *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 232 (1997), we explained that the "six-month discovery rule period begins to run in medical malpractice cases when the plaintiff, on the basis of objective facts, is aware of a possible cause of action," which "occurs when the plaintiff is aware of an injury and a possible causal link between the injury and an act or omission of the physician."

Here, plaintiff's deposition testimony indicated that defendant had been monitoring his "kidney numbers" for years. During this monitoring, plaintiff's numbers were slightly elevated, and defendant ordered an ultrasound of his kidneys in 2009. However, plaintiff testified that he was apprised afterwards by defendant that his kidneys were "fine." Plaintiff continued to be tested twice a year and, according to plaintiff, defendant never indicated that he suffered from kidney disease or that his kidneys were otherwise failing. Plaintiff testified further that defendant "kept on mentioning" his kidney number and stated, "don't worry about it, it was fine, it was within safe limits, is what he always told me." On January 3, 2011, plaintiff went to the hospital with flu-like symptoms, at which point, according to plaintiff, emergency room personnel told him that his "kidneys failed" and that his numbers were "way out of whack."

Considering these facts together, as of January 3, 2011, plaintiff was aware that defendant had been monitoring his numbers for years, that his numbers were "way out of whack" upon admission to the hospital, and that his kidneys had apparently failed, despite the fact that defendant had regularly assured him that his kidneys were "fine." These facts should have aroused at least some modicum of suspicion in a reasonable person that defendant had provided deficient care, and they also suggest that plaintiff should have been aware of a kidney problem and a possible causal linkage between that problem and some negligent act or omission on defendant's part. See *id*. at 222 (stating that a "plaintiff need not know for certain that he had a claim, or even know of a likely claim before the six-month period would begin"). Thus, as the Court of Appeals dissent concluded, plaintiff should reasonably have discovered the existence of his claim on January 3, 2011, and his action was barred by the limitations period in MCL 600.5838a(2) because he failed to commence the action within six months after this date. I am aware that the immediate reaction of any person to what plaintiff learned on that date would not have been to assess what was required to preserve a medical malpractice action but rather to seek out treat-

ment, but legal claims are not of indefinite duration; in this instance they must be brought within two years of the malpractice or within six months of when a person discovers or should have discovered the existence of the claim, whichever date is later.

Moreover, even if one were to disregard the January 2011 date, plaintiff should at least have discovered the existence of his claim by October 2011, at which time plaintiff's nephrologist recommended that he obtain a kidney transplant. By this time, not only had plaintiff been *diagnosed* with kidney failure, but he had also been counseled as to how to *address* this condition. That his kidneys failed and that a transplant was recommended, combined with his knowledge that defendant had been monitoring his kidneys for years yet never once indicated they were failing, supplied plaintiff with more than sufficient information concerning the basis for a legal claim.

In sum, plaintiff should have discovered his claim by January 3, 2011, or, at the very latest, by October 2011. However, plaintiff failed to commence his action within six months of either of these dates. Therefore, the action was time-barred under MCL 600.5838a(2), and the trial court, in my judgment, properly granted summary disposition in favor of defendants.

ZAHRA and WILDER, JJ., joined the statement of MARKMAN, C.J.

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel DEPARTMENT OF NATURAL RESOURCES v GELMAN SCIENCES, INC, No. 156373; Court of Appeals No. 337818.

Leave to Appeal Denied January 19, 2018:

SHEARDOWN v GUASTELLA, No. 156931; Court of Appeals No. 338089.

Summary Disposition January 24, 2018:

PEOPLE v TEMELKOSKI, No. 150643; reported below: 307 Mich App 241. 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 reverse the judgment of the Court of Appeals and reinstate the Wayne Circuit Court's order removing defendant from the sex offender registry on the basis that requiring him to register violates due process. US Const, Am XIV; Const 1963, art 1, § 17.

On March 4, 1994, defendant pleaded guilty as charged to one count of second-degree criminal sexual conduct in violation of MCL 750.520c(1)(a) and was sentenced as a youthful trainee under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*., to a 3-year term of probation. HYTA provides that when a criminal defendant between the ages of 17 and 20 pleads guilty to certain crimes, a trial court may "without entering a judgment of conviction and with the consent of that individual, consider and assign that individual to the status of youthful trainee." MCL 762.11(1). The statute in effect at the time of defendant's plea further provided that "[a]n assignment of an individual to the status of youthful trainee as provided in this chapter is not a conviction for a crime, and the individual assigned to the status of youthful trainee *shall not* suffer a civil disability or loss of right or

privilege following his or her release from that status because of his or her assignment as a youthful trainee." MCL 762.14(2), as amended by 1993 PA 293 (emphasis added).

Defendant does not claim that he was promised assignment as a youthful trainee in exchange for his guilty plea. Cf. *Santobello v New York*, 404 US 257, 262 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."). Rather, he claims that he was induced by HYTA to plead guilty because the statute offered him potential benefits for pleading guilty that he could not otherwise have obtained had he exercised his constitutional right to a trial. See generally *Corbitt v New Jersey*, 439 US 212 (1978) (implicitly recognizing that a statute alone can induce a plea). We believe that the *Santobello* principle applies with equal force to a statutory provision, such as HYTA, that induces a defendant to plead guilty by offering him certain benefits if he does so and satisfies other statutory conditions.

In this case, defendant was screened and presumably deemed eligible for youthful trainee status before entering his guilty plea, and thus it is clear that such a disposition was contemplated by the parties. While he had no entitlement to assignment as a youthful trainee, there can be little doubt that the possibility of a HYTA discharge was "one of the principal benefits sought by defendant[] [in] deciding whether to [plead guilty] or instead to proceed to trial." *INS v St Cyr*, 533 US 289, 323 (2001). Indeed, in light of the fact that defendant pleaded guilty to the principal charge, it appears this may have been the only motivation for his decision to waive his right to a trial and plead guilty.

After defendant pleaded guilty, the Legislature enacted the Sex Offender Registration Act (SORA), MCL 28.721 *et seq*., which retroactively defined defendant's completion of youthful training as a conviction and required him to register under the act and to comply with the obligations imposed on such registrants. 1994 PA 295. It is undisputed that registration under SORA constitutes a civil disability. Although the Legislature may retroactively attach civil consequences to a conviction, see *Hawker v New York*, 170 US 189 (1898), here defendant pleaded guilty in reasonable reliance on the possibility of receiving a sentence under HYTA and benefitting from its express promise that upon successful completion of his youthful training, he would not have a conviction on his record or suffer any related civil disabilities.

Because defendant pleaded guilty on the basis of the inducement provided in HYTA as effective in 1994 (i.e., before SORA's effective date), was assigned to HYTA training by the trial judge, and successfully completed his HYTA training, retroactive application of SORA deprived defendant of the benefits under HYTA to which he was entitled and therefore violated his constitutional right to due process. US Const, Am XIV; Const 1963, art 1, § 17. See *Jideonwo v Immigration & Naturalization Serv*, 224 F3d 692, 700 n 7 (CA 7, 2000) (noting that "where retroactive application of a statute disturbs settled expectations based on the state of the law upon which a party relied at the time an action

was taken such that 'manifest injustice' would result, the Due Process Clause prohibits retroactive application of the law").

The motion of plaintiff-appellee to add an appendix to its supplemental brief is granted.

WILDER, J. (*dissenting*). I respectfully dissent from this Court's order reversing the judgment of the Court of Appeals and reinstating the trial court's order removing defendant from the sex offender registry. I write separately because I would have remanded the case to the trial court to further develop the factual record to determine (1) whether, at the time of his plea, defendant was promised benefits derived from his assignment to and subsequent release from youthful trainee status under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*., and (2) whether he was *actually* induced to plead guilty as a result of that promise. In my view, the record before us is insufficient to conclude, at this stage, that a violation of defendant's due process rights has occurred.

To comport with due process, a defendant's guilty plea must be voluntary, knowing, and made " 'with sufficient awareness of the relevant circumstances and likely consequences.' " *People v Cole*, 491 Mich 325, 333 (2012), quoting *Brady v United States*, 397 US 742, 748 (1970). Moreover, "when a plea rests in any *significant degree* on a promise" such that the promise is "part of the inducement or consideration" for the plea, "*the essence of th*[*at*] *promise*[] *must in some way be made known*" and the promise "must be fulfilled." *Santobello v New York*, 404 US 257, 261-262 (1971) (emphasis added).

Appellate review of a defendant's guilty plea is a "necessarily limited and record-circumscribed inquiry . . . ." *People v Taylor*, 383 Mich 338, 360 (1970). The starting point for evaluating the voluntariness of a defendant's guilty plea is the "verbatim record" of the guilty-plea proceeding made contemporaneously in the trial court. MCR 6.302(F). "Normally, where a defendant states on the record that no promises, inducements, coercion, or other undue influences have been offered to him or brought to bear upon him, he will be held to his record denial." *People v Weir*, 111 Mich App 360, 361 (1981).

The trial court has the responsibility of deciding whether the defendant's plea was induced by an unfulfilled promise, and its finding should not be overturned unless it is clearly erroneous. *People v Hall*, 399 Mich 288, 291 (1976) (holding that "[i]t was the circuit judge's responsibility to determine whether the plea was induced by a promise of leniency which went unfulfilled" and that the Court of Appeals "erred in substituting its judgment for that of the circuit judge"); *id*. ("The trial court is in the best position to determine whether or not the plea of guilty was induced by promises of leniency because it can observe the demeanor of the conflicting witnesses in determining their credibility.") (quotation marks and citation omitted); see also *People v Belanger*, 73 Mich App 438, 450-451 (1977) ("The trial court is best equipped to determine whether the defendant's guilty plea was induced by promises of leniency since it held an evidentiary hearing on the matter and had the opportunity to observe the demeanor of the witnesses and determine their credibility."); *People v Bolden*, 78 Mich App 120, 123 (1977) ("It was the circuit judge's respon-

sibility to determine whether the plea was induced by a promise of leniency which went unfulfilled.") (quotation marks and citation omitted).

On the record before this Court, the trial court has made no finding that any promise was made to defendant that actually induced him to plead guilty, and no finding has been made that any such promise made has not been fulfilled. Moreover, there is no record evidence establishing by whom such promise was made, i.e., by defense counsel, the prosecutor, or the court. Notably, during oral argument before this Court, defense counsel conceded that defendant does not claim that the HYTA statute itself constitutes a promise on which defendant relies. In addition, no written plea agreement exists, and no transcript of the plea hearing exists. The absence of rudimentary factual findings or supporting records is unsurprising considering that the issue of whether a due process violation occurred was never raised by the parties or addressed by the trial court or the Court of Appeals in the lower court proceedings. See *Taylor*, 383 Mich at 359-360 (the voluntariness of a guilty plea is a question of fact, which "cannot be determined under our adversary system of jurisprudence in a proceeding in which that question of fact was never put in issue").

While defendant acknowledges these multiple deficiencies, he asks this Court to assume that his plea was induced by his expectation of HYTA's benefits. But to make this assumption based on the sequence of events and surviving documents—and, importantly, not an actual record—that (1) a promise was made to defendant and (2) that such a promise induced defendant's plea runs contrary to this Court's firmly established jurisprudence. See *Taylor*, 383 Mich at 359-360; *Hall*, 399 Mich at 291. Because the record is clearly insufficient to support a conclusion that defendant's plea was induced by an alleged expectation of receiving potential HYTA benefits, the trial court is in the best position to make a factual determination as to the promise made and whether defendant relied on that promise at the time he entered his guilty plea. For these reasons, I respectfully disagree with this Court's determination to substitute its own judgment for that of the trial court.

I am also concerned that extending the *Santobello* principle, which applies solely to record promises made by prosecutors, to apply with equal force to statutory provisions, such as HYTA, runs contrary to this Court's jurisprudence. See *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 661 (2005) ("[A]bsent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.' ") (quotation marks and citations omitted). Furthermore, absent a clear violation of a defendant's constitutional rights, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope. *Landgraf v USI Film Prod*, 511 US 244, 267 (1994). "[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Concrete Pipe & Prod of California, Inc v Constr*

Laborers Pension Trust for Southern California, 508 US 602, 637 (1993) (quotation marks and citations omitted). Even if defendant had an expectation that he would receive the benefits of HYTA—i.e., that he would not suffer a civil disability or loss of right or privilege—and the subsequent enactment of the Sex Offender Registration Act (SORA), MCL 28.721 *et seq*., imposed a new liability based on defendant's past acts, he has failed to show that the enactment of SORA was a clear violation of his constitutional right to due process.

Accordingly, I would remand the case to the trial court to further develop the factual record before making a judicial determination at the outset, on appeal, as to whether SORA's sex offender registry requirement violates defendant's due process rights.

ZAHRA, J., joins the statement of WILDER, J.

CLEMENT, J., did not participate.

PEOPLE V JAMAL BENNETT, No. 155115; Court of Appeals No. 328759. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment addressing whether the erroneous admission of the music videos and gang-affiliation evidence was harmless, and we remand this case to that court for reconsideration of those issues. The Court of Appeals correctly stated that "[a] preserved error in the admission of evidence does not warrant reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Burns*, 494 Mich 104, 110 (2013) (quotation marks and citation omitted). However, the Court of Appeals failed to adequately explain why the erroneous admission of the music videos was harmless under this standard, especially in light of the prosecutor's concession that the record does not reflect that this was a gang-motivated killing, the defendant's admission that he was the shooter, and, in particular, the defendant's asserted affirmative defenses of self-defense and defense of others, which the prosecution bore the burden of disproving beyond a reasonable doubt. *People v Dupree*, 486 Mich 693, 697 (2010). On remand, the Court of Appeals shall engage in an examination of the entire cause and reconsider whether it is more probable than not that the preserved error in the admission of the music videos was outcome-determinative. *Burns*, 494 Mich at 110.

Because the error in the admission of the gang-affiliation testimony was not preserved, the Court of Appeals shall review that error under the plain-error standard. *People v Carines*, 460 Mich 750, 763-764 (1999). In determining whether the defendant has carried his burden of showing prejudice, the Court of Appeals shall take into account the considerations noted above. Finally, in relation to both errors, the Court of Appeals shall address whether the erroneously admitted evidence, in conjunction with the prosecutor's arguments in closing that this evidence showed the "mentality" of the defendant and his friends on the night of the offense and the "lifestyle" they lived, constituted impermissible character evidence used to prove that the defendant "acted in conformity with the character traits commonly associated with gang members on a particular occasion, in violation of MRE 404(a)." *People v Bynum*, 496 Mich 610, 631 (2014); see also *Michelson v United States*,

335 US 469, 475-476 (1948) (explaining that character evidence is generally inadmissible not because it "is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge").

In all other respects, leave to appeal is denied.

HENRY v DOW CHEMICAL COMPANY, No. 156128; reported below: 319 Mich App 704. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse Part II of the controlling opinion of the Court of Appeals for the reasons stated in the Court of Appeals dissenting opinion, and we remand this case to the Saginaw Circuit Court for further proceedings in accordance with the procedures outlined in that dissenting opinion. This action is based on the plaintiffs' claim that the defendant is responsible for the presence of dioxin on their real properties. MCL 600.5827 provides that the three-year limitations period for property damage claims arising out of negligence or nuisance, MCL 600.5805(10), begins to run from "the time the claim accrues," and "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." See *Trentadue v Buckler Automatic Lawn Sprinkler Co,* 479 Mich 378, 387 (2007). The wrong is done when the plaintiff is harmed. *Id.* at 388. As explained by dissenting Judge GADOLA, the claimed harm to the plaintiffs in this case is the presence of dioxin in the soil of their properties. The period of limitations began to run from the date that this "wrong" occurred. The circuit court must therefore determine the accrual date of the plaintiffs' claims based on the occurrence of the wrong—the presence of dioxin on the plaintiffs' properties. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v SPITLER, No. 156281; Court of Appeals No. 331962. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for plenary consideration of the admissibility of each proffered statement under MRE 803(3). See *People v Fisher*, 449 Mich 441 (1995); *People v White*, 401 Mich 482 (1977). Although the Court of Appeals reviewed the admissibility of each proffered statement under MRE 803(1), 803(2) and 803(24), it neglected to consider MRE 803(3), which was the basis argued by the prosecuting attorney in the Court of Appeals for the admission of the testimony of all three witnesses. The application for leave to appeal as cross-appellant is denied. We do not retain jurisdiction.

In re LMB, No. 156674; Court of Appeals No. 338169. The motion to vacate the Court of Appeals judgment and remand for a decision on the merits is granted in part. The application for leave to appeal the September 14, 2017 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to that court for reconsideration in light of the December 18, 2017 Court of Appeals order in *Sarna v Healy* (Docket No. 341211).

PEOPLE v EDDIE WILLIAMS, No. 156759; Court of Appeals No. 338512. Pursuant to MCR 7.305(H)(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 decision in *People v Cobbs*, 443 Mich 276 (1993), does not exempt trial courts from articulating the basis for guidelines departures. Here, the trial court failed to articulate any reason for imposing a minimum sentence that was below the applicable guidelines range. On remand, the trial court shall "consult the applicable guidelines range and take it into account when imposing a sentence" and shall "justify the sentence imposed in order to facilitate appellate review." *People v Lockridge*, 498 Mich 358, 392 (2015). If the trial court determines that the sentence will exceed the preliminary evaluation given to the defendant pursuant to *Cobbs*, 443 Mich at 283, the court shall give the defendant the opportunity to affirm or withdraw his plea, but the court shall not state the sentence it intends to impose. MCR 6.310(B)(2)(b). We do not retain jurisdiction.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered January 24, 2018:

KENDZIERSKI v MACOMB COUNTY, No. 156086; reported below: 319 Mich App 278. The appellant shall file a supplemental brief within 42 days of the date of this order. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

The Michigan Municipal League, Michigan Association of Counties, Michigan Townships Association, State Bar of Michigan Public Corporation Law Section, State Bar of Michigan Labor Law Section, and the American Federation of State, County, and Municipal Employees 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.

PEOPLE v KAVANAUGH, No. 156408; reported below: 320 Mich App 293. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) what deference should be accorded to the trial court's factual findings where a recording of events under consideration is available to an appellate court; (2) what evidence may be considered in determining whether there was clear error in the trial court's factual findings; and (3) what standard of review is to be applied under such circumstances. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as

required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. 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. 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.

PEOPLE v GREGORY WASHINGTON, No. 156648; reported below: 321 Mich App 276. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the trial court's action of resentencing the defendant while an application for leave to appeal was pending in this Court was a jurisdictional defect, and (2) if so, whether the defendant could properly raise the jurisdictional defect in a successive motion for relief from judgment. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief, or the date of the order appointing counsel, whichever is later. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied January 24, 2018:

PEOPLE v QUINTIN KING, No. 152321; Court of Appeals No. 315953.

PEOPLE v BLEVINS, No. 153367; reported below: 314 Mich App 339.

PEOPLE v BLEVINS, No. 153375; reported below: 314 Mich App 339.

PEOPLE v DON MURPHY, No. 155139; Court of Appeals No. 333761.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v MALCOLM KING, No. 155689; Court of Appeals No. 328577.

PEOPLE v HOWARD, No. 155878; Court of Appeals No. 320695.

PEOPLE v PICKETT, No. 156494; Court of Appeals No. 338006.

HUND v HUND, No. 156528; Court of Appeals No. 334313.

MORNINGSIDE COMMUNITY ORGANIZATION v WAYNE COUNTY TREASURER, No. 156707; Court of Appeals No. 336430.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered January 26, 2018:

JONES FAMILY TRUST v SAGINAW COUNTY LAND BANK AUTHORITY, No. 155863; Court of Appeals No. 329442. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the trial court erred in granting summary disposition in favor of defendant Saginaw County Land Bank Authority on the appellant's inverse condemnation claim; and (2) whether the measure of damages on the appellant's breach of third-party contract claim is the same as the measure of damages on a tort claim for the negligent destruction of property. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

SEJASMI INDUSTRIES, INC v A+MOLD, INC, No. 156341; Court of Appeals No. 336205. The appellant shall file a supplemental brief within 42 days of the date of this order. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

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.

VIVIANO, J., not participating due to a familial relationship with the presiding circuit court judge in this case.

Leave to Appeal Denied January 31, 2018:

MAXEY v BOTSFORD GENERAL HOSPITAL, No. 157079; Court of Appeals No. 341002.

Leave to Appeal Denied February 2, 2018:

In re ST BERNARD, No. 157048; Court of Appeals No. 338209.

In re BARTLETT, Nos. 157076 and 157077; Court of Appeals Nos. 341781 and 341782.

Leave to Appeal Denied February 7, 2018:

DENNIS v TYLER, No. 155631; Court of Appeals No. 331503.

MARKMAN, C.J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal. I would grant leave to appeal because I believe that the Court of Appeals majority likely erred by concluding that defendant was not an "affiliated father" under MCL 722.1433(1) of the Revocation of Paternity Act (ROPA), MCL 722.1431 *et seq*., on the basis of an incorrect interpretation of that provision in *Glaubius v Glaubius*, 306 Mich App 157, 168 (2014). Moreover, the Court of Appeals' application of this standard here "will cause material injustice," MCR 7.305(B)(5)(a), in that a child may effectively be left without a father.

BT was born to plaintiff Olivia Fay Dennis on July 26, 2012. Plaintiff married defendant Steve Tyler the next day. The birth certificate identified defendant as the father. Defendant believed that he had signed an acknowledgment-of-parentage form for BT, but it turned out that he actually did not. On December 4, 2013, plaintiff filed a pro se complaint for divorce. In her complaint, plaintiff listed BT under the heading of "minor children of the parties *born or adopted during or before* the marriage" and circled the word "before." She further listed her younger child (BD) under the heading "children born during the marriage that are *not* the husband's children." Finally, she indicated that it would be "in the best interests of the children that the Court order" reasonable parenting time and child support. Nevertheless, on July 7, 2014, seven months after her complaint for divorce had been filed, plaintiff filed a motion requesting an order of nonpaternity of defendant as to her two children. Plaintiff then obtained a DNA test for BD, which revealed that defendant was not his father, but failed to obtain one for BT. When plaintiff sought to obtain a DNA test for BT, the trial court noted her extensive delay in requesting such a test and ordered the parties to submit a proposed judgment to the court or the case would be dismissed. Plaintiff submitted a proposed judgment listing defendant as BT's father, providing plaintiff and defendant joint legal and physical custody over BT, and providing defendant "reasonable parenting time." On December 3, 2014, the court closely reviewed the proposed judgment with the parties, who agreed to its terms, and then signed it. Plaintiff subsequently filed a motion to revoke defendant's paternity, noting that a DNA test conducted after the divorce judgment had entered demonstrated that defendant was not BT's biological father. The trial court denied plaintiff's motion, but the Court of Appeals majority reversed and remanded for further proceedings. *Dennis v Tyler*, unpublished per curiam opinion of the Court of Appeals, issued March 21, 2017 (Docket No. 331503). Judge MARKEY dissented, concluding that the trial court had properly determined that defendant was an "affiliated father." *Id*. (MARKEY, J., dissenting).

The issue is whether defendant's paternity should now be revoked. Under ROPA, there are five classifications of fathers. Relevant to this case, MCL 722.1433(1) defines an "affiliated father" as "a man who has been determined *in* a court to be the child's father." When analyzing whether defendant here was an "affiliated father," both the Court of

Appeals majority and dissent relied, as they were bound to do, on that court's prior interpretation of "affiliated father" in *Glaubius*, 306 Mich App at 168. In *Glaubius*, the plaintiff (mother) and the defendant (father) were married, and a child was born during their marriage. *Id*. at 161. The plaintiff filed for divorce, alleging that there was one child born of the marriage. *Id*. The parties entered into a consent judgment of divorce, and the judgment referred to the defendant as the child's father and granted him custody and visitation. *Id*. at 162. Later that year, the plaintiff discovered that the defendant was not, in fact, the biological father, and she filed a motion to revoke paternity. *Id*. at 162-163. The Court of Appeals held that "an affiliated father exists when, in a court of law, a dispute or question about a man's paternity has been settled or resolved and it was concluded by the court, on the basis of reasoning or observation, that the man is the child's father." *Id*. at 168. The Court reasoned that because the child was born during the marriage, the divorce judgment merely recognized the presumption of paternity for a child born during a marriage, and because this presumption was never challenged, the trial court never "determined" the issue of paternity. *Id*. at 171.[1] Accordingly, it concluded that the defendant was not an "affiliated father" under MCL 722.1433(1). *Id*.

I believe that *Glaubius* likely erred by interpreting MCL 722.1433(1) to require a determination "*by* a court" when it actually requires only a determination "*in* a court." The use of the word *in* suggests that an "affiliated father" may exist even if the court has not separately decided paternity. The parties here, at least arguably, *did* have it determined "*in* a court" that defendant was the child's father when they agreed and finalized their consent judgment of divorce. Based on this understanding, when a controversy over paternity has been finalized *in* a court, the father is an "affiliated father." The proper interpretation of ROPA, which was enacted only in 2012, constitutes an "issue involv[ing] a legal principle of major significance to the state's jurisprudence," MCR 7.305(B)(3), and therefore I would grant leave to appeal to reconsider *Glaubius*'s interpretation of MCL 722.1433(1).[2]

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[1] The defendant in *Glaubius* appealed the Court of Appeals' decision to this Court, which granted leave to appeal, asking the parties to brief, *inter alia*, "(1) whether the defendant was merely the 'presumed father' of the minor child, see MCL 722.1433(4), or whether he was the 'affiliated father,' see MCL 722.1433(2), due to certain aspects of the parties' divorce judgment—provisions that 't[ook] as confessed' the complaint allegation that the parties had had one child, that referred to the parties as mother and father, and that provided for child custody and visitation." *Glaubius v Glaubius*, 497 Mich 929 (2014). However, the appeal was dismissed before oral arguments by stipulation of the parties. *Glaubius v Glaubius*, 498 Mich 899 (2015).

[2] Moreover, it is questionable whether the Court of Appeals majority correctly applied *Glaubius* to the present facts. In *Glaubius*, the Court of Appeals held that defendant was not an "affiliated father" because the

Additionally, I believe that the Court of Appeals majority's application of the *Glaubius* standard "will cause material injustice." MCR 7.305(B)(5)(a). Under ROPA, the paternity of an "affiliated father" may only be revoked if "paternity was determined based on the affiliated father's failure to participate in the court proceedings . . . ." MCL 722.1439(1). Because defendant here *participated* in the proceedings, if he were an "affiliated father," his paternity could not be revoked. By contrast, if defendant is not an affiliated father, he does not fit within any of the five classifications of fathers in MCL 722.1433, and therefore his paternity would likely be revoked.[3]

Of utmost importance in cases involving child custody and paternity is to protect the best interests of the child. Defendant here is the *only* father that BT, who is now five years old, has ever known, and there is nothing in the record to indicate the identity of BT's biological father. Defendant has cared for BT since birth and has repeatedly and unequivocally sought to remain BT's father, notwithstanding the DNA test that showed he is not BT's biological father. Moreover, defendant has presumably used his joint custody and parenting time since the divorce judgment was entered to continue to maintain and strengthen his bond with BT. It is undisputedly in the best interest of a child to have a strong relationship with a father who loves and cares for him, as opposed to having no father at all. Accordingly, applying *Glaubius*'s interpretation of MCL 722.1433(1) in this case will almost certainly "cause material injustice" because BT will likely be deprived forever of a committed and loving father. MCR 7.305(B)(5)(a).[4]

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court did not *determine* his paternity, but rather merely recognized the presumption of paternity for a child born during a marriage. *Glaubius*, 306 Mich App at 171; MCL 722.1433(e). Here, by contrast, there is no statutory presumption because the child was born one day before the marriage. Thus, when the issue was raised and the trial court entered a judgment of divorce naming defendant as the father, this arguably "determined" the issue. It is unclear, under *Glaubius*, how focused, or how exclusively focused, a judicial proceeding must be upon the father's status in order to give rise to an "affiliated father" determination. Thus, even if *Glaubius* did correctly interpret MCL 722.1433(1), I would still grant leave to appeal to consider whether the Court of Appeals majority properly applied its standard to the instant facts.

[3] It is deeply worth noting that defendant married plaintiff *one day* after the child was born, leaving him only one day shy of being a "presumed father" under MCL 722.1433(e), and that he believed—albeit incorrectly—that he had signed an acknowledgment of parentage form for BT, which would have made him an "acknowledged father" under MCL 722.1433(a).

[4] That this result "will cause material injustice" is further supported by the fact that, as Judge MARKEY noted in her dissent, plaintiff, "from the child's birth, deliberately and repeatedly asserted in many contexts

Rather than deny leave to appeal, which effectively maintains the *Glaubius* standard as the binding interpretation of MCL 722.1433(1) for all Michigan courts, and to allow a child to be deprived of a father on the basis of that likely erroneous interpretation, I would grant leave to appeal.

Reconsideration Denied February 7, 2018:

NAYYAR v OAKWOOD HEALTHCARE, INC, No. 154603; Court of Appeals No. 329135.

MARKMAN, C.J. (*concurring*). This case involves a remarkable confluence of what appears to be *both* medical and legal dereliction, resulting in an extraordinary miscarriage of justice.

Concerning the medical aspect, defendant hospital erroneously placed Bimla Nayyar's name on another patient's x-ray records, which led to unnecessary brain surgery being performed on Nayyar, a patient seeking treatment for a dislocated jaw. Nayyar died as a result, and defendant later conceded negligence.

Concerning the legal aspect, plaintiff's counsel, instead of pleading ordinary negligence and medical malpractice in the alternative as counselled by *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 432-433 (2004), pleaded ordinary negligence (in which damages are uncapped) instead of medical malpractice (in which damages are capped). Defendant moved for summary disposition at trial, contending that plaintiff's claims sounded exclusively in medical malpractice, not ordinary negligence, and that plaintiff had failed to comply with the statutory notice and pleading requirements applicable to medical malpractice claims. The trial court granted this motion and the parties negotiated a stipulated order that dismissed plaintiff's ordinary negligence claim with prejudice, but stated that plaintiff was not precluded from bringing a medical malpractice claim. Plaintiff did not appeal the trial court's order but instead refiled the lawsuit as a medical malpractice action, and defendant conceded negligence so that the case proceeded to a jury only on the issues of causation of death and damages. At this second trial, plaintiff's counsel sought *again* to raise the (uncapped) ordinary negligence claim, and the trial court allowed plaintiff to amend the complaint to assert ordinary negligence. During the course of the trial, plaintiff's attorneys repeatedly asserted that the claim being litigated was one for ordinary negligence, and they convinced the second trial court to enter a judgment that was unmoored from the statutory cap on damages applicable to a medical malpractice action. The jury eventually awarded damages of $20 million, necessarily a judgment for ordinary negligence. Defendant then moved for a judgment notwithstanding the verdict, arguing that the verdict was precluded by principles of collateral estoppel because it was predicated on ordinary

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that defendant was BT's father," such as on the child's birth certificate and in her complaint for divorce (in which she sought child support from defendant). *Dennis*, unpub op at 5 (MARKEY, J., dissenting).

negligence, a claim that had been dismissed with prejudice by the first trial court. This motion was denied by the second trial court, and defendant appealed and moved for peremptory reversal of the second trial court's decision. On appeal, the Court of Appeals granted defendant's motion, concluding that the second trial court's order allowing the amendment of the complaint to include a claim of ordinary negligence constituted an impermissible collateral attack on the first trial court's order dismissing the ordinary negligence claim. The Court of Appeals also held that plaintiff was precluded by collateral estoppel from raising the ordinary negligence claim in the second lawsuit because it had been fully litigated and disposed of by the unappealed final order in the first lawsuit. As a result, the Court of Appeals held that only the theory of medical malpractice remained available to plaintiff in the second lawsuit. The Court also proceeded to say that "where plaintiff unequivocally proceeded in this action under an ordinary negligence theory and the jury awarded damages under that theory, defendant was entitled to judgment notwithstanding the verdict[.]" *Nayyar Estate v Oakwood Healthcare*, unpublished order of the Court of Appeals, entered July 15, 2016 (Docket No. 329135).

To summarize, plaintiff now has no negligence claim and no medical malpractice claim, all despite the fact that (a) defendant-hospital openly admitted negligence, (b) a jury determined that this negligence constituted the proximate cause of plaintiff's death, and (c) a jury awarded plaintiff a $20 million verdict.

I concur in this Court's denial of plaintiff's motion for reconsideration because the Court of Appeals correctly held that plaintiff's prior stipulation to the dismissal of his negligence claim with prejudice precluded any recovery on that claim at a subsequent trial under the collateral attack rule and collateral estoppel. Yet the decedent's husband's plaintive inquiry nonetheless resonates loudly: "How is [this] possible in a just and fair world . . . ?" There is no satisfactory answer, in my judgment, only that further review of this matter might well be pursued in an appropriate action.

WILDER, J., did not participate because he was on the Court of Appeals panel.

Leave to Appeal Denied February 14, 2018:

In re CLEMONS, No. 157088; Court of Appeals No. 338177.

Reconsideration Denied February 14, 2018:

In re BARTLETT, Nos. 157076 and 157077; Court of Appeals Nos. 341781 and 341782. Leave to appeal denied at 501 Mich 968.

Summary Disposition February 20, 2018:

PEOPLE V BRIAN LEE, No. 153632; Court of Appeals No. 316110. By order of September 29, 2016, the application for leave to appeal the January 12,

2016 order of the Court of Appeals was held in abeyance pending the decisions in *People v Steanhouse* (Docket No. 152849) and *People v Masroor* (Docket Nos. 152946-8). On order of the Court, the cases having been decided on July 24, 2017, 500 Mich 453 (2017), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals remanding this case to the trial court for a hearing pursuant to *People v Lockridge*, 498 Mich 358 (2015), and we remand this case to the Court of Appeals for plenary review of the defendant's claim that his sentence was disproportionate under the standard set forth in *People v Milbourn*, 435 Mich 630, 636 (1990). See *People v Steanhouse*, 500 Mich at 460-461. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE V SHANE MOORE, No. 155052; Court of Appeals No. 334768. Pursuant to MCR 7.305(H)(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 the trial court erred when scoring Offense Variable (OV) 9, MCL 777.39, and OV 10, MCL 777.40. In all other respects, leave to appeal is denied.

MARIK V MARIK, No. 155833; Court of Appeals No. 336087. By order of September 12, 2017, the application for leave to appeal the April 20, 2017 order of the Court of Appeals was held in abeyance pending the decisions in *Marik v Marik* (Docket No. 154549) and *Ozimek v Rodgers* (Docket No. 154776). On order of the Court, the orders having entered on November 16, 2017, 501 Mich 918-919 (2017), the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we vacate the order of the Court of Appeals and we remand this case to that court for reconsideration in light of its forthcoming decision in *Marik v Marik (On Remand)* (Docket No. 333687). We do not retain jurisdiction.

PEOPLE V KLUKOWSKI, No. 155904; Court of Appeals No. 337241. The prosecuting attorney has conceded that consecutive sentencing is not applicable. Therefore, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Chippewa Circuit Court to amend the judgment of sentence to reflect that the sentences imposed in this case are to run concurrently. *People v Sawyer*, 410 Mich 531 (1981). In all other respects, leave to appeal is denied.

PEOPLE V ANTONIO CRAWFORD, No. 156062; Court of Appeals No. 330215. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment addressing whether the other-acts evidence was probative of the defendant's intent, and we remand this case to the Court of Appeals for reconsideration in light of *People v Denson*, 500 Mich 385 (2017). On remand, the Court of Appeals shall reconsider whether the other-acts evidence was relevant to show the necessary intent for armed robbery and not merely propensity for wrongdoing. In all other respects, leave to appeal is denied.

PEOPLE V ERNEST COLEMAN, No. 156638; Court of Appeals No. 339482. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied February 20, 2018:

PEOPLE v ERIC WILLIAMS, No. 154530; Court of Appeals No. 332779.

PEOPLE v DARRIN CRAWFORD, No. 155217; Court of Appeals No. 319998.

PEOPLE v MUNSON, No. 155231; Court of Appeals No. 334835.

PEOPLE v VAN BUREN, No. 155277; Court of Appeals No. 335538.

PEOPLE v LARRY COLE, No. 155315; Court of Appeals No. 335444.

FARRIS v COUNTY OF ANTRIM, No. 155340; Court of Appeals No. 329816.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v FARLEY, No. 155341; Court of Appeals No. 334465.

PEOPLE v DEVON MATTHEWS, No. 155423; Court of Appeals No. 336101.

PEOPLE v DEMONE HALL, No. 155504; Court of Appeals No. 335288.

PEOPLE v JACOBS, No. 155514; Court of Appeals No. 334600.

PEOPLE v KENNETH WILLIAMS, No. 155565; Court of Appeals No. 336612.

PEOPLE v ANTHONY LEE-VICTOR WILLIAMS, No. 155593; Court of Appeals No. 329447.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v SHAQUILLE TURNER, No. 155622; Court of Appeals No. 336503.

PEOPLE v GOMEZ, No. 155625; Court of Appeals No. 336725.

PEOPLE v BLACKWELL, No. 155628; Court of Appeals No. 336137.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v DEANGELO JONES, No. 155661; Court of Appeals No. 337231.

PEOPLE v ROY LAY, No. 155677; Court of Appeals No. 335408.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v BRINDISI, No. 155681; Court of Appeals No. 335201.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v MCGLOTHAN, No. 155682; Court of Appeals No. 334817.

PEOPLE v SYDNI MATTHEWS, No. 155805; Court of Appeals No. 336222.

PEOPLE v TRUITT, No. 155806; Court of Appeals No. 337138.
WILDER, J., did not participate because he was on the Court of Appeals panel.

TOMA v ST PETER MEDICAL CENTER, No. 155860; Court of Appeals No. 330585.

SCHULTZ v GENDREGSKE, No. 155877; Court of Appeals No. 331133.

PEOPLE v MCBEE, No. 156016; Court of Appeals No. 330048.

PEOPLE v TAIT, No. 156026; Court of Appeals No. 332252.

RAMSEY v LABORERS' LOCAL 1191, No. 156066; Court of Appeals No. 329920.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v JOSHUA HERNANDEZ, No. 156081; Court of Appeals No. 338056.

PEOPLE v OBERLE, No. 156085; Court of Appeals No. 332956.

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN v WESTFIELD INSURANCE COMPANY, No. 156106; Court of Appeals No. 330961.

PEOPLE v BEAMON, No. 156110; Court of Appeals No. 332509.

PEOPLE v PETTES, No. 156112; Court of Appeals No. 330711.

PEOPLE v LAKEAM JOHNSON, No. 156113; Court of Appeals No. 337375.

PEOPLE v APATO, No. 156117; Court of Appeals No. 337527.

PEOPLE v DEVON ARMANTE BELL, No. 156159; Court of Appeals No. 335350.

In re CARACO PHARMACEUTICAL LABORATORIES SHAREHOLDER LITIGATION, No. 156177; Court of Appeals No. 329933.

HOME-OWNERS INSURANCE COMPANY v ADVANCED FARM EQUIPMENT, LLC, No. 156192; Court of Appeals No. 336464.

HOME-OWNERS INSURANCE COMPANY v ADVANCED FARM EQUIPMENT, LLC, No. 156195; Court of Appeals No. 336456.

ROBERTS v SALMI, No. 156197; Court of Appeals No. 335943.

PEOPLE v GEORGE BROWN, No. 156212; Court of Appeals No. 332471.

HOOGENSTYN v ORTHOPAEDIC ASSOCIATES OF GRAND RAPIDS, PC, No. 156220; Court of Appeals No. 332063.

FJN LLC v PARAKH, No. 156224; Court of Appeals No. 331889.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v WENDOLOWSKI, No. 156251; Court of Appeals No. 338797.

PEOPLE v GARDNER, No. 156252; Court of Appeals No. 338245.

PEOPLE v HARNER, No. 156299; Court of Appeals No. 331122.

PEOPLE v BATCHELOR, No. 156311; Court of Appeals No. 330312.

PEOPLE v RIMSON, No. 156313; Court of Appeals No. 330578.

PEOPLE v IESHIA BARNES, No. 156316; Court of Appeals No. 331777.

PEOPLE v VICTORIA FOSTER, No. 156318; Court of Appeals No. 331148.

PEOPLE v MATTSON, No. 156323; Court of Appeals No. 331312.

PEOPLE v BIESZKA, No. 156325; Court of Appeals No. 337977.

PEOPLE v MERRIWEATHER, No. 156328; Court of Appeals No. 331666.

PEOPLE v TRAVESS SMITH, No. 156331; Court of Appeals No. 338570.

PEOPLE v TALJA BUSH, No. 156335; Court of Appeals No. 330077.

AZZAR v CITY OF MACKINAC ISLAND, No. 156345; Court of Appeals No. 331308.

BROOKS v GENESEE COUNTY, No. 156349; Court of Appeals No. 330119.

PEOPLE v REGAINS, No. 156379; Court of Appeals No. 330129.

PEOPLE v HARRISON, No. 156382; Court of Appeals No. 336992.

BURKHARDT v BAYLISS, No. 156393; Court of Appeals No. 330092.

PEOPLE v STRAIGHT, No. 156395; Court of Appeals No. 338468.

PEOPLE v MINORE, No. 156402; Court of Appeals No. 337681.

In re WILLIAMS ESTATE, No. 156405; Court of Appeals No. 332993.

PEOPLE v JOHNNY ROBERTS, No. 156407; Court of Appeals No. 338826.

PEOPLE v DANTE JOHNSON, No. 156416; Court of Appeals No. 332585.

PEOPLE v MCTAGGART, No. 156418; Court of Appeals No. 337934.

In re FORFEITURE OF 2002 JAGUAR, No. 156422; Court of Appeals No. 336762.

DC MEX HOLDINGS, LLC v AFFORDABLE LAND, LLC, No. 156423; reported below: 320 Mich App 528.

PEOPLE v BRIAN ALEXANDER, No. 156424; Court of Appeals No. 328571.

PEOPLE v DAQUANA WILLIAMS, No. 156440; Court of Appeals No. 338645.

PEOPLE v ROMERO, No. 156441; Court of Appeals No. 331145.

PEOPLE v DAVID BROWN, No. 156442; Court of Appeals No. 339002.

PEOPLE v MARKS, No. 156449; Court of Appeals No. 338774.

PEOPLE v HEIM, No. 156460; Court of Appeals No. 332625.

PEOPLE v DAVID COLEMAN, No. 156465; Court of Appeals No. 329847.

PEOPLE v CAHILL, No. 156466; Court of Appeals No. 339100.

PEOPLE v LARRY PRICE, No. 156467; Court of Appeals No. 331538.

PEOPLE v JAMISON, No. 156470; Court of Appeals No. 331836.

In re BELL, No. 156476; Court of Appeals No. 333005.

ARMSTEAD v DERY, Nos. 156477 and 156478; Court of Appeals Nos. 339513 and 339514.

PEOPLE v MILTON, No. 156479; Court of Appeals No. 338477.

PEOPLE v NEUMAN, No. 156483; Court of Appeals No. 331400.

PEOPLE v DEAHJE ROBINSON, No. 156485; Court of Appeals No. 338791.

PEOPLE v MAURICE LEWIS, No. 156508; Court of Appeals No. 338776.

PEOPLE v ALFREY, No. 156531; Court of Appeals No. 338647.

PEOPLE v BATES, No. 156543; Court of Appeals No. 332356.

PEOPLE v BADGLEY, No. 156550; Court of Appeals No. 339366.

PEOPLE v CHAMBERS, No. 156560; Court of Appeals No. 339151.

PEOPLE v TEON SMITH, No. 156564; Court of Appeals No. 339032.

PEOPLE v JAMES, No. 156608; Court of Appeals No. 338906.

PEOPLE v JERMAINE COLE, No. 156625; Court of Appeals No. 339484.

PEOPLE v JOSHUA HERNANDEZ, No. 156807; Court of Appeals No. 338055.

Leave to Appeal Before Decision by the Court of Appeals Denied February 20, 2018:

CROWN ENTERPRISES, INC v STATE OF MICHIGAN, No. 156650; Court of Appeals No. 340039.

CLEMENT, J., did not participate due to her prior involvement as chief legal counsel for the Governor.

Superintending Control Denied February 20, 2018:

HAZELTINE v ATTORNEY GRIEVANCE COMMISSION, No. 156471.

Reconsideration Denied February 20, 2018:

PEOPLE v ZARN, Nos. 153685 and 153686; Court of Appeals Nos. 323279 and 323280. Summary disposition order entered at 501 Mich 921. On order of the Court, the motion for reconsideration of this Court's November 29, 2017 order is considered. This Court's order reversed only "that part of the judgment of the Court of Appeals remanding this case to the

trial court for a hearing pursuant to *People v Lockridge*, 498 Mich 358 (2015)," and did not disturb the Court of Appeals ruling that the trial court "should amend defendant's judgment of sentence to reflect concurrent sentences." Accordingly, the motion for reconsideration is denied, because it does not appear that the order was entered erroneously.

PEOPLE v LYONS, No. 154129; Court of Appeals No. 332308. Leave to appeal denied at 501 Mich 907.

PEOPLE v KUCHARCZYK, No. 154306; Court of Appeals No. 333078. Leave to appeal denied at 501 Mich 907.

PEOPLE v COWAN, No. 154444; Court of Appeals No. 331947. Summary disposition order entered at 501 Mich 900.

FOSTER v FOSTER, No. 154829; Court of Appeals No. 324853. Summary disposition order entered at 501 Mich 917.

ELECTRIC STIK, INC v PRIMEONE INSURANCE COMPANY, No. 154899; Court of Appeals No. 327421. Leave to appeal denied at 501 Mich 878.

PEOPLE v PLATER, No. 154962; Court of Appeals No. 333742. Leave to appeal denied at 501 Mich 907.

PEOPLE v NATALIE FOSTER, No. 155126; Court of Appeals No. 334292. Leave to appeal denied at 501 Mich 908.

MAKI ESTATE v COEN, No. 155397; reported below: 318 Mich App 532. Leave to appeal denied at 501 Mich 879.

REID v WALKER, No. 155484; Court of Appeals No. 328587. Leave to appeal denied at 501 Mich 915.

KIM v CITY OF IONIA, No. 155558; Court of Appeals No. 334981. Leave to appeal denied at 501 Mich 909.

SMITH v DEPARTMENT OF CORRECTIONS, No. 155633; Court of Appeals No. 335684. Leave to appeal denied at 501 Mich 925.

VILLAGE OF PENTWATER v BATES, No. 155749; Court of Appeals No. 328528. Leave to appeal denied at 501 Mich 909.

GHANAM v ALEXANDER, No. 155791; Court of Appeals No. 335837. Leave to appeal denied at 501 Mich 909.

In re PETITION OF ISABELLA COUNTY TREASURER, No. 155846; Court of Appeals No. 329858. Leave to appeal denied at 501 Mich 910.

LEWIS v CAMERON, No. 155883; Court of Appeals No. 330743. Leave to appeal denied at 501 Mich 910.

BERNSTEIN, J., did not participate due to his prior relationship with the Sam Bernstein Law Firm.

Motion to Reopen Case Denied February 20, 2018:

EXLINE v SILVER, No. 155085; Court of Appeals No. 327797. By order

of February 17, 2017, this Court administratively closed this case because it appeared that proceedings were stayed by the filing of a petition in bankruptcy. The order further provided that once the stay was no longer in effect, the case could be reopened on the motion of any party filed within 42 days after the date of the order removing the stay. On order of the Court, the motions to extend time and to reopen the case are considered, and they are denied. No motions having been filed within 42 days after the date of the order removing the stay, the Clerk of the Court is hereby directed to close this file.

Leave to Appeal Denied February 27, 2018:

In re ANGEL BARTLETT, No. 156986; Court of Appeals No. 341256.

Summary Disposition March 5, 2018:

PEOPLE v WOODWORTH, No. 155108; Court of Appeals No. 335275. By order of May 2, 2017, the application for leave to appeal the November 22, 2016 order of the Court of Appeals was held in abeyance pending the decisions in *People v Steanhouse* (Docket No. 152849) and *People v Masroor* (Docket No. 152946-8). On order of the Court, the cases having been decided on July 24, 2017, 500 Mich 453 (2017), the application is again considered and, pursuant to MCR 7.305(H)(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 the defendant's sentence is reasonable under the standard set forth in *Steanhouse*.

FORNER v ALLENDALE CHARTER TOWNSHIP SUPERVISOR, No. 156867; Court of Appeals No. 339072. Pursuant to MCR 7.305(H)(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 the plaintiff's petition to the Allendale Charter Township Zoning Board of Appeals was for a zoning permit such that a fee could be imposed pursuant to MCL 125.3406. In all other respects, leave to appeal is denied.

Leave to Appeal Denied March 5, 2018:

PEOPLE v MARCO MARTIN, No. 153986; Court of Appeals No. 331011.

WILDER, J., did not participate because he was on the Court of Appeals panel.

CARTER v GUS HARRISON CORRECTIONAL FACILITY WARDEN, No. 154316; Court of Appeals No. 331883.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v BLALOCK, No. 154739; Court of Appeals No. 334035.

PEOPLE v MELVIN JONES, No. 155473; Court of Appeals No. 330136.

PEOPLE v RIVERS, No. 155475; Court of Appeals No. 328331.

PEOPLE v LAVELY, No. 155505; Court of Appeals No. 334604.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v KEVIN JOHNSON, No. 155533; Court of Appeals No. 335805.

PEOPLE v POWELL, No. 155552; Court of Appeals No. 335437.

PEOPLE v BLAYLOCK, No. 155592; Court of Appeals No. 335747.

PEOPLE v REED, No. 155697; Court of Appeals No. 335359.

PEOPLE v WOLFBAUER, No. 155710; Court of Appeals No. 335102.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v MAURICE HAYNES, No. 155720; Court of Appeals No. 335964.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v GENE BRIDGES, No. 155751; Court of Appeals No. 335968.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v JOSHUA GONZALEZ, No. 155773; Court of Appeals No. 336925.

PEOPLE v MESI, No. 155774; Court of Appeals No. 337457.

PEOPLE v STOVALL, No. 155777; Court of Appeals No. 336587.

SHUAYTO v LAWRENCE TECHNOLOGICAL UNIVERSITY, No. 155782; Court of Appeals No. 329520.

PEOPLE v SAMMAN, No. 155834; Court of Appeals No. 335903.

PEOPLE v CRAIG LEWIS, No. 155888; Court of Appeals No. 335896.

PEOPLE v VANDEZ WRIGHT, No. 155892; Court of Appeals No. 337154.

PEOPLE v SIMS, No. 155996; Court of Appeals No. 336401.

PEOPLE v SCHWARZ, No. 155997; Court of Appeals No. 336109.

WILDER, J., did not participate because he was on the Court of Appeals panel.

LANSING PARKVIEW, LLC v K2M GROUP, LLC, No. 156023; Court of Appeals No. 328507.

PEOPLE v MICHAEL THOMAS, No. 156028; Court of Appeals No. 329750.

WHITE v MATTHEWS, No. 156029; Court of Appeals No. 338125.

WHITE v SOUTHEAST MICHIGAN SURGICAL HOSPITAL, No. 156031; Court of Appeals No. 338256.

PEOPLE v CHAPLIN, No. 156053; Court of Appeals No. 331190.

PEOPLE v DONALD TAYLOR, No. 156109; Court of Appeals No. 337544.

WELLS FARGO BANK, NA v JOHNSON, No. 156138; Court of Appeals No. 336323.

PEOPLE v PAGAN, No. 156145; Court of Appeals No. 325558.

BEN JOSEPH BURKHART TRUST v CRAMER, No. 156164; Court of Appeals No. 330609.

MA v WEBER, Nos. 156190 and 156191; Court of Appeals Nos. 330380 and 332462.

TITAN TRANSPORTATION SERVICES, INC v SELECTIVE INSURANCE COMPANY OF AMERICA, No. 156199; Court of Appeals No. 332227.

SHAMEE CATWILMAT, LLC v SHAMEE DEVELOPMENT COMPANY, LLC, No. 156236; Court of Appeals No. 330616.

WILDER, J., did not participate because he was on the Court of Appeals panel.

GEETER v CHIPPEWA CORRECTIONAL FACILITY WARDEN, No. 156253; Court of Appeals No. 338085.

PEOPLE v STEVEN SHAW, No. 156254; Court of Appeals No. 331125.

PEOPLE v KAJUAN BROWN, No. 156279; Court of Appeals No. 331309.

PEOPLE v DIONTE TRAVIS, No. 156297; Court of Appeals No. 331479.

PEOPLE v QUADRINI, No. 156304; Court of Appeals No. 331223.

PEOPLE v SHIVERS, No. 156307; Court of Appeals No. 330574.

TRAIL SIDE LLC v VILLAGE OF ROMEO, No. 156310; Court of Appeals No. 331747.

PEOPLE v HARLACZ, No. 156312; Court of Appeals No. 338103.

PEOPLE v SCRIVO, No. 156324; Court of Appeals No. 330292.

PEOPLE v CHRISTOPHER MICHAEL TAYLOR, No. 156337; Court of Appeals No. 329358.

PEOPLE v SCROGGINS, No. 156352; Court of Appeals No. 332623.

PEOPLE v JONES-BURDINE, No. 156374; Court of Appeals No. 330935.

PEOPLE OF THE CITY OF STERLING HEIGHTS v REGAN, No. 156383; Court of Appeals No. 337147.

PEOPLE v DONTREAU ROBINSON, No. 156385; Court of Appeals No. 331680.

PEOPLE v CRAIGE, No. 156398; Court of Appeals No. 333018.

PEOPLE v MARTELL WASHINGTON, No. 156404; Court of Appeals No. 332077.

LEONI TOWNSHIP v COLUMBIA TOWNSHIP, No. 156413; Court of Appeals No. 331301.

PEOPLE v CHARLES BARNES, No. 156419; Court of Appeals No. 338385.

OSTROWSKI v CANTON CHARTER TOWNSHIP, No. 156431; Court of Appeals No. 331949.

PEOPLE v MASSEY, No. 156432; Court of Appeals No. 331077.

PEOPLE v GALINDO, No. 156443; Court of Appeals No. 338718.

VIGGERS v VIGGERS, No. 156447; Court of Appeals No. 332481.

PEOPLE v GUAJARDO, No. 156455; Court of Appeals No. 333012.

PEOPLE v RONALD WILLIAMS, No. 156456; Court of Appeals No. 332192.

VIGGERS v PACHA, No. 156495; Court of Appeals No. 334522.

PEOPLE v ISWED, No. 156536; Court of Appeals No. 338176.

PEOPLE v PAUL MILLER, No. 156556; Court of Appeals No. 331773.

PEOPLE v DUNSON, No. 156561; Court of Appeals No. 330238.

PEOPLE v MACK, No. 156562; Court of Appeals No. 332079.

JEWETT v GARFIELD CHARTER TOWNSHIP, No. 156563; Court of Appeals No. 331092.

PEOPLE v DANIEL GRAY, No. 156566; Court of Appeals No. 331126.

PEOPLE v NICHOLAS, No. 156567; Court of Appeals No. 339048.

PEOPLE v HINSON, No. 156568; Court of Appeals No. 338996.

PEOPLE v FREEMON, No. 156572; Court of Appeals No. 332919.

PEOPLE v MERCER GRAHAM, No. 156573; Court of Appeals No. 336133.

PEOPLE v WATTS, No. 156609; Court of Appeals No. 331509.

ABHE & SVBODA, INC v STATE OF MICHIGAN, No. 156610; Court of Appeals No. 332489.

PEOPLE v DANIEL BUTLER, No. 156612; Court of Appeals No. 339347.

FEDERAL NATIONAL MORTGAGE ASSOCIATION v BISZCZANIK, No. 156619; Court of Appeals No. 338134.

PEOPLE v QUINTON DANIELS, No. 156621; Court of Appeals No. 339400.

EMPLOYERS MUTUAL CASUALTY COMPANY v HELICON ASSOCIATES, INC, No. 156649; Court of Appeals No. 322215.

WILDER, J., did not participate because he was on the Court of Appeals panel at an earlier stage of the proceedings.

MANSOUR LAW, PC v OAKLAND COUNTY, No. 156680; Court of Appeals No. 332797.

PEOPLE v EUGENE SHAW, No. 156726; Court of Appeals No. 332405.

PEOPLE v DWAYNE MOORE, No. 156734; Court of Appeals No. 332554.

PEOPLE v JACQUELINE LEWIS, No. 156741; Court of Appeals No. 332424.

PEOPLE v MARTWAN JOHNSON, No. 156751; Court of Appeals No. 329134.

PEOPLE v CAVES, No. 156756; Court of Appeals No. 333079.

WIECH v THYSSENKRUPP ELEVATOR AMERICAS CORPORATION, No. 156779; Court of Appeals No. 338700.

PEOPLE v KUIPER, No. 156805; Court of Appeals No. 338873.

PEOPLE v DANIEL QUINN, No. 156808; Court of Appeals No. 340074.

O'BRIEN v FIEGER, No. 157111; Court of Appeals No. 340948.

Superintending Control Denied March 5, 2018:

MCBRIDE v ATTORNEY GRIEVANCE COMMISSION, No. 154113.

Leave to Appeal Granted March 7, 2018:

HEGADORN v DEPARTMENT OF HUMAN SERVICES DIRECTOR, TRIM v DEPARTMENT OF HUMAN SERVICES DIRECTOR, and FORD v DEPARTMENT OF HEALTH AND HUMAN SERVICES, Nos. 156132, 156133, and 156134; reported below: 320 Mich App 549. The parties shall include among the issues to be briefed whether: (1) the Court of Appeals clearly erred in holding that the trust assets of the plaintiffs' spouses and decedent Lollar's spouse are "countable assets" for purposes of Medicaid eligibility; and (2) the Department of Health and Human Services could base its decision on the retroactive application of a department policy adopted more than 45 days after the plaintiffs' applications were filed. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

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 March 7, 2018:

PEOPLE v WILLIAM DAVIS, No. 155131; Court of Appeals No. 335569. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v AGUILAR, No. 156295; Court of Appeals No. 338747. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Lenawee Circuit Court, and we remand this case to the trial court for resentencing. The trial court erred by assigning 50 points to Offense Variable 11 (OV 11), MCL 777.41(1)(a), when the record does not support a finding that the five additional sexual penetrations, which occurred between the defendant and the victim over a two-month period, arose from the same sexual penetration that gave rise to the sentencing offense. See *People v Johnson*, 474 Mich 96 (2006). That error resulted in the alteration of the defendant's minimum sentencing guidelines range, thereby entitling him to resentencing. *People v Francisco*, 474 Mich 82 (2006). On resentencing, the trial court shall assign zero points to OV 11. In all other respects, leave to appeal is denied.

Leave to Appeal Denied March 7, 2018:

PEOPLE v CHARLES DAMON JONES, No. 155759; Court of Appeals No. 324384.

CARTER v CAPITAL AREA TRANSPORTATION AUTHORITY, No. 155764; Court of Appeals No. 330573.

PEOPLE v MICHAEL FOSTER, No. 155903; reported below: 319 Mich App 365.

SPEET v SINTEL, INC, No. 156001; Court of Appeals No. 330168.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v SCOTT SMITH, No. 156043; Court of Appeals No. 337981.

SOUTHFIELD EDUCATION ASSOCIATION v BOARD OF EDUCATION OF THE SOUTHFIELD PUBLIC SCHOOLS, No. 156342; reported below: 320 Mich App 353.

BERNSTEIN, J., would grant leave to appeal.

PEOPLE v TAWNEY, No. 156599; Court of Appeals No. 338313.

PEOPLE v POSTEMA, No. 156601; Court of Appeals No. 338374.

PEOPLE v KIMBERLY MURPHY, No. 156738; reported below: 321 Mich App 355.

Application for Leave to Appeal Dismissed March 7, 2018:

In re MJG, No. 156338; reported below: 320 Mich App 310, and *In re* BGP and *In re* JSP, Nos. 156339 and 156340; reported below: 320 Mich App 338. On order of the Court, the motion to strike the notice of intervention is considered, and it is granted. There is no justiciable controversy because the losing parties did not file an application for leave to appeal and the Attorney General does not represent an aggrieved party. *Federated Ins Co v Oakland County Rd Comm*, 475 Mich 286 (2006). The application for leave to appeal is dismissed. The motion to extend time to file an answer is dismissed as moot.

Summary Disposition March 9, 2018:

PEOPLE v INMAN, Nos. 155170 and 155171; Court of Appeals Nos. 328368 and 328370. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, and in light of the prosecutor's concession that the defendant in this case should receive relief under *People v Lockridge*, 498 Mich 358 (2015), we reverse in part the judgment of the Court of Appeals, and we remand this case to the Oakland Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *Lockridge*, 498 Mich at 394-397. On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered March 9, 2018:

PEOPLE v CAMERON, No. 155849; reported below: 319 Mich App 215. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether court costs under MCL 769.1k(1)(b)(*iii*) should be classified as a tax, a fee, or some other category of charge; and (2) if court costs are a tax, whether the statute violates the Separation of Powers Clause, Const 1963, art 3, § 2, or the Distinct-Statement Clause, Const 1963, art 4, § 32. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties 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. 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 March 9, 2018:

PEOPLE v WAFER, No. 153828; Court of Appeals No. 324018.

MARKMAN, C.J. (*dissenting*). Renisha McBride, the deceased, was shot and killed by defendant in the middle of the night on defendant's porch. In hindsight, it appears likely that she was seeking some aid

after being involved in a nearby car accident a few hours earlier. Defendant, unfortunately, was unaware of these facts. Instead, understanding only that his home was under assault from one or more unknown individuals outside, he chose to meet the apparent threat at his front door.

Despite the tragic nature of this case, defendant was entitled to a fair trial with all the protections guaranteed to him by law. In my judgment, however, defendant was deprived of a critical protection at trial. This deprivation prejudiced the outcome, for which the only remedy is a new trial. Accordingly, I respectfully dissent from this Court's order denying leave to appeal.

I. FACTS AND PROCEEDINGS

Defendant lived alone in Dearborn Heights, close to the border of Detroit. He was aware that his neighborhood had recently suffered from an increase in crime. For instance, one of his neighbors had to display a handgun for protection against apparent drug users. In addition, defendant's vehicle had been vandalized a few weeks before the shooting at issue. As a result of this increase, defendant converted a hunting shotgun that he owned into a shotgun that was better suited for home defense by installing a pistol grip. His home had three doors—at the front, side, and back of the home. All doors were kept locked, including the screen door protecting the front door.

The deceased crashed her car in Detroit (near Dearborn Heights) at about 1:00 a.m. on November 2, 2013. Witnesses indicated that the deceased seemed "out of it," and she declined to wait for an ambulance. Instead, she walked away from the scene. It is not clear what the deceased did between about 1:30 a.m. and 4:30 a.m., nor is it clear why she appeared at defendant's home. In any event, at about 4:30 a.m., defendant was awakened by a loud banging.

Defendant testified that the banging started at the side door and then moved to the front door. Defendant looked out of the front-door peephole and saw a figure leaving the porch. The banging then resumed at the side door, increasing in intensity. Defendant said that he feared that the person or persons were trying to enter his home and that the side door was being "attacked." He then obtained a baseball bat and went into the kitchen. The banging again resumed at the front door; this time, it sounded like metal hitting the door. Defendant decided to obtain his shotgun from the bedroom closet. By that point, the banging had again moved to the side door; defendant believed that it sounded like the person or persons were trying to kick in the door. When the banging at the side door stopped, defendant went to the front door to investigate, fearing that "they" were attempting to break into his home. He believed that if the person or persons outside saw him at the front door holding a gun, the person or persons might run away. By then, according to defendant, the front-door peephole was cracked and unusable from the pounding on the door.

Defendant testified that he unlocked the front door, opened it a few inches, and saw that the screen from the screen door was damaged or

out of place. He then opened the front door completely, at which point someone suddenly rushed toward the door. Defendant explained that he immediately discharged his shotgun while assertedly fearing for his life, apparently with the screen door still closed, and the deceased was killed at close range. Experts later opined that she was two to eight feet away from the shotgun when it was discharged, but more likely at the short end of that range. Defendant said that it was only after he discharged the shotgun that he realized the person was a woman. He called the police at 4:42 a.m., stating that he had "just shot somebody on my front porch with a shotgun banging on my door."[1]

The trial court provided two self-defense instructions to the jury, CJI2d 7.15 and CJI2d 7.16, each of which is consistent with the Self-Defense Act, MCL 780.971 *et seq*.[2] However, the trial court refused defense counsel's requests to also give CJI2d 7.16a.[3] Relevant to this case, CJI2d 7.16a would have instructed the jury that if an individual is "in the process of breaking and entering," and the homeowner honestly and reasonably believes that fact, then the jury should presume that the homeowner has an honest and reasonable belief of imminent death or great bodily harm. See MCL 780.951(1). The trial court reasoned that CJI2d 7.16a was inapplicable because "there is no evidence that [the deceased] was either breaking or entering."

Ultimately, the jury found defendant guilty as charged of second-degree murder, MCL 750.317, statutory manslaughter, MCL 750.329, and possession of a firearm during the commission of a felony, MCL 750.227b. The Court of Appeals affirmed his convictions, *People v Wafer*, unpublished per curiam opinion of the Court of Appeals, issued April 5, 2016 (Docket No. 324018), and we directed the Clerk to schedule oral argument on the application, *People v Wafer*, 500 Mich 930 (2017).

II. STANDARD OF REVIEW

This Court reviews de novo claims of instructional error. *People v Dupree*, 486 Mich 693, 702 (2010).

III. DISCUSSION

A. COMMON LAW OF SELF-DEFENSE

"At common law, a claim of self-defense, which 'is founded upon

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[1] A medical expert testified that at the time of this incident, the deceased had "very high alcohol levels," "active marijuana in her system," and likely suffered a concussion in the car accident a few hours earlier. In his opinion, these impairments "reduc[e] the ability to put forth good judgement."

[2] CJI2d 7.15 is now titled M Crim JI 7.15, and CJI2d 7.16 is now titled M Crim JI 7.16.

[3] CJI2d is now titled M Crim JI 7.16a.

necessity, real or apparent,' may be raised by a nonaggressor as a legal justification for an otherwise intentional homicide." *People v Riddle*, 467 Mich 116, 126 (2002), quoting 40 Am Jur 2d, Homicide, § 138, p 609. "[T]he killing of another person in self-defense is justifiable homicide only if the defendant honestly and reasonably believes his life is in imminent danger or that there is a threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself." *Riddle*, 467 Mich at 127. "[O]nce the defendant satisfies the initial burden of production, the prosecution bears the burden of disproving the common law defense of self-defense beyond a reasonable doubt." *People v Reese*, 491 Mich 127, 155 (2012) (quotation marks and citation omitted; alteration in original).

As a general rule under the common law, a person exercising his right of self-defense is "bound, if possible, to get out of his adversary's way, and has no right to stand up and resist if he can safely retreat or escape." *Pond v People*, 8 Mich 150, 176 (1860). However, under the castle doctrine, "[i]t is universally accepted that retreat is not a factor in determining whether a defensive killing was necessary when it occurred in the accused's dwelling[.]" *Riddle*, 467 Mich at 134. "The rule has been defended as arising from 'an instinctive feeling that a home is sacred, and that it is improper to require a man to submit to pursuit from room to room in his own house.' " *Id*., quoting *People v Godsey*, 54 Mich App 316, 319 (1974) (citations and quotation marks omitted).

B. STATUTES GOVERNING SELF-DEFENSE

"With the enactment of the Self-Defense Act (SDA), MCL 780.971 *et seq*., the Legislature codified the circumstances in which a person may use deadly force in self-defense or in defense of another person without having the duty to retreat." *Dupree*, 486 Mich at 708. MCL 780.972(1)(a) of the SDA reads as follows:

> (1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:
>
> (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.

MCL 780.972 is consistent with the common law of self-defense to the extent that it allows a person to use deadly force in self-defense when (1) the person honestly and reasonably believes that there is a threat of imminent death or great bodily harm to himself, and (2) the person honestly and reasonably believes that the use of deadly force is necessary to prevent such an outcome.

Furthermore, MCL 780.951 provides heightened statutory protection for a person who uses deadly force in self-defense when the circumstances suggest that another person presents an imminent threat of death or great bodily harm to those within a dwelling. MCL 780.951(1) provides, in relevant part, as follows:

> (1) . . . [I]t is a rebuttable presumption in a civil or criminal case that an individual who uses deadly force or force other than deadly force under [MCL 780.972] has an honest and reasonable belief that imminent death of, sexual assault of, or great bodily harm to himself or herself or another individual will occur if both of the following apply:
>
> (a) The individual against whom deadly force or force other than deadly force is used is in the process of breaking and entering a dwelling or business premises or committing home invasion or has broken and entered a dwelling or business premises or committed home invasion and is still present in the dwelling or business premises, or is unlawfully attempting to remove another individual from a dwelling, business premises, or occupied vehicle against his or her will.
>
> (b) The individual using deadly force or force other than deadly force honestly and reasonably believes that the individual is engaging in conduct described in subdivision (a).

Thus, MCL 780.951(1) essentially provides that, when the evidence shows that both subdivisions (a) and (b) have been satisfied, the defendant is entitled to a rebuttable presumption that he possesses an honest and reasonable belief of imminent death or great bodily harm. The trial court here, despite repeated requests from defense counsel, refused to instruct the jury concerning MCL 780.951 by providing the jury CJI2d 7.16a. Its refusal to do so is dominantly at issue in this appeal. Put simply, defendant was *entitled* to such an instruction if the evidence supported both MCL 780.951(1)(a) and (1)(b). See *People v Rodriguez*, 463 Mich 466, 472 (2000) ("[W]hen a jury instruction is requested on any theories or defenses and is supported by evidence, it must be given to the jury by the trial judge.") (quotation marks and citation omitted); *People v Kolanek*, 491 Mich 382, 411-412 (2012) ("[I]f a defendant produces sufficient evidence of the elements of the defense, then the question whether the defendant has asserted a valid defense is for the jury to decide.").

a. MCL 780.951(1)(A)

In relevant part, MCL 780.951(1)(a) is satisfied when either (1) the individual "is in the process of breaking and entering a dwelling" *or* (2) the individual "has broken and entered a dwelling . . . and is still present in the dwelling . . . ."

To constitute a "breaking," the use of "any force" is sufficient. See *People v White*, 153 Mich 617, 621 (1908) ("[I]f any force at all is

necessary to effect an entrance into a building, through any place of ingress, usual or unusual, whether open, partly open or closed, such entrance is a breaking sufficient in law to constitute burglary, if the other elements of the offense are present."). To constitute an "entry," " 'it is sufficient if any part of defendant's body is introduced within the house.' " *People v Gillman*, 66 Mich App 419, 430 (1976), quoting 3 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 1133, p 1528.

MCL 780.951(1)(a) *separately* refers to an individual who is "in the process of breaking and entering" and an individual who "has broken and entered." Under the principle of statutory interpretation that "[c]ourts must give effect to every word, phrase, and clause in a statute," *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146 (2002), the phrase "in the process of breaking and entering" must mean something different than "has broken and entered." Otherwise, the first phrase would be nugatory.

The most straightforward meaning of "in the process of breaking and entering," in light of the fact that the statute separately refers to "has broken and entered," is that the breaking and entering must be in progress, although the breaking and entering is not yet complete. With that in mind, it is clear that under one entirely reasonable view of the evidence, the deceased here was "in the process of breaking and entering." Evidence showed that the screen from the screen door had been pushed against the front door when defendant opened it.[4] A reasonable inference, therefore, is that the deceased pushed the screen against the front door to pound on it. That is, the deceased was responsible for dislodging the screen and pushing her hand through the screen door to the front door. Logically, when an entrance to a building is protected by two doors, in order to access the building, the outer door must be broken before the inner door is broken. When a person breaks through the outer door, that person is quite literally "in the process of" breaking and entering the building. Here, assuming that the deceased broke through the screen door to access the front door, as the evidence suggests, she had been *successful* in breaking one of two barriers to the home and thus was "in the process of" breaking and entering. Moreover, as defendant testified, the banging on the doors was exceedingly loud and forceful, to the extent that the peephole was damaged. And other evidence suggested that the deceased had damaged one of her boots and injured her hands as a possible result of her repeated banging on the doors. Certainly, one way to accomplish an entry into a home is to break down the door by the raw application of physical force. Simply put, the evidence, in my judgment, was sufficient to warrant a finding that the deceased was "in the process of" breaking and entering. Accordingly, the evidence showed that MCL 780.951(1)(a) was satisfied.

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[4] In particular, defendant testified that the screen was dislodged inward when he opened it, and another witness testified that the front door had small markings on it that were consistent with the screen pushing against it.

b. MCL 780.951(1)(B)

Having concluded that the evidence showed that the deceased may have been "in the process of breaking and entering," thus satisfying MCL 780.951(1)(a), the next question is whether the evidence satisfied MCL 780.951(1)(b). Under MCL 780.951(1)(b), the individual using deadly force must "honestly and reasonable believe[]" that the other individual "is engaging in conduct described in subdivision (a)."

The evidence clearly shows that MCL 780.951(1)(b) was satisfied. Defendant testified that he was in fear, that he believed that the person or persons outside were trying to get inside his home in the middle of the night, and that when he pulled the trigger, it was "them or me." Thus, he had an honest belief that the deceased was "in the process of breaking and entering." Furthermore, that belief was reasonable as well, given his testimony as to the loud and sustained banging in the middle of the night, his testimony that the banging on the front door was so forceful as to damage the peephole, and his testimony that the screen had been dislodged. It was altogether reasonable under these circumstances, including the recent criminal history of the neighborhood, for an individual to believe that the person or persons outside were in the process of breaking and entering the home. Accordingly, the evidence showed that MCL 780.951(1)(b) was satisfied as well.

Therefore, the evidence satisfied both MCL 780.951(1)(a) and (1)(b), such that defendant was entitled to a jury instruction on the rebuttable presumption set forth in that statute. The trial court, I believe, erred by ruling otherwise.[5]

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[5] I decline to address the prosecutor's new argument in this Court that MCL 780.951, in a criminal case, merely serves as a mechanism for a defendant to satisfy his initial burden of production concerning one element of self-defense under the SDA. "The general rule is well established that upon appellate review, parties cannot assume a position inconsistent with or different from that taken at the trial and are restricted to the theory upon which the case was defended in the court below." *Heider v Mich Sugar Co*, 375 Mich 490, 506 (1965) (opinion by KELLY, J.). In the trial court, the prosecutor argued that CJI2d 7.16a should not be given because it was not applicable to the particular facts at hand, *not* because MCL 780.951 is a burden-of-production statute. Furthermore, after opening statements, the prosecutor remarkably reached out to the Committee on Model Criminal Jury Instructions and obtained a favorable amendment of CJI2d 7.16a with immediate effect. By doing so, the prosecutor clearly evinced an understanding that the rebuttable presumption of MCL 780.951 was, in fact, appropriate to submit to the jury in certain cases. Under these circumstances, I do not believe that it would be appropriate to entertain the prosecutor's new argument concerning that instruction.

C. PRESERVED ERROR

"Preserved, nonconstitutional errors are subject to harmless-error review, governed by MCL 769.26[.]" *People v Lyles*, 501 Mich 107, 117 (2017). Under MCL 769.26, "a defendant carries the burden of showing that 'it is more probable than not that the error was outcome determinative.' " *Id*. at 117-118, quoting *People v Lukity*, 460 Mich 484, 495-496 (1999). For the following five reasons, I conclude that the failure to instruct the jury concerning the rebuttable presumption of MCL 780.951 was outcome-determinative error and, therefore, a new trial is warranted.

First, it is clear that a jury instruction on the rebuttable presumption of MCL 780.951, which concerns "an honest and reasonable belief that imminent death of, sexual assault of, or great bodily harm to himself or herself or another individual will occur," would have squarely supported defendant's theory and undermined the prosecutor's theory with regard to the first element of self-defense set forth in MCL 780.972(1)(a) of the SDA, which requires an honest and reasonable belief of "imminent death or great bodily harm to himself." In addition, a jury that affirmatively found in favor of defendant—as opposed to merely entertained reasonable doubt—as to the first element of self-defense would have also been inclined to find reasonable doubt as to the second element of self-defense set forth in MCL 780.972(1)(a) of the SDA, which requires an honest and reasonable belief "that the use of deadly force is necessary to prevent" that outcome. That is, a jury that found that defendant possessed an honest and reasonable belief of imminent death or great bodily harm would have been substantially more likely to entertain reasonable doubt as to whether he possessed an honest and reasonable belief that the use of deadly force was necessary to prevent such an outcome.

Second, a review of the prosecutor's closing argument shows that he relied heavily on the theory that defendant was angry and frustrated, not afraid, when he confronted the apparent would-be intruder:

> Yet she ended up in the morgue. With bullets in her head and in her brain. Because the defendant picked up this shotgun, released this safety, raised it at her, pulled the trigger and blew her face off. He heard knocks and he was mad.
>
> He was angry. And he was full of piss and vinegar. And he was gonna find out what's going on. And he took that shotgun, while mad, angry and full of piss and vinegar to find out what's going on.
>
> Why? Why? Why? Because some kids paint balled his car a few weeks earlier. Because he was fed up with the knocking. Why? Why?
>
> He wanted a confrontation. He wanted the kids, the neighborhood kids to leave him alone. He wanted to show them a shotgun. Because he had had enough. Enough of the drug paraphernalia on his front yard.

> Enough of the paint ball. Enough of the kids doing whatever to him. And he went and took a shotgun, in his words, to show it to 'em and scare them away.
>
> Now the sound's back at the front door. I've had enough. I'm going to find out what's going on. He goes to where the sound is with the shotgun. He wants a confrontation.
>
> And what he finds is a 19 year old unarmed teenager. Wet, probably cold, scared, disoriented, possible closed head injury. And based on the evidence in this case and the reasonable inferences, looking for help. He raised up his gun at that person and shot her in the face.
>
> * * *
>
> He wanted to show the shotgun. He opened the door a bit. Then he opened it all the way. He saw a person. At that point he raised it up, he raised up the shotgun.
>
> He may have even stopped and said something. Not sure what I said, because now I'm piss [sic] and mad. Not scared. Now I'm mad.

Simply put, the prosecutor argued that defendant was angry and aggressive, not fearful for his own life. But anger and aggression are not necessarily inconsistent with a belief that one's life is in danger.[6] It is entirely possible that an individual such as defendant could be angry that the sanctity of his home was being violated, *and* sufficiently aggressive to affirmatively confront the situation, while still believing that his life is in danger. An individual can have a wide variety of reactions to believing that his or her life is being threatened, including anger, fear, resignation, and so forth. But so long as the *belief* is present, the *particular* emotional reaction to that belief is inconsequential. One need not react timidly or tentatively or by cowering in the face of the circumstances confronting defendant in this case in order that his response not be characterized as "angry and aggressive" rather than "fearful." Through MCL 780.951, the Legislature has expressed its intention that an individual who is confronted with a breaking and entering is entitled to additional legal protection concerning his *belief* of imminent death or great bodily harm. The jury should have been informed of that presumption, which would have necessarily made it much more difficult for the prosecutor to utilize defendant's asserted emotional reaction to assert that he did not possess such a belief beyond a reasonable doubt.

In addition, the prosecutor argued that the jury should find defendant guilty because he did not flee to a different part of the house:

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[6] Indeed, MCL 780.972(1)(a) of the SDA does not use the word "fears." Rather, it uses the word "believes." Fear is not a requirement for lawful self-defense.

> How about shutting the door. How about keeping it shut. How about calling 911. *How about going into a different part of your house*. That's not retreating. *But going to a different part of your house*. [Emphasis added.]

The contention that "going to a different part of your house" is not tantamount to "retreating" is clearly a misstatement of the castle doctrine. See *Riddle*, 467 Mich at 134. By so arguing to the jury, however, the prosecutor encouraged the jury to find that defendant did not possess an honest and reasonable belief of imminent death or great bodily harm because he did not go to a different part of the house. Had the jury been instructed on the rebuttable presumption of MCL 780.951, defendant would have been protected against such an improper argument.

Third, I find it difficult to believe that the jury found beyond a reasonable doubt that defendant did not act in self-defense when the apparent would-be intruder rushed toward the front door in the middle of the night, and he instinctively pulled the trigger of the shotgun in response. Instead, given the prosecutor's closing argument, the jury likely identified as absolutely critical the fact that defendant opened the front door to confront the would-be intruder or intruders, rather than staying behind closed doors. Instructing the jury on the rebuttable presumption of MCL 780.951 would have explicitly informed the jury that an individual who is in the process of breaking and entering may pose an imminent threat to the homeowner inside. Making that information explicit would have meant that the jury was required to presume, at all times relevant to this case, that defendant possessed an honest and reasonable belief of imminent death or great bodily harm unless rebutted by the prosecutor. Thus, the jury would have presumed that *before, during, and after* defendant opened the front door, he possessed such a belief. The only remaining question would then have been whether defendant possessed an honest and reasonable belief that "the use of deadly force [was] necessary to prevent the imminent death or great bodily harm." MCL 780.972(1)(a). If the jury's focus had been on that moment in time when the apparent would-be intruder rushed toward defendant, it would have been almost impossible to escape the conclusion that he had used necessary deadly force or, at a minimum, that there had been a reasonable doubt as to whether he had used necessary deadly force. In my view, it is only because the prosecutor was able to expand the jury's focus to the time before defendant opened the door that he was able to obtain a conviction. That time frame, however, was virtually irrelevant as to whether defendant had used "necessary" deadly force, given that defendant had no duty to retreat in his dwelling, which included the porch. See *People v Richardson*, 490 Mich 115, 121 (2011).

Fourth, the jury was instructed that "a person is [n]ever required to retreat if attacked in his home," which includes the "porch." The negative implication of this instruction was that defendant *himself* must be attacked in his home for the duty to retreat no longer to be a relevant concept. But the castle doctrine is not so limited. Rather, under the

castle doctrine, the duty to retreat is simply not a relevant concept when, in addition to such circumstances, an individual is attempting an unlawful entry into the dwelling. See *Pond*, 8 Mich at 177 ("A man is not, however, obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house, *or to prevent his forcible entry*, even to the taking of life.") (emphasis added). And that is precisely what the facts showed here.

For this reason, I respectfully disagree with the Court of Appeals that the failure to instruct the jury concerning MCL 780.951 constituted harmless error because the jury found defendant guilty, thereby rejecting his self-defense argument beyond a reasonable doubt. See *Wafer*, unpub op at 4 n 2 ("[T]here was scant evidence of self-defense while, in contrast, the jury received detailed instructions on defendant's self-defense theory and the prosecutor presented ample evidence to disprove defendant's claim of self-defense beyond a reasonable doubt."). Even if the presumption *itself* might not have affected the case, instructing the jury concerning MCL 780.951 would have assisted the jury in understanding that the duty to retreat simply is not implicated when the apparent would-be intruder is attempting to break through the doors of the home. Absent such an instruction, the jury was essentially informed of the opposite: that the duty to retreat *is* a relevant concept in such circumstances.

Fifth, during her opening statement, defense counsel discussed CJI2d 7.16a and told the jury that it should presume that defendant "had an honest and reasonable belief that imminent death or great bodily harm would occur" if "[t]he deceased was breaking and enter[ing] a dwelling." However, defense counsel was unable to offer such an argument during her closing argument because the trial court had refused to instruct the jury concerning MCL 780.951. Given this discrepancy between the opening statement and closing argument, the jury was left either with the impression that the evidence introduced at trial did not show that defendant had an honest and reasonable belief that imminent death or great bodily harm would occur, or else failed to show that the deceased was in the process of breaking and entering, or both; otherwise, the jury would have received a final instruction consistent with the opening statement. In either event, defendant was prejudiced. If the jury was left with the first impression, defendant was prejudiced because he did, in fact, introduce evidence showing that he honestly and reasonably believed that imminent death or great bodily harm would occur to him, and the jury should not have been implicitly informed to preemptively disregard such evidence during its deliberations. If the jury was left with the second impression, defendant was prejudiced because whether the deceased was in the process of breaking and entering was undoubtedly a critical issue in this case, and the jury should not have been implicitly informed that the dispute had been resolved in favor of the prosecutor.

For these reasons, I conclude that the failure to instruct the jury concerning MCL 780.951 was not harmless error, and consequently, a new trial is warranted.

IV. DEFENSE OF HABITATION

Notwithstanding my conclusion that a new trial is warranted because of the erroneous failure to instruct the jury concerning MCL 780.951, my review of the record indicates that another error occurred at trial. This error, in my judgment, provides an *independent* basis for a new trial.

Under the common law, in addition to self-defense, a person within a dwelling could also avail himself of the defense of habitation in cases such as the instant case. See generally, 4 Blackstone, Commentaries on the Laws of England, p *180 ("If any person attempts a robbery or murder of another, or attempts to break open a house, *in the night-time*, (which extends also to an attempt to burn it), and shall be killed in such attempt, the slayer shall be acquitted and discharged."). One scholar has explained the distinction between these two defenses as follows:

> As an exception to the generalized duty to retreat, the Castle Doctrine sits at the intersection of two distinct but interrelated defenses: defense of habitation and self-defense. Defense of habitation is primarily based on the protection of one's dwelling or abode, and stems from the common law belief that a man's home is his castle. Essentially, the defense provides that the use of deadly force may be justified to prevent the commission of a felony in one's dwelling, although there is considerable discussion on whether the intrusion must be accompanied by the intent to commit a violent felony. Some courts require that defense of habitation only be asserted as against an external threat, and if that is true, then the defense cannot be claimed as against a cohabitant in lawful possession. Because the threat is of the commission of a forcible felony in the home, courts agree that there is no duty to retreat when claiming the defense of one's habitation. As stated forcefully by the Minnesota Supreme Court, "[m]andating a duty to retreat for defense of dwelling claims will force people to leave their homes by the back door while their family members are exposed to danger and their houses burgled."
>
> Derived from similar roots, and potentially overlapping, is self-defense in the home. Whereas in defense of habitation, deadly force may be used to prevent the commission of an atrocious felony, in self-defense, deadly force may be used when necessary in resisting or preventing an offense which reasonably exposes the person to death or serious bodily harm. The contemplated need for self-defense in the home, therefore, is in some sense broader—it can be an external or internal attack—but it is narrower in its requirement that the attacker intends death or serious bodily harm. [Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 Marq L Rev 653, 665-666 (2003) (citations omitted).]

This Court has recognized the distinction between these two defenses. See *People v Gonsler*, 251 Mich 443, 445 (1930) ("The defense of life or

limb *or* of [the homeowner's] habitation was not involved if the dying declaration was true.") (emphasis added).[7]

The seminal case in Michigan concerning defense of habitation is *Pond*. The pertinent facts of *Pond* were as follows:

> Pond went to the door and hallooed, "Who is tearing down my net-house?" to which there was no answer. The voices of a woman and child were heard crying, and the woman's voice was heard twice to cry out "for God's sake!" Cull's voice was also heard from the net-house, not speaking, but hallooing as if he was in pain. Pond cried out loudly, "Leave, or I'll shoot." The noise continuing, he gave the same warning again, and in a few seconds shot off one barrel of the gun. Blanchard was found dead the next morning. [*Pond*, 8 Mich at 180-181.]

This Court reversed Pond's conviction because had he properly used deadly force in defending the net-house, which comprised part of his dwelling, from attack:

> A question was raised whether the net-house was a dwelling or a part of the dwelling of Pond. We think it was. . . .
>
> * * *
>
> Apart from its character as a dwelling, which was denied by the court below, *the attack upon the net-house for the purpose of destroying it, was a violent and forcible felony*. And the fact that it is a statutory and not common law felony, does not, in our view, change its character. Rape and many other of the most atrocious felonious assaults, are statutory felonies only, and yet no one ever doubted the right to resist them unto death. *And a breaking into a house with the design of stealing the most trifling article, being common law burglary, was likewise allowed to be resisted in like manner, if necessary*. [*Id*. at 181-182 (emphasis added).]

"We think there was error . . . in holding that the protection of the net-house could not be made by using a dangerous weapon . . . ." *Id*. at 182.

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[7] More recently, in *Riddle*, this Court implicitly recognized that self-defense and defense of habitation are separate defenses. When agreeing with the prosecutor's assertion that "*Pond* did not in any way purport to extend the self-defense castle exception to the curtilage area surrounding the dwelling," we explained that "*Pond* considered the net-house to be a dwelling not for the purpose of the self-defense castle doctrine but instead for the purpose of *a completely different defense* . . . ." *Riddle*, 467 Mich at 136 & n 27 (emphasis added). That "completely different defense," as explained herein, was the defense of habitation.

Thus, *Pond* establishes that, wholly distinct from self-defense, deadly force may be used for defense of habitation when the assailant against the habitation apparently possesses the "design" (i.e., the intent) to commit a felony therein. See *id*. And furthermore, that felony to be committed need not itself be violent. Rather, "stealing the most trifling article" is sufficient. See *id*. See also 3A Gillespie, Michigan Criminal Law & Procedure (2d ed), § 91:58, Defense of Habitation, p 376 ("*Force, including deadly force, may be used to* repel an intruder or *prevent forcible entry* into a dwelling where under the circumstances the occupant would reasonably believe the intruder intended to commit a felony or to do serious bodily harm.") (emphasis added).[8]

Consistent with this common law is Michigan Criminal Nonstandard Jury Instruction § 25:8, titled "Defenses—Habitation," which reads as follows:

> (1) The defendant contends that the killing (use of deadly force, in the event death is not caused by use of force) was justified because it occurred under circumstances entitling [him/her] to use deadly force to prevent forcible entry into [his/her] dwelling, under circumstances where the defendant would reasonably believe the intruder intended to commit a felony or do serious bodily harm to one within the dwelling.
>
> (2) If you have a reasonable doubt as to whether the defendant did indeed use deadly force against the intruder in an attempt to prevent forcible entry into [his/her] dwelling, under circumstances where the defendant would reasonably believe the intruder intended to commit a felony, or do serious bodily harm to one within the dwelling, then the defendant is not guilty of any crime.
>
> (3) An individual is entitled to use deadly force to prevent forcible entry into [his/her] dwelling, under circumstances where the defendant would reasonably believe the intruder intended to commit a felony, or do serious bodily harm to one within the dwelling, only when all of the following circumstances exist:
>
> (A) The evidence must show that a forcible intrusion into the dwelling was occurring.
>
> (B) The evidence must show that the forcible intrusion was occurring under circumstances where it would be reasonable for an

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[8] Footnote 11 of *Riddle* is consistent with this proposition. There, this Court stated that "[w]e specifically do not address whether a person may exercise deadly force in defense of his habitation, and our holding should not be misconstrued to sanction such use of force as it pertains to the defense of one's habitation." *Riddle*, 467 Mich at 121 n 11. Aside from the fact that this Court expressly declined to address the question of defense of habitation, it is certainly true that deadly force may not be used when a person is *only* seeking to defend his habitation. Rather, the assault against the habitation must be accompanied by circumstances indicating that the assailant intends to commit a felony therein.

> occupant to believe the intruder intended to commit a felony or do serious bodily harm to one within the dwelling; the use of deadly force is not permissible to expel a mere trespasser.
>
> (C) The evidence must show that the defendant thus entertained an honest and reasonable belief that the use of deadly force was necessary to prevent the intruder from committing a felony or doing serious bodily harm to one within the dwelling.
>
> (4) The defendant does not have to prove that [he/she] acted in defense of [his/her] dwelling. Instead, the prosecutor must prove beyond a reasonable doubt that the defendant did not act in defense of [his/her] dwelling.
>
> (5) Whether the evidence raises a reasonable doubt that, under these standards, the defendant was justified in using deadly force to defend [his/her] dwelling, is a question you must determine. [Murphy & VandenHombergh, *Michigan Nonstandard Jury Instructions—Criminal* (Eagan: Thomson Reuters, 2017), pp 388-389 (italics omitted).]

In my judgment, this jury instruction sets forth the common law of defense of habitation in Michigan with reasonable precision. Moreover, Comment 2 to this instruction in particular provides a thoughtful explanation of the distinction between self-defense and defense of habitation:

> Defense of habitation is a different defense from self-defense, and differs from protection of other property. The dwelling is viewed as a place of special importance as a place of security, and thus defense of the dwelling permits the use of deadly force where the defender reasonably believes that the trespasser or intruder intends to commit a felony or to do harm to him or her or another within the house. *Unlike the defense of self-defense, it is not required that the defendant be in fear of imminent death or great bodily harm at the time deadly force is employed, as is required with self-defense*. [*Id*. at 389-390 (emphasis added).]

I am unable to locate any place in the instant record where defense counsel requested that the trial court give Michigan Criminal Nonstandard Jury Instruction § 25:8—or other instruction concerning the defense of habitation—to the jury.[9] If defense counsel failed to do so, her failure arguably fell below an objective standard of reasonableness. See *Strickland v Washington*, 466 US 668 (1984). I can identify no trial strategy that would justify the failure to request that the trial court provide an instruction concerning a defense that is squarely applicable to the case and is arguably more likely to be successful than any other defense that might be argued. Once again, defense of habitation simply

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[9] Michigan Criminal Nonstandard Jury Instruction § 25:8 was listed as Michigan Criminal Nonstandard Jury Instruction § 25.9 before 2014.

does not require that the defendant possess a belief of imminent death or great bodily harm. Rather, the defendant is only required to possess a belief that a forcible intrusion is occurring and that the intruder intends to commit a felony inside the habitation. Thus, an instruction concerning the defense of habitation would have fundamentally undermined the prosecutor's case, which was premised upon the notion that defendant should be found guilty because he did not possess a belief of imminent death or great bodily harm. Furthermore, defense of habitation allows the defendant to repel a forcible intrusion *before* it is successful. See *Pond*, 8 Mich at 181-182.[10] Thus, an instruction concerning the defense of habitation would also have undermined the prosecutor's case to the extent that it relied on the notion that defendant should not even have opened the front door to confront the would-be intruder.

Such an instruction, if requested, should have been given by the trial court. The evidence showed that the deceased had broken through the screen door as a result of her pounding and banging. Thus, a forcible intrusion into the dwelling was occurring. Furthermore, given that the assault against the dwelling was occurring in the middle of the night in a relatively high-crime neighborhood, it was, in my judgment, reasonable for defendant to believe that the assailant intended to commit a felony therein. See, e.g., MCL 750.360 ("Any person who shall commit the crime of larceny by stealing in any dwelling house . . . shall be guilty of a felony."). And defendant further testified that this was his honest belief as well.

I have little doubt that such an instruction likely would have changed the outcome of the trial. Even if the jury found beyond a reasonable doubt that the prosecutor disproved self-defense, the jury still would have been obligated to acquit defendant if a forcible intrusion was occurring, it was reasonable to believe that the assailant of the dwelling intended to commit a felony therein, and defendant possessed an honest and reasonable belief of this fact. Given the significant evidence supporting each of these facts, an acquittal would have been almost inevitable.

Regardless of whether defense counsel raised the issue concerning defense of habitation in the trial court, the trial court failed to give any such instruction to the jury. Appellate counsel, in my judgment, should

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[10] Michigan is hardly alone in this regard. See, e.g., *State v Blue*, 356 NC 79, 87 (2002) (explaining that "the use of deadly force in defense of the habitation is justified only to *prevent* a forcible entry into the habitation under such circumstances . . . that the occupant reasonably apprehends death or great bodily harm . . . or believes that the assailant intends to commit a felony") (quotation marks and citation omitted; emphasis in original); *State v Ivicsics*, 604 SW2d 773, 777 (Mo App, 1980) (explaining that defense of habitation "differs from self defense by authorizing protective acts to be taken earlier than they otherwise would be authorized, that is, at the time when and place where the intruder is seeking to cross the protective barrier of the house") (quotation marks and citation omitted).

have argued on direct appeal that the instruction should have been given and, if appropriate, that defense counsel was ineffective for failure to so argue. This may well have constituted ineffective assistance of appellate counsel. Accordingly, in a motion for relief from judgment, I believe that defendant would be able to show both "good cause" for failure to raise the issue concerning defense of habitation on direct appeal, see MCR 6.508(D)(3)(a), and "actual prejudice" from the failure to instruct the jury on this defense, see MCR 6.508(D)(3)(b).

V. CONCLUSION

In the end, the fundamental question here is whether the alleged instructional error concerning the rebuttable presumption of MCL 780.951 warrants reversal. I believe that it does. Defendant was deprived of the legal *presumption* to which he was entitled by statute, that he acted in self-defense out of an honest and reasonable belief of imminent death or great bodily harm when the deceased apparently tried to break down the doors of his home in the middle of the night. Had the jury *presumed* that he possessed such a belief, it would have been far more likely to find that the prosecutor did not disprove self-defense beyond a reasonable doubt.

It is altogether tragic that Renisha McBride lost her life. However, I do not believe that defendant is properly held responsible, or that he *would* have been held responsible, but for the trial court's failure to properly instruct the jury concerning the full gravity of the situation faced by defendant. Accordingly, I respectfully dissent.

CLEMENT, J., did not participate in the disposition of this matter because the Court considered it before she assumed office.

MARTIN v MILHAM MEADOWS I LIMITED PARTNERSHIP, No. 154360; Court of Appeals No. 328240.

MARKMAN, C.J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal. I would reverse the judgment of the Court of Appeals and reinstate the trial court's grant of summary disposition in favor of defendants.

Plaintiff, Michael Martin, sustained injuries when he slipped and fell down the stairs inside his townhouse. The stairs at issue led from the main floor of Martin's unit to his basement, and they were wooden stairs painted with what the building's maintenance supervisor described as "Sherwin Williams porch and floor paint." After the fall, Martin filed the instant lawsuit against Milham Meadows I Limited Partnership, which owned the building, and Medallion Management Inc, which was responsible for maintaining the premises. According to Martin's complaint, the paint used on the basement stairs was slippery and caused tenants to fall. In relevant part, Martin alleged that the stairs were not fit for their intended use as required by MCL 554.139(1)(a) and that they were not kept in reasonable repair as required by MCL 554.139(1)(b). Defendants moved for summary disposition under MCR 2.116(C)(10), and the trial court granted this motion and dismissed Martin's claims with prejudice. However, the Court of Appeals reversed the trial court's decision

regarding Martin's claims under MCL 554.139(1)(a) and (b), holding that there were questions of material fact regarding whether the stairs were fit for their intended use and whether they were kept in reasonable repair.

In relevant part, MCL 554.139 provides:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants [sic] wilful or irresponsible conduct or lack of conduct.

In *Allison v AEW Capital Mgt, LLP*, 481 Mich 419 (2008), this Court analyzed a lessor's duty under MCL 554.139(1)(a) and (b). The plaintiff in *Allison* sustained injuries during a fall, which occurred while walking on one to two inches of snow in the parking lot of his apartment complex. *Id*. at 423. In relevant part, the plaintiff alleged that the condition of the parking lot constituted a breach of the covenants in MCL 554.139(1). *Id*.

With respect to MCL 554.139(1)(a), *Allison* explained that "the lessor effectively has a contractual duty to keep the parking lot 'fit for the use intended by the parties.' " *Id*. at 429. *Allison* indicated that "fit" is defined as " 'adapted or suited; appropriate[.]' " *Id*., quoting *Random House Webster's College Dictionary* (1997). Because the primary purpose of a parking lot is to store vehicles, "a lessor has a duty to keep a parking lot adapted or suited for the parking of vehicles." *Allison*, 481 Mich at 429. *Allison* explained, "A parking lot is generally considered suitable for the parking of vehicles as long as the tenants are able to park their vehicles in the lot and have reasonable access to their vehicles." *Id*. Therefore, in the context of snow and ice, "[a] lessor's obligation under MCL 554.139(1)(a) with regard to the accumulation of snow and ice concomitantly would commonly be to ensure that the entrance to, and the exit from, the lot is clear, that vehicles can access parking spaces, and that tenants have reasonable access to their parked vehicles." *Id*. Notably, *Allison* held that lessors do not need to maintain perfect conditions:

> The statute does not require a lessor to maintain a lot in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for use as a parking lot. Mere inconvenience of access, or the need to remove snow and ice from parked cars, will not defeat the characterization of a lot as being fit for its intended purposes. [*Id*. at 430.]

Here, Martin claims that the slippery nature of the stairs made them unfit for their intended use. "The primary purpose or intended use of a stairway is to provide pedestrian access to different levels of a building or structure." *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124, 130 (2010). The record contains evidence that the stairs were in good condition when Martin moved into the townhouse and that he successfully traversed the stairs thousands of times to access different levels of his townhouse; thus, these stairs successfully served their "intended use" thousands of times. The Court of Appeals improperly discounted the fact that Martin successfully traversed the stairs thousands of times, and it improperly enlarged a landlord's duty to essentially encompass a guarantee of safety.

Contrary to the opinion by the Court of Appeals, a tenant's ability to avoid a condition is, in fact, highly relevant to whether the condition is only a "mere inconvenience of access." As *Allison* explained, "[m]ere inconvenience of access" does "not defeat the characterization of [the premises] as being fit for its intended purposes." *Allison*, 481 Mich at 430. The relevant inquiry under the "intended use" covenant is whether, and to what degree, a condition interferes with the intended use of the premises. As the trial court noted, Michigan law does not require a landlord to make the premises "fool-proof." Defendants' motion for summary disposition was supported with evidence that the stairs were in good condition when Martin moved in and that he successfully traversed the stairs thousands of times, which strongly supports the notion that the stairs were fit for their intended use. Martin failed to respond with evidence demonstrating that any alleged level of slipperiness precluded reasonable access to different levels of his townhouse.[1] Therefore, he failed to show that there was a genuine issue of material fact as to whether the stairs were "fit" (i.e., "adapted or suited; appropriate") for their intended purposes. The Court of Appeals erred by holding otherwise, and the trial court properly granted summary disposition in favor of defendants regarding the alleged violation of the covenant set forth in MCL 554.139(1)(a).

With respect to the covenant set forth in MCL 554.139(1)(b), *Allison* stated, "The plain meaning of 'reasonable repair' as used in MCL 554.139(1)(b) requires repair of a defect in the premises." *Id*. at 434 (quotation marks and citation omitted). In turn, *Allison* held that "repairing a defect equates to keeping the premises in a good condition *as a result of restoring and mending damage to the property*." *Id*. (emphasis added). After concluding that there was a question of material fact regarding whether the stairs were fit for their intended use—a conclusion that is flawed for the reasons explained above—the Court of Appeals summarily concluded, "Similarly, a question of material fact exists regarding whether defendants failed to keep the premises in reasonable repair after Mar[t]in provided notice of the steps' slippery

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[1] Martin did obtain an expert, but the expert merely opined that there were ways to make the stairs less slippery. There is no evidence that the alleged level of slipperiness precluded reasonable access to different levels of the townhouse.

condition." *Martin v Milham Meadows I Ltd Partnership*, unpublished per curiam opinion of the Court of Appeals, issued July 19, 2016 (Docket No. 328240), p 10. The conclusory treatment of this issue by the Court of Appeals expands *Allison*'s definition of "reasonable repair" and gives little meaning to the qualifier "reasonable."

Here, Martin's complaint merely alleged slipperiness of the stairs due to the paint used; it did not contain allegations of damage to the stairs. Inspections by defendants indicated that the stairs were in good condition, and Martin acknowledged this fact when signing his lease. Although Martin's expert opined that the paint on the stairs was more slippery than a paint containing a nonslip additive, this opinion does not indicate that there was a defect that required *restoring or mending damage* to the premises; rather, it merely demonstrates that there was a conceivable way that the stairs could have been improved. Because the paint used on the stairs did not constitute damage to the premises requiring mending or restoring, it cannot be said that defendants failed to "keep the premises in reasonable repair" on the basis of the alleged slipperiness of the paint. Accordingly, defendants were entitled to summary disposition regarding Martin's claim under MCL 554.139(1)(b).

In sum, I would fully sustain *Allison*, reverse the judgment of the Court of Appeals, and reinstate the trial court's grant of summary disposition in favor of defendants.

HARMONY MONTESSORI CENTER v CITY OF OAK PARK, No. 154819; Court of Appeals No. 326870.

MARKMAN, C.J. (*concurring*). I concur in this Court's order denying leave to appeal because petitioner has failed adequately to brief the specific issue raised by this Court in its order for supplemental briefing, which was "whether *Ladies Literary Club v Grand Rapids*, 409 Mich 748 (1980), and *David Walcott Kendall Memorial School v Grand Rapids*, 11 Mich App 231 (1968), continue to provide the appropriate test of what constitutes a 'nonprofit . . . educational . . . institution[]' under MCL 211.7n." *Harmony Montessori Center v Oak Park*, 500 Mich 1016 (2017) (alterations in original). I write separately because I believe that this Court's current interpretation of what constitutes an "educational institution" under MCL 211.7n is a "strained construction that is contrary to the Legislature's intent." *SBC Health Midwest, Inc v Kentwood*, 500 Mich 65, 71 (2017) (quotation marks and citation omitted). In a future case, this Court should consider adopting a definition of "educational institution" that is more consistent with the plain meaning of that phrase.

The General Property Tax Act (GPTA), MCL 211.1 *et seq.*, provides that "all property, real and personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation." MCL 211.1. Section 7 of the GPTA provides property tax exemptions for properties put to particular uses. As relevant here, MCL 211.7n provides:

> Real estate or personal property owned and occupied by *nonprofit* theater, library, *educational*, or scientific *institutions* incorporated under the laws of this state with the buildings and

> other property thereon while occupied by them solely for the purposes for which the institutions were incorporated is exempt from taxation under this act. In addition, real estate or personal property owned and occupied by a nonprofit organization organized under the laws of this state devoted exclusively to fostering the development of literature, music, painting, or sculpture which substantially enhances the cultural environment of a community as a whole, is available to the general public on a regular basis, and is occupied by it solely for the purposes for which the organization was incorporated is exempt from taxation under this act. [Emphasis added.]

Thus, "nonprofit educational institutions" are exempt from property taxes under the GPTA if they are "incorporated under the laws of this state with the buildings and other property thereon while occupied by them solely for the purposes for which the institutions were incorporated." *Id*.

In *Detroit v Detroit Commercial College*, 322 Mich 142, 153 (1948), this Court held that an institution is only entitled to a tax exemption as an "educational institution" if it "fit[s] into the general scheme of education provided by the State and supported by public taxation." This Court went on to hold that, because the institution seeking an exemption in that case was "a specialized school operated for the purpose of training its students to enter into specialized fields of employment," it was not entitled to a tax exemption as an "educational institution." *Id*. In *David Walcott Kendall Mem Sch* (*Kendall*), the Court of Appeals addressed the *Detroit Commercial College* case, opining:

> To apply the rule of [that] case to the present case, we must find that even if a school exists, and is created or is expanded to meet the needs of these students in a specialized major field of advanced study which substantially parallels the same major field of study as a State supported college or university, tax exemption cannot be granted for that school. It must be a "general educational institution"; not a "special school". [*Kendall*, 11 Mich App at 238.]

The Court of Appeals then noted the change in educational demands and the public need for such education since this Court's decision in 1948, and how specialized schools addressing a particular area of study might meet these needs. *Id*. at 238-240. In light of these developments, the Court of Appeals, in an apparent attempt to expand the scope of institutions entitled to an exemption, "formulate[d] the following test to be applied in dealing with schools of higher education" that seek an exemption as an "educational institution":

> If the particular institution in issue were not in existence, then would, and could, a substantial portion of the student body who now attend that school instead attend a State-supported college

> or university to continue their advanced education in that same major field of study? [*Id.* at 240.]

In *Ladies Literary Club*, this Court adopted the test from *Kendall*:

> In [*Detroit Commercial College*], our Court determined that an institution seeking an educational exemption must fit into the general scheme of education provided by the state and supported by public taxation. This proposition was refined in [*Kendall*], which declared that an educational exemption may be available to an institution otherwise within the exemption definition, if the institution makes a substantial contribution to the relief of the burden of government.
>
> It cannot be maintained that were it not for the Ladies Literary Club's programs, which enhance educational and cultural interests, the burden on the state would be proportionately increased. The club's programs do not sufficiently relieve the government's educational burden to warrant the claimed educational institution exemption. [*Ladies Literary Club*, 409 Mich at 755-756; see also *Mich United Conservation Clubs v Lansing Twp*, 423 Mich 661, 669-670 (1985).]

Thus, this Court has held that an entity is entitled to a tax exemption as an "educational institution" if it can show (1) that it is part of the "general scheme of education provided by the state and supported by taxation" and (2) that it "makes a substantial contribution to the relief of the burden of government." *Ladies Literary Club*, 409 Mich at 755-756.[1]

I believe that this standard is unsupported by the statutory text. Nothing in MCL 211.7n suggests that an entity only constitutes an "educational institution" if it "makes a substantial contribution to the relief of the burden of government." *Id.* This requirement effectively limits tax exemptions to those institutions that perform a quasi-governmental function by relieving the government of some public responsibility. However, the statute does not require that the institution

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[1] This Court has never clearly explained whether an entity is entitled to an exemption if it satisfies *either* of these requirements, or whether it is only entitled to an exemption if it satisfies *both* of these requirements. However, multiple Court of Appeals decisions have cited *Ladies Literary Club* for the proposition that an entity is only entitled to an exemption if it satisfies *both* of these requirements. See, e.g., *Harmony Montessori Ctr v Oak Park*, unpublished per curiam opinion of the Court of Appeals, issued February 18, 2014 (Docket No. 312856), p 2; *Telluride Ass'n Inc v City of Ann Arbor*, unpublished per curiam opinion of the Court of Appeals, issued July 16, 2013 (Docket Nos. 304735 and 305239), pp 5-6; *Mich Laborers' Training & Apprenticeship Fund v Breitung Twp*, unpublished per curiam opinion of the Court of Appeals, issued October 23, 2012 (Docket No. 303723), p 3.

have any particular effect on the government's burden. Rather, it only requires that the institution be "educational." That is, the relevant inquiry is the nature of the institution—whether the institution is "educational"—not the effect that the institution has upon the government's burden.

Respondent argues that a tax exemption is an "unequal removal of the burden generally placed on all landowners to share in the support of local government" and therefore must be strictly construed in favor of the taxing entity. *Mich Baptist Homes & Development Co v City of Ann Arbor*, 396 Mich 660, 669-670 (1976); see also *Ladies Literary Club*, 409 Mich at 753. It further contends that because an exempted institution is no longer supporting services alternatively provided by public taxation, it is reasonable to require an institution to show that its activities relieve the government's burden to provide such services. Essentially, respondent argues that the "educational institution" exemption is a sort of quid pro quo; if the institution relieves the government's burden to provide education to the public, then it receives a tax exemption. However, nothing in the language of the statute suggests such a requirement, and it is well established that the perceived purpose of a statute may not supersede the statutory text. See, e.g., *Perkovic v Zurich American Ins Co*, 500 Mich 44, 53 (2017) ("The Court of Appeals' reliance on the perceived purpose of the statute runs counter to the rule of statutory construction directing us to discern legislative intent from plain statutory language."). This principle applies with equal force when interpreting a statute that provides a tax exemption. As this Court has recently explained:

> When interpreting statutory language, our obligation is to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute. This requires us to consider the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme. . . .
>
> . . . This Court has historically required that tax exemptions be narrowly or strictly construed in favor of the government. Yet at the same time, we have held that this requirement does not permit a strained construction that is contrary to the Legislature's intent. [*SBC Health Midwest*, 500 Mich at 70-71 (quotation marks and citations omitted).]

In my judgment, engrafting a requirement that an institution relieve the government's burden in order to receive a tax exemption as an "educational institution" is a "strained construction that is contrary to the Legislature's intent." *Id.* at 71.

Moreover, even if the Legislature's ostensible "purpose" for exempting "educational institutions" from property tax assessment were relevant to the interpretation of MCL 211.7n, the quid pro quo relationship suggested by respondent is not the only possible justification for such an exemption. Rather, it is possible that the Legislature simply wanted to promote the existence of "educational institutions" by lessening the

financial burden on them. This Court has long recognized the benefits derived from providing tax exemptions to "educational institutions":

> We need not, in our history, go beyond the ordinance of 1787, which declares that—
>
> "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."
>
> Exemption from taxation is the only form of encouragement that our laws provide. . . . The advantage of multiplying the facilities of learning has been rightly regarded as worth to any decent community very much more than can be counted in money. [*Detroit Home & Day Sch v Detroit*, 76 Mich 521, 523-524 (1889).]

Similarly, the United States Supreme Court has recognized the role of tax exemptions in promoting the development of "educational institutions":

> New York, in common with the other States, has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its "moral or mental improvement," should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes. [*Walz v Tax Comm of City of New York*, 397 US 664, 672 (1970).]

This alternative understanding of the "purpose" for providing a tax exemption to "educational institutions" is supported by the fact that MCL 211.7n also provides a tax exemption to nonprofit theaters, and it is difficult to see how those institutions relieve any governmental burden. Therefore, even if the Legislature's "purpose" for providing a property tax exemption were relevant to defining an "educational institution" under MCL 211.7n, I see no reason why that "purpose" is limited to the quid pro quo relationship advocated by respondent.

I also find no statutory basis for concluding that an entity is only an educational institution if it fits within the "general scheme of education *provided by the state and supported by public taxation*." *Ladies Literary Club*, 409 Mich at 755 (emphasis added). While there is a strong and proud tradition of publicly funded education both in Michigan and in the United States as a whole, there is a similarly proud tradition of private educational institutions. Indeed, "tax exemption for private educational institutions extends to the beginning of colonial America." Colombo, *Why is Harvard Tax-Exempt? (And Other Mysteries of Tax Exemption for Private Educational Institutions)*, 35 Ariz L Rev 841, 844 (1993). There is no statutory basis for concluding that an "educational institution" must be part of the "general scheme of education *provided by the state*" rather than a part of the general scheme of education provided by the state *and* private institutions.

For these reasons, I believe that, in a more appropriate case, this Court should reconsider what constitutes an "educational institution"

under MCL 211.7n. While I do not purport to articulate a definitive standard in this statement, I share a few initial observations that I believe warrant further consideration by this Court. Taken in isolation, the definition of the word "educational" could be broadly interpreted to provide a property tax exemption for most properties, which would clearly be inconsistent with the statutory scheme.[2] However, when viewed in the context of MCL 211.7n as a whole, I believe that a more reasonable interpretation emerges. MCL 211.7n does not only provide a tax exemption for "educational institutions," but also for theaters, libraries, scientific institutions, and properties "devoted exclusively to fostering the development of literature, music, painting, or sculpture which substantially enhances the cultural environment of a community as a whole, [and] is available to the general public on a regular basis . . . ." "This Court must avoid an interpretation that would render any part of the statute nugatory." *People v Rea*, 500 Mich 422, 433 (2017). Accordingly, it appears that theaters, libraries, scientific institutions, and properties devoted to promoting cultural development will generally *not* constitute "educational institutions," even if they are "educational" in the broadest sense of the term.

In addition, the history of the American educational experience itself provides at least some guidance as to the meaning of an "educational institution." There are certain kinds of institutions that, in the American experience, have traditionally been viewed as "educational institutions." Such institutions include public schools,[3] parochial schools,[4] liberal arts colleges,[5] graduate

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[2] *Merriam-Webster's Collegiate Dictionary* defines "educate"—the verb form of "educational"—as "**1 a :** to provide schooling for <chose to [educate] their children at home> **b :** to train by formal instruction and supervised practice esp. in a skill, trade, or profession **2 a :** to develop mentally, morally, or aesthetically esp. by instruction **b :** to provide with information[.]"

[3] This category would also seem to include "public school academies," i.e., charter schools. See *Council of Orgs & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 576 (1997) ("[W]e find that public school academies are 'public schools.' ").

[4] See *Walz*, 397 US at 703 (Douglas, J., dissenting) ("Parochial schools teach religion; yet they are also educational institutions offering courses competitive with public schools. They prepare students for the professions and for activities in all walks of life. Education in the secular sense [is] combined with religious indoctrination at . . . parochial schools . . . .").

[5] See generally Bauer, *Small Liberal Arts Colleges, Fraternities, and Antitrust: Rethinking Hamilton College*, 53 Cath U L Rev 347, 354-357 (2004) (describing the origin and expansion of American liberal arts colleges).

programs,[6] and vocational schools.[7] The common thread among these institutions is that they instruct students in order to promote intellectual growth or employment-related skills. By contrast, other kinds of institutions that "educate" in the broadest sense, such as baby-sitting programs, zoos, dance academies, and athletic teams, are not, in common parlance, generally considered to be "educational institutions." Thus, it appears to me that an "educational institution" must be of a kind that, in the perspective of the overall American experience, has been traditionally viewed as an institution that instructs students to promote intellectual growth or employment related skills. But these are all tentative ruminations and speculations, and await specific development in a future case.

As the Supreme Court of New Hampshire aptly noted when defining an "educational institution" under its own tax exemption statute, "the construction of a brightline test is impossible; each case will necessarily depend on its own peculiar facts." *New Canaan Academy, Inc v Town of Canaan*, 122 NH 134, 137 (1982). Thus, it is incumbent upon this Court, as the highest court in this state, to provide an appropriate framework for determining whether an entity constitutes an "educational institution" that is entitled to a property tax exemption. In my judgment, the current framework is clearly contrary to the statutory text and imposes an unwarranted burden on an institution seeking a tax exemption to show that it performs a quasi-governmental function. I welcome the opportunity in a future case to formulate a new standard for what constitutes an "educational institution" that is more consistent with the plain meaning of that phrase and within the American educational tradition.

PEOPLE v CHATMAN, No. 155184; Court of Appeals No. 328246.

MARKMAN, C.J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal. I instead would reverse the Court of Appeals' judgment because I believe that the Court of Appeals erred by holding that the trial judge's questioning of three witnesses exhibited bias against defendant, denying defendant a fair trial.

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[6] See generally Kimball, *The Context of Graduate Degrees at Harvard Law School Under Dean Erwin N. Griswold, 1946-1967, Commentary on Gail Hupper's Educational Ambivalence: The Rise of a Foreign-Student Doctorate in Law*, 49 New Eng L Rev 449, 450-455 (2015) (describing the development of graduate programs throughout the United States from 1870 to 1970).

[7] See James, *Predatory Ed: The Conflict between Public Good and For-Profit Higher Education*, 38 JC & UL 45, 104 n 322 (2011) ("Vocational education has had a long history in the United States, starting in the form of apprenticeships in the early colonial period. Land-grant institutions continued this tradition, with an early mission of training farmers and home-economists. Today, vocational training is offered at high schools, training centers, and two and four-year colleges and universities . . . .").

"A trial judge's conduct deprives a party of a fair trial if a trial judge's conduct pierces the veil of judicial impartiality." *People v Stevens*, 498 Mich 162, 170 (2015). "A judge's conduct pierces this veil and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party." *Id*. at 171. "In evaluating the totality of the circumstances, the reviewing court should inquire into a variety of factors, including the nature of the judicial conduct, the tone and demeanor of the trial judge, the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions." *Id*. at 172. As this Court has explained:

> Identifying the nature of the conduct provides the starting point to evaluate whether the conduct overstepped the line of judicial impartiality. For instance, when evaluating a judge's questioning of witnesses, a reviewing court must first bear in mind that such interrogation is generally appropriate under MRE 614(b).[1] This Court has stated that the central object of judicial questioning should be to clarify. Therefore, it is appropriate for a judge to question witnesses to produce fuller and more exact testimony or elicit additional relevant information. [*Id*. at 173 (citations omitted).]

In this case, it is undisputed that defendant shot the victim. The only issue at trial was whether defendant shot the victim in self-defense or by accident. The victim testified that defendant was playing with his gun, and the victim asked him to put his gun away. The victim also testified that he did not have a weapon and they were 10 feet apart when defendant shot him. Defendant, on the other hand, testified that he was not playing with his gun. Instead, defendant stated that the victim had asked him for money and, when he refused, the victim, who was highly intoxicated, became angry, shoved defendant, and threw a chair at him. Defendant testified that he pulled out his gun when the victim charged him with the chair and that he accidentally pulled the trigger during a subsequent struggle for the gun.

The Court of Appeals held that the trial court's questions worked to highlight the prosecutor's theory of the case. For example, the court asked the victim whether he had a weapon, even though the victim had already testified that he was weaponless, and the court inquired of the victim how far apart he and the defendant had been when they were arguing, even though the victim had already testified that they were about 10 feet apart.[2] The trial court also asked Reverend Lumsie Fisher,

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[1] MRE 614(b) provides: "The court may interrogate witnesses, whether called by itself or by a party."

[2] As the Court of Appeals acknowledged, "The tone of the judge with this witness could not be gauged from the transcript." *Chatman*, unpub op at 7.

who was in the house during the incident, whether he saw the victim with a weapon, which, according to the Court of Appeals, only "reinforced [the victim's] status as an unarmed victim."[3] *People v Chatman*, unpublished per curiam opinion of the Court of Appeals, issued December 6, 2016 (Docket No. 328246), p 5. Finally, the trial court questioned Detective Nicole Bock, the fingerprint analyst who matched defendant's fingerprints to those on the gun. Bock testified that the matched fingerprint card indicated the name of Ryan Reynolds. The trial court asked Bock whether the fingerprints also matched defendant's (Ryan Chatman's) fingerprints or whether the name of "Ryan Reynolds" was synonymous with that of Ryan Chatman. Bock did not directly answer the court's questions but instead stated that it was not her job to make that determination. A different officer later testified that Ryan Reynolds and Ryan Chatman were indeed the same person.

I do not believe that the trial court's questions of the witnesses demonstrated any bias. The fact that some of the questions were repetitive of the prosecutor's questions hardly demonstrates a bias. There is nothing inappropriate about a judge repeating questions to ensure that he or she understands the facts of a case correctly. The issue in this case was whether the shooting was the result of self-defense or an accident, and therefore it was critical to ensure that the judge and the jury understood who exactly possessed a weapon and who did not. Furthermore, there was nothing inappropriate about asking Fisher whether the victim was armed. Even though the victim had already testified that he was not armed, it was helpful to confirm that collaborating testimony had been presented on this issue.

I also do not believe that all of the trial court's questions were pro-prosecutor in any coherent way. For example, the trial court asked the victim why the victim did not just leave when he saw that defendant was playing with a gun. He also asked the victim how the argument had escalated so quickly and whether he had said anything to defendant to provoke him. Finally, the trial court asked the victim, immediately after the victim indicated that the gun was a "nine millimeter," whether he had ever fired a handgun. In my judgment, it appears that the trial court asked this question not to suggest that the victim must not have been the aggressor, but rather to question how the victim would have known that the gun was a "nine millimeter" if he had not had any prior experiences with handguns.

I also believe that the trial court was genuinely confused about Bock's testimony[4] and was simply attempting to clarify the testimony given that Bock seemed to be testifying that a different person's fingerprints were found on the gun, even though all previous testimony had indicated that the gun was indisputably defendant's gun and that

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[3] As the Court of Appeals recognized, the judge's questioning of Fisher was "brief." *Id*.

[4] At one point, the trial judge specifically acknowledged, "I don't understand."

defendant was the only person seen with a gun.[5] See *Stevens*, 498 Mich at 175-176 ("Judicial questioning might be more necessary when a judge is confronted with a difficult witness who refuses to answer questions posed by attorneys or repeatedly responds to those questions with unclear answers . . . ."). The Court of Appeals held that "[t]he tone of this trial judge in questioning this witness appears argumentative." *Chatman*, unpub op at 9. To the extent that this is true, I believe that is so simply because the trial court was justifiably confused by Bock's testimony.

In addition, the judge's questioning of the three witnesses did not consume a significant part of the three-day trial.[6] The judge did not interrupt direct or cross-examination, but held his questions until after the parties had finished and then allowed further examination by the parties if they desired. Finally, the trial court instructed the jury that the judge's comments and questions were not evidence and that they were not meant to influence their votes or express a personal opinion. "Because it is well established that jurors are presumed to follow their instructions, a curative instruction will often ensure a fair trial despite minor or brief inappropriate conduct." *Stevens*, 498 Mich at 177 (quotation marks, citation, and brackets omitted).

The instant case is distinguishable from *Stevens*, in which we held that the trial judge's questioning of witnesses "pierce[d] the veil of judicial impartiality," depriving defendant of the right to a fair trial. *Id.* at 170. To begin with, unlike in *Stevens*, defendant did not object to any of the trial court's questions. In addition, in *Stevens*, the trial judge questioned defendant's expert's qualifications, even though the judge had already endorsed him as an expert; several times asked questions that undermined the expert's credibility; and questioned the defendant

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[5] "Indeed, the judge's questioning of prosecution witness Michigan State Police Lieutenant Bock . . . might actually have been helpful to the defendant, as the witness was unable to testify that the 'state ID number' on the fingerprint identification card matched that of the defendant in this case." *Chatman*, unpub op at 2 (GADOLA, J., dissenting in part).

[6] As the Court of Appeals dissent explained:

> A review of the record reveals that the trial court asked a total of three questions in the course of a 3-day trial concerning the ultimate issue in dispute in this case, which concerned whether a physical struggle between the defendant and the victim led to the victim's shooting. The court asked the victim: (1) "Did you ever grab anything . . . ?"; (2) "Do you remember ever grabbing a chair or anything?"; and (3) "Did you lay any hands on [defendant] at all?" These questions, while arguably unnecessary given the prosecution's direct examination of the witness, were not hostile, as they were directed to the victim, and merely produced cumulative testimony concerning the events leading up to the shooting. [*Chatman*, unpub op at 2 (GADOLA, J., dissenting in part).]

in a manner that suggested disbelief of the defendant. None of that (or anything remotely similar) occurred in this case. For these reasons, I do not believe that the judge's questioning pierced the veil of judicial impartiality warranting reversal of defendant's convictions and a new trial.

Even assuming that there was error here (and I discern none), the error was hardly plain, i.e., clear or obvious.[7] Moreover, the alleged error could not reasonably be said to have affected the outcome of the lower court proceeding. It was undisputed that defendant had a gun, that the victim did not have a gun, and that defendant shot the victim. The only issue at trial was whether defendant acted in self-defense or accidentally. Therefore, the trial court's questioning of the victim and Fisher about who possessed a gun and its questioning of the detective concerning defendant's fingerprints on the gun could not possibly have affected the outcome of the proceeding. Finally, defendant does not even *argue* that he was actually innocent and, for the reasons explained above, the error did not in any way affect the fairness, integrity or public reputation of any judicial proceedings. Therefore, in my judgment, defendant is not entitled to relief and accordingly I would reverse the Court of Appeals' judgment.

PEOPLE v RODNEY HUBBARD, No. 155856; Court of Appeals No. 337343.

MARKMAN, C.J. (*concurring*). On defendant's direct appeal, I concurred in the order denying leave to appeal but observed "that this Court, in an appropriate case, should revisit its conclusion in *People v Tobey*, 401 Mich 141, 148 (1977), that voiceprint evidence is inadmissible because it has not 'achieved general scientific acceptance as a reliable identification device . . . .' " *People v Hubbard*, 480 Mich 898 (2007) (MARKMAN, J., concurring). I noted that at that time, "[s]ince *Tobey* was decided, 11 other states have addressed the admissibility of voiceprint evidence: five states have admitted such evidence, . . . and six states have rejected such evidence . . . ." *Id*. I continue to believe that this Court at some point should revisit the admissibility of voiceprint evidence; however, in my judgment, this is not the case to do so because defendant previously submitted the same voiceprint analysis in conjunction with his unsuccessful second motion for relief from judgment. Therefore, defendant cannot receive relief on that basis in the instant motion for relief from judgment. See MCR 6.508(D)(2). Accordingly, I concur in this Court's order denying leave to appeal.

COUNCIL OF ORGANIZATIONS AND OTHERS FOR EDUCATION ABOUT PAROCHIAID v STATE OF MICHIGAN, No. 156392; Court of Appeals No. 339545.

MARKMAN, C.J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal. The decision by the Court of Claims to issue this preliminary injunction is a matter of considerable significance for the constitutional architecture of this state. As explained further below, preliminary injunctions constitute an extraordinary remedy that

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[7] This issue is unpreserved, so defendant has the burden of satisfying the plain-error requirements of *People v Carines*, 460 Mich 750 (1999).

must be granted only with extreme circumspection, and the effect of this preliminary injunction is that a single judge of the Court of Claims has summarily halted the implementation of a duly adopted legislative enactment of the two representative branches of Michigan's government. These circumstances warrant close consideration; a preliminary injunction should only be granted when the party seeking the injunction satisfies the high burden of establishing the necessary requirements to obtain this relief. In my judgment, plaintiffs did not do so here and the Court of Claims abused its discretion in holding otherwise. Accordingly, I would reverse the order of the Court of Claims issuing this preliminary injunction.

Plaintiffs filed suit in the Court of Claims challenging the constitutionality of MCL 388.1752b (§ 152b), which allocates funds to provide reimbursement for "actual costs incurred by nonpublic schools in complying with a health, safety, or welfare requirement mandated by a law or administrative rule of this state."[1] Plaintiffs argued that the disbursement of funds under § 152b would violate Const 1963, art 8, § 2, which prohibits public funds from being appropriated or paid "directly or indirectly to aid or maintain" a nonpublic school. Plaintiffs further argued that § 152b constituted an appropriation of public money for private purposes without a two-thirds vote of each house of the Legislature, in violation of Const 1963, art 4, § 30. During the suit, plaintiffs sought a preliminary injunction to prevent the disbursement of funds under § 152b, and the Court of Claims granted this request. Defendants then filed an application for leave to appeal in the Court of Appeals, which denied the application for leave to appeal.

This Court reviews a trial court's grant of a preliminary injunction for an abuse of discretion. *Detroit Fire Fighters Ass'n, IAFF Local 344 v Detroit*, 482 Mich 18, 28 (2008). Preliminary injunctive relief constitutes a form of extraordinary relief, *Mich Coalition of State Employee Unions v Civil Serv Comm*, 465 Mich 212, 219 (2001), and should be issued with caution and only when there is a compelling case for such relief, *Mich Consol Gas Co v Pub Serv Comm*, 389 Mich 624, 641 (1973) ("Before the court grants injunctive relief, even though it is on a temporary basis, a compelling case must be made for such action."). The party seeking the preliminary injunction

> bears the burden of proving that the traditional four elements favor the issuance of a preliminary injunction. The trial court must evaluate whether (1) the moving party made the required demonstration of irreparable harm, (2) the harm to the applicant absent such an injunction outweighs the harm it would cause to

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[1] MCL 388.1752b(1). The allocation is for fiscal years 2016–2017 and 2017–2018, and the total amount of reimbursement is not to exceed $2.5 million for each fiscal year. Notably, during the pendency of this litigation, § 152b was amended to narrow the scope of the reimbursement, which previously included educational matters such as the teaching of civics courses. See 2017 PA 108.

> the adverse party, (3) the moving party showed that it is likely to prevail on the merits, and (4) there will be harm to the public interest if an injunction is issued. [*Detroit Fire Fighters Ass'n*, 482 Mich at 34.]

First, plaintiffs failed to make the required demonstration of irreparable harm. Irrespective of any standing considerations, "a particularized showing of irreparable harm was, and still is, as our law is understood, *an indispensable requirement to obtain a preliminary injunction*." *Mich Coalition*, 465 Mich at 225-226 (emphasis added). That is, even if it could be said that plaintiffs possessed standing under *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372 (2010), absent any concrete and particularized injury, they still must demonstrate a particularized showing of irreparable harm in order to obtain a preliminary injunction. "The mere apprehension of future injury or damage cannot be the basis for injunctive relief," *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 9 (2008), and "it is well settled that an injunction will not lie . . . where the threatened injury is speculative or conjectural," *id*. at 9 n 15 (quotation marks and citation omitted). Absent a *particularized* showing of concrete irreparable harm, "the extraordinary nature of a preliminary injunction would be trivialized." *Id*. at 11.

Plaintiffs offer three unconvincing reasons why they purportedly made the required demonstration of irreparable harm: (1) constitutional violations equate to irreparable harm, (2) the expenditure of funds will detrimentally affect their financial interests, and (3) a preliminary injunction is necessary to preserve their cause of action.

As to the first basis, plaintiffs rely solely upon *Garner v Mich State Univ*, 185 Mich App 750, 764 (1990), to argue that a constitutional violation by definition constitutes "irreparable harm which cannot be adequately remedied by an action at law." However, plaintiffs misconstrue *Garner*, which instead stands for the proposition that "temporary *loss of a constitutional right* constitutes irreparable harm which cannot be adequately remedied by an action at law." *Id*. (emphasis added). Plaintiffs here make no argument that *they* specifically will suffer any loss of a constitutional right and, thus, their reliance on *Garner* is misplaced. The mere allegation of a constitutional violation is insufficient to demonstrate irreparable harm unless there is a showing of *concrete* irreparable injury *to the party before the court*. *Mich Coalition*, 465 Mich at 225-226. To hold otherwise would render it such that a preliminary injunction would be warranted in *every* case seeking judicial review of a legislative enactment. Plaintiffs' argument that the alleged unconstitutional disbursement of funds constitutes irreparable harm is nothing more than an assertion of generalized harm, which has traditionally been viewed as insufficient to justify the kind of premature and extraordinary judicial intervention requested in this case. See generally *Hammel v Speaker of House of Representatives*, 297 Mich App 641, 652 (2012) ("Plaintiffs' generalized argument that a constitutional violation would result in harm is insufficient because it is not particularized.").

As to plaintiffs' second basis (i.e., the expenditure of funds will detrimentally affect their financial interests), the Court of Claims specifically "decline[d] to find that [the irreparable harm consisted of] the $2.5 million that might have gone elsewhere . . . ." Indeed, plaintiffs cannot show that they, or any other person or institution, would have otherwise received the disputed funds or are otherwise entitled to these funds in the event the allocation under § 152b is struck down.[2] Thus, this argument also fails.

As to plaintiffs' third basis, they contend that a preliminary injunction is necessary to preserve their opportunity even to bring a claim to prevent the alleged unconstitutional disbursement of funds. However, on appeal, plaintiffs fail altogether to recognize the amendment of § 152b that provides that the unexpended funds from 2016–2017 are carried forward into 2017–2018, which dissipates the need for a preliminary injunction on plaintiffs' "lost claims" grounds. Moreover, even assuming an alleged unconstitutional disbursement of funds in the event of a theoretical loss of their cause of action, plaintiffs again have failed to demonstrate how *they* specifically would be harmed. I am not convinced that these circumstances constitute "irreparable harm."[3]

Plaintiffs' arguments in support of an "irreparable harm" are tantamount to asserting that an alleged constitutional violation has occurred absent any showing of a concrete or particularized injury to any of the plaintiffs who are actually in court. By issuing a preliminary injunction in these circumstances, the Court of Claims renders the extraordinary nature of a preliminary injunction trivial, *Pontiac Fire Fighters*, 482 Mich at 11; negates the role of the "irreparable harm" factor; and, in my

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[2] Plaintiffs argue that the funds appropriated under § 152b are drawn "[f]rom the general fund money appropriated under section 11," i.e., MCL 388.1611, and therefore would have been appropriated for public schools had they not been appropriated under § 152b. However, the § 11 general fund consists of funds "appropriated for the public schools of this state and *certain other state purposes relating to education* . . . ." MCL 388.1611 (emphasis added). Plaintiffs fail to explain how any of the individual plaintiffs *in this case* would have benefitted in any way from the funds remaining in the general fund. Plaintiffs cannot say what educational purposes the money would alternatively have served or what specific persons or institutions, if any, would have benefitted. That is, they have failed to make *any* showing of harm, much less a "particularized showing of irreparable harm" to the interests of any *party before the court*.

[3] This already unconvincing argument is diminished even further when taking into account that, as explained below, this is a cause of action in which plaintiffs have failed to demonstrate a likelihood of success on the merits; therefore, under this basis, their alleged "irreparable harm" is the loss of a cause of action for which they failed to show a likelihood of success on the merits.

judgment, abuses its discretion in failing to accord reasonable meaning to this Court's traditional preliminary injunction factors.

Second, not only have plaintiffs failed to make the required demonstration of irreparable harm, they have also, perhaps even more significantly, failed to demonstrate a likelihood of success on the merits. "In order to justify the extraordinary remedy of a preliminary injunction, the moving party *must* show a likelihood that it will succeed on the merits of the claim." *Northern Warehousing, Inc v Dep't of Ed*, 475 Mich 859, 859 (2006) (emphasis added). Relevant to the likelihood of success in this case, the funds at issue are allocated under § 152b, and this statute, as with any other statute, carries a *presumption of constitutionality*:

> A statute will be presumed to be constitutional by the courts unless the contrary clearly appears; and in case of doubt every possible presumption not clearly inconsistent with the language and the subject matter is to be made in favor of the constitutionality of legislation. Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity. A statute is presumed to be constitutional and it will not be declared unconstitutional unless clearly so, or so beyond a reasonable doubt. [*Cady v Detroit*, 289 Mich 499, 505 (1939) (citations omitted).]

In assessing this presumption, this Court's precedents must obviously be closely considered. In *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 406 (1971), this Court addressed Const 1963, art 8, § 2, noting that this provision prohibited the state from appropriating or paying public monies " 'directly or indirectly to aid or maintain' " a nonpublic school and that this language was added to the Michigan Constitution as a result of "Proposal C," a constitutional amendment from the early 1970s. In giving meaning to Const 1963, art 8, § 2, this Court held that "[t]he language of this amendment, read in the light of the circumstances leading up to and surrounding its adoption, and the common understanding of the words used, *prohibits the purchase*, with public funds, *of educational services* from a nonpublic school." *Id*. at 406-407 (emphasis added). This Court specifically addressed whether Proposal C prohibited the state from providing what we described as "auxiliary" services to nonpublic school students at nonpublic schools. *Id*. at 417. Focusing on the inherent characteristics of auxiliary services, which were understood to consist of general health and welfare measures by nature, this Court held that the state may provide those services without running afoul of Const 1963, art 8, § 2:

> The prohibitions of Proposal C have no impact upon auxiliary services. Since auxiliary services are general health and welfare measures, they have only an incidental relation to the instruction of private school children. They are related to educational instruction only in that by design and purpose they seek to provide

> for the physical health and safety of school children, or they treat physical and mental deficiencies of school children so that such children can learn like their normal peers. Consequently, the prohibitions of Proposal C which are keyed into prohibiting the passage of public funds into private school hands for purposes of running the private school operation are not applicable to auxiliary services which only incidentally involve the operation of educating private school children. [*Id*. at 419-420 (emphasis added).]

In rejecting the argument that Proposal C prohibited the state from providing such auxiliary services to private school students, we explained that the "literal perspective on Proposal C's mandate of no public funds for nonpublic schools would place the state in a position where it discriminates against the class of nonpublic school children in violation of the equal protection provisions of the Fourteenth Amendment of the United States Constitution." *Id*. at 430. This Court further explained, "In the case of parochial or other church-related school children . . . , [P]roposal C would violate the free exercise of religion clause of the First Amendment to the United States Constitution." *Id*. Finally, this Court noted "that health and safety measures only incidentally benefit religion and do not constitute state support of or excessive entanglement in religion"; therefore, there were no Establishment Clause concerns with providing exclusively auxiliary services to nonpublic school students. *Id*. at 435 n 22.

Here, the funds allocated under § 152b provide reimbursement only for "actual costs incurred by nonpublic schools in complying with a health, safety, or welfare requirement mandated by a law or administrative rule of this state."[4] As with the auxiliary services in *Traverse City Sch Dist*, complying with a health, safety, or welfare requirement bears only "an incidental relation to the instruction of private school children." *Id*. at 419. As a result, it is difficult to discern how these conceivably could breach Proposal C, and it is even more difficult to discern how plaintiffs have borne their burden of demonstrating a likelihood of success on this issue.[5] That is *not* to say that the statute may not ultimately be ruled unconstitutional, only that the burden upon plain-

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[4] MCL 388.1752b(1). For instance, MCL 333.9208 requires that schools not permit a child to attend unless the school receives a certificate of immunization or statement of exemption, and MCL 257.715a requires inspection of certain school buses.

[5] Plaintiffs alternatively argue that they are likely to prevail on their claim under Const 1963, art 4, § 30, which provides, "The assent of two-thirds of the members elected to and serving in each house of the legislature shall be required for the appropriation of public money or property for local or private purposes." However, the funds appropriated under § 152b "are intended for the public purpose of ensuring the health, safety, and welfare of the children in nonpublic schools and to reimburse nonpublic schools for costs described in this section." MCL 388.1752b(7).

tiffs at *this* juncture to show a likelihood of unconstitutionality has not been satisfied by either plaintiffs or the trial court.

In summarily concluding that plaintiffs demonstrated a likelihood of success on the merits, the Court of Claims failed entirely to analyze the deficiencies in plaintiffs' arguments, neglected even to mention the presumption of constitutionality afforded to § 152b, and eschewed any effort to distinguish the circumstances in this case from those in *Traverse City Sch Dist*. This overall lack of serious analysis largely turns the relevant standards and burden of proof on their head, effectively presuming a likelihood of success for *plaintiffs* while giving little regard to the presumption of constitutionality and the precedents of this Court, which necessarily come into play in the preliminary-injunction analysis. In my view, plaintiffs here have failed altogether in light of *Traverse City Sch Dist* to make a clear showing of unconstitutionality and as a result have failed to demonstrate a likelihood of success on the merits. Absent this showing, issuance of a preliminary injunction is improper. *Northern Warehousing, Inc*, 475 Mich at 859.

Third, this Court's decision in *Traverse City Sch Dist* is reinforced by a recent United States Supreme Court decision in *Trinity Lutheran Church of Columbia v Comer*, 582 US ___; 137 S Ct 2012 (2017), which addressed an analogous issue involving the denial of state grant monies to a church-affiliated preschool based on a Missouri constitutional provision similar to Proposal C. After acknowledging that providing the state grant monies to a church-affiliated preschool would not offend the Establishment Clause, *Trinity Lutheran* held that under the Free Exercise Clause a state could not deny an otherwise available public benefit on the basis of religious status. *Id*. at ___; 137 S Ct at 2019. This holding mirrors the conclusion in *Traverse City Sch Dist* that the Establishment Clause did not prohibit the state from providing general health and safety measures to nonpublic schools and that the Free Exercise Clause required the Court to reject the interpretation of Proposal C that prohibited the state from providing auxiliary services to private school students. See *Traverse City Sch Dist*, 384 Mich at 430, 434 & n 22. As reflected in both of these cases, the Establishment Clause is not the only relevant constitutional provision; rather, the Free Exercise Clause is also highly relevant. In the words of *Trinity Lutheran*, "there is 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." *Trinity Lutheran*, 582 US at ___; 137 S Ct at 2019 (citation omitted). When confronted with arguments that "auxiliary" aid was unconstitutional, both this Court and the United States Supreme Court held not only that such aid did not run afoul of the Establishment Clause but also that the Free Exercise Clause was implicated by an application that would deny aid on the

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Ensuring the health, safety, and welfare of schoolchildren constitutes a proper public purpose, and, as explained above, the appropriation of funds under § 152b may well constitute an equally constitutional means to further that public purpose.

basis of religious status.[6] Thus, *Trinity Lutheran* effectively reinforces the insights and conclusions of *Traverse City Sch Dist*.

Fourth, even if there were any doubt concerning the validity of *Traverse City Sch Dist*, which held that the state *may* provide general health and safety measures to nonpublic school students at nonpublic schools without offending Const 1963, art 8, § 2, the Court of Claims may not ignore precedents set forth by the highest court of this state. A lower court does not have the authority to strike down or disregard "precedent from this Court that has not been clearly overruled by the Court or superseded by subsequent legislation or constitutional amendment." *Associated Builders & Contractors v Lansing*, 499 Mich 177, 192 (2016). To put a finer point on it, except when a precedent of this Court has been overruled or superseded, lower courts are "not authorized to anticipatorily ignore our decisions . . . ." *Id*. at 191-192 (emphasis omitted). Simply put, the Court of Claims was bound to follow *Traverse City Sch Dist*'s interpretation of Const 1963, art 8, § 2, and, in my judgment, did not do so here.

Fifth, the above problems are compounded in considering the effect of the decision by the Court of Claims, which inappropriately exercises the judicial power at the expense of the legislative and executive powers. Given that a preliminary injunction requires a likelihood of success on the merits, issuing the instant injunction *presumes* the unconstitutionality of a law and temporarily nullifies that law—one enacted in concord by the legislative and executive branches—by postponing its implementation until after it has passed judicial muster. That is not the way our constitutional system operates. Once again, it typically is a matter of considerable constitutional consequence when a single judge delays the implementation of a legislative measure approved by 148 legislators and one governor, each acting on behalf of "we the people." That is not to say that a preliminary injunction may never delay the implementation of a law, but only that such relief may only be granted after careful consideration of the necessary requirements for a preliminary injunction, the presumption of constitutionality afforded to our statutes, and this Court's precedents. Ultimately, plaintiffs in these circumstances have a high burden to which they must be held in order to avoid trivializing the extraordinary nature of injunctive relief and our separation of powers. Const 1963, art 3, § 2. Plaintiffs here utterly failed to meet these high burdens, yet defendants have now been enjoined, at least temporarily, from having § 152b take effect. See *New Motor Vehicle Bd of California v Orrin W Fox Co*, 434 US 1345, 1351 (1977) (Rehn-

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[6] Although *Trinity Lutheran* involved express discrimination based upon religious classification, *Trinity Lutheran*, 582 US at ___; 137 S Ct at 2021, and Const 1963, art 8, § 2 involves all nonpublic schools, religious or secular, *Traverse City Sch Dist* noted that we look to the "impact" of the classification, *Traverse City Sch Dist*, 384 Mich at 433-434 (noting that "here with ninety-eight percent of the private school students being in church-related schools the 'impact' is nearly total").

quist, J.) (stating that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury").

By failing to engage in a thorough and disciplined analysis of whether a concrete and particularized "irreparable harm" would be suffered by a party before the court and failing to sufficiently analyze plaintiffs' likelihood of success in prevailing on the merits, the Court of Claims rendered trivial the extraordinary nature of a preliminary injunction. In doing so, the Court of Claims failed to give deference to the presumption of constitutionality afforded to § 152b and this Court's precedents and it improperly enhanced the role of the judiciary within our constitutional process at the expense of the roles of legislative and executive authorities. For these reasons, I would reverse the decision of the Court of Claims.

CLEMENT, J., did not participate due to her prior involvement as chief legal counsel for the Governor.

FOSTER v MICHIGAN BELL TELEPHONE COMPANY, No. 156787; Court of Appeals No. 337783.

MARKMAN, C.J., states as follows: I agree with defendant that the magistrate here erred by analyzing plaintiff's claim under the standard from *Rakestraw v Gen Dynamics Land Sys Inc*, 469 Mich 220 (2003), rather than under the "significant manner" standard from MCL 418.301(2). Because plaintiff's spondylosis constituted a "condition[] of the aging process," he was required to show not only that there was a pathological change in his condition, but also that his employment "contributed to or aggravated or accelerated" the condition in a "*significant manner*." MCL 418.301(2) (emphasis added). However, for the reasons stated in the concurring statement in the Michigan Compensation Appellate Commission, I believe that the magistrate for all effective purposes made the necessary findings to support the conclusion that plaintiff's preexisting condition of the aging process was aggravated in a "significant manner" by his workplace fall. Accordingly, I concur in this Court's order denying leave to appeal.

PEOPLE v ELLERY, No. 156979; Court of Appeals No. 340548.

Summary Disposition March 16, 2018:

PEOPLE v ROBERT JOHNSON, No. 153080; Court of Appeals No. 329742. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We note that the Court of Appeals currently has before it the case of *People v Davis*, Docket No. 335569, a case we remanded for consideration as on leave granted on March 7, 2018. The *Davis* case involves an issue similar to one presented in this case, and the court's disposition in *Davis* may be instructive in resolving that issue.

PEOPLE v MABEN, No. 156512; Court of Appeals No. 338851. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the St. Clair Circuit Court, and we remand this case to that

court for resentencing. In light of the prosecutor's factual concessions on remand and the redaction of all references to threats or witness intimidation in the presentence report, there is no record evidence to support a finding that the defendant attempted to interfere with the administration of justice so as to warrant the assignment of 10 points for Offense Variable 19 (OV 19), MCL 777.49. Because the deduction of the 10 points erroneously scored under OV 19 changes the applicable sentencing guidelines range, the defendant is entitled to resentencing. See *People v Kimble*, 470 Mich 305 (2004). In all other respects, leave to appeal is denied.

Summary Disposition March 21, 2018:

MADSON V JASO, No. 154529; reported below: 317 Mich App 52. By order of February 3, 2017, the application for leave to appeal the August 25, 2016 judgment of the Court of Appeals was held in abeyance pending the decisions in *Ozimek v Rodgers* (Docket No. 154776) and *Marik v Marik* (Docket No. 154549). On order of the Court, the orders having entered on November 16, 2017, 501 Mich 918-919, 919 (2017), the application is again considered. MCR 7.305(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: (1) for a determination of whether the question presented is now moot, and (2) if not moot, for reconsideration—in light of this Court's order in *Marik v Marik*, 501 Mich 918-919 (2017) (overruling *Ozimek v Rodgers (On Remand)*, 317 Mich App 69 (2016))—of the question whether the February 2, 2016 order of the Lenawee Circuit Court that directed that the plaintiff would have parenting time every other weekend "affect[ed] the custody of a minor" within the meaning of MCR 7.202(6)(a)(iii). We further note that this Court has opened an administrative file, ADM File No. 2017-20, to consider amending MCR 7.202(6)(a)(iii). We do not retain jurisdiction.

PEOPLE V RONALD FOSTER, No. 156088; Court of Appeals No. 336811. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for the appointment of new appellate counsel to represent the defendant as on direct appellate review. See *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005). The record reflects that defendant's appellate counsel did not file an application for leave to appeal, seek any other relief on the defendant's behalf, or move to withdraw based on the attorney's determination, after a thorough review of the trial record, that the appeal was wholly frivolous. Thus, through no fault of the defendant, he lost the right to seek leave to appeal to the Court of Appeals on direct review. On remand, new appellate counsel, once appointed, may file an application for leave to appeal in the Court of Appeals for consideration under the standard for direct appeals, and/or any appropriate postconviction motions in the circuit court, within six months of the date of the circuit court's order appointing counsel.

Costs are imposed against the attorney, Tracie Gittleman, in the amount of $500, to be paid to the Clerk of this Court. We do not retain jurisdiction.

ROYCE v LAPORTE, No. 156131; Court of Appeals No. 337549. By order of October 3, 2017, the application for leave to appeal the April 11, 2017 order of the Court of Appeals was held in abeyance pending the decisions in *Ozimek v Rodgers* (Docket No. 154776) and *Marik v Marik* (Docket No. 154549). On order of the Court, the orders having entered on November 16, 2017, 501 Mich 918-919, 919 (2017), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals and we remand this case to the Court of Appeals for further consideration in light of this Court's November 16, 2017 order in *Marik v Marik*, 501 Mich 918-919 (2017). On remand, we direct the Court of Appeals to issue an opinion specifically addressing the issue whether the order in question may affect the custody of a minor within the meaning of MCR 7.202(6)(a)(iii), or otherwise be appealable by right under MCR 7.203(A). If the Court of Appeals determines that the Oakland Circuit Court Family Division's order is appealable by right, it shall take jurisdiction over the defendant-appellant's claim of appeal and address its merits. If the Court of Appeals determines that the Oakland Circuit Court Family Division's order is not appealable by right, it may then dismiss the defendant-appellant's claim of appeal for lack of jurisdiction, or exercise its discretion to treat the claim of appeal as an application for leave to appeal and grant the application. See *Varran v Granneman (On Remand)*, 312 Mich App 591 (2015), and *Wardell v Hincka*, 297 Mich App 127, 133 n 1 (2012). We direct the Court of Appeals' attention to the fact that we have also remanded the related case of *Royce v Laporte* (Docket No. 156766) to the Court of Appeals and that *Marik v Marik* (Docket No. 155833), and *Madson v Jaso (After Remand)* (Docket No. 154529), have also been remanded to the Court of Appeals for reconsideration. We further note that this Court has opened an administrative file, ADM File No. 2017-20, to consider amending MCR 7.202(6)(a)(iii). The motion to consolidate is denied. We do not retain jurisdiction.

PEOPLE v DALTON, No. 156750; Court of Appeals No. 338792. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

ROYCE v LAPORTE, No. 156766; Court of Appeals No. 340354. In lieu of granting leave to appeal, we vacate the order of the Court of Appeals and we remand this case to that court for further consideration in light of this Court's November 16, 2017 order in *Marik v Marik*, 501 Mich 918-919 (2017). On remand, we direct the Court of Appeals to issue an opinion specifically addressing the issue whether the order in question may affect the custody of a minor within the meaning of MCR 7.202(6)(a)(iii), or otherwise be appealable by right under MCR 7.203(A). If the Court of Appeals determines that the Oakland Circuit Court Family Division's order is appealable by right, it shall take jurisdiction over the defendant-appellant's claim of appeal and address its merits. If the Court of Appeals determines that the Oakland Circuit Court Family

Division's order is not appealable by right, it may then dismiss the defendant-appellant's claim of appeal for lack of jurisdiction, or exercise its discretion to treat the claim of appeal as an application for leave to appeal and grant the application. See *Varran v Granneman (On Remand)*, 312 Mich App 591 (2015), and *Wardell v Hincka*, 297 Mich App 127, 133 n 1 (2012). We direct the Court of Appeals' attention to the fact that we have also remanded the related case of *Royce v Laporte* (Docket No. 156131) to the Court of Appeals and that *Marik v Marik* (Docket No. 155833), and *Madson v Jaso (After Remand)* (Docket No. 154529), have also been remanded to the Court of Appeals for reconsideration. We further note that this Court has opened an administrative file, ADM File No. 2017-20, to consider amending MCR 7.202(6)(a)(iii). We do not retain jurisdiction.

Leave to Appeal Granted March 21, 2018:

PEOPLE v BRUCE and PEOPLE v STANLEY NICHOLSON, Nos. 156827 and 156828; Court of Appeals Nos. 331232 and 331233. On order of the Court, the application for leave to appeal the October 5, 2017 judgment of the Court of Appeals is considered, and it is granted, limited to the issue whether the defendant federal border patrol agents were "public officers" for purposes of the common-law crime of misconduct in office when they assisted—as members of a law enforcement task force that included Michigan State Police and Michigan motor carrier officers—in the execution of a search warrant. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

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.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered March 21, 2018:

PEOPLE v AMES, No. 156077; Court of Appeals No. 337848. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether MCL 769.34(10) has been rendered invalid by this Court's decision in *People v Lockridge*, 498 Mich 358 (2015), to the extent that the statute requires the Court of Appeals to affirm sentences that fall within the applicable guidelines range "absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." See *People v Schrauben*, 314 Mich App 181, 196 (2016). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix,

or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied March 21, 2018:

PEOPLE v MARCUS COOPER, No. 155555; Court of Appeals No. 335125.

SAGINAW EDUCATION ASSOCIATION v EADY-MISKIEWICZ, ET AL, Nos. 155906, 155907, 155908, 155909, 155910, 155911, 155912, 155913, 155914, 155915, and 155916; reported below: 319 Mich App 422.

PEOPLE v WALTER COX, No. 156032; Court of Appeals No. 331151.

MCMULLEN v CITIZENS INSURANCE COMPANY, No. 156167; Court of Appeals No. 332373.

KERN v KERN-KOSKELA, No. 156225; reported below: 320 Mich App 212.

BAHODA v KAPLAN, No. 156370; Court of Appeals No. 332313.

MIHAJLOVSKI v BIRACH BROADCASTING CORPORATION, No. 156426; Court of Appeals No. 331284.

PEOPLE v MARBURY, No. 156429; Court of Appeals No. 331831.

TEAMSTERS LOCAL 214 v BEUTLER, No. 156514; Court of Appeals No. 330854.

PEOPLE v GLORIANNA WOODARD, No. 156749; reported below: 321 Mich App 377.

Reconsideration Denied March 21, 2018:

JENDRUSINA v MISHRA, No. 154717; reported below: 316 Mich App 621. Leave to appeal denied at 501 Mich 958.

Leave to Appeal Denied March 23, 2018:

PEOPLE v CHRISTOPHER NICHOLSON, No. 156421; Court of Appeals No. 333546.

MCCORMACK, J. (*concurring*). I concur in this Court's order denying leave to appeal, but write separately because I believe the Court of Appeals erred by applying the "common scheme or plan" exception to MRE 404(b) when the evidence of the defendant's prior armed-robbery conviction was only logically relevant to prove identity under a modus operandi theory. I nevertheless concur in the order denying leave because the defendant has not shown that the error undermined the reliability of the verdict.

Evidence of other acts may be admissible under MRE 404(b) if the proponent can show logical relevance and a proper, nonpropensity

purpose such as "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). A court considering 404(b) evidence must not simply accept at face value the stated purpose of other-acts evidence. Instead, the court must "closely scrutinize" whether the proponent's theory of relevance is consistent with its stated purpose. *People v Denson*, 500 Mich 385, 400 (2017). Scrutiny is especially important when the prosecution asks the jury to consider the defendant's prior crimes as evidence that the defendant committed *this* crime. This Court has imposed a higher standard of logical relevance for other-acts evidence used to prove identity under a modus operandi theory than for other theories. *People v Golochowicz*, 413 Mich 298, 325-326 (1982). To admit evidence of other acts to prove identity, (1) there must be "substantial proof that the defendant committed one of the similar acts" and (2) the acts must have a "special quality or circumstance" that identifies the defendant as the perpetrator. *People v VanderVliet*, 444 Mich 52, 66 n 16 (1993), amended 445 Mich 1205 (1994). To establish a common design or plan, however, it is not necessary to show either "distinctive and unusual features" or a "high degree of similarity" between the charged act and the other acts. *People v Hine*, 467 Mich 242, 252-253 (2002).

The trouble, of course, is that a common design or common plan is the core element of a modus operandi theory. See 1 McCormick, Evidence (7th ed), § 190, p 1036 (modus operandi requires common characteristics of perpetrator's crimes be "so unusual and distinctive as to be like a signature"). For cases in which only identity is at issue, the proponent cannot just pluck out the core element of modus operandi and dub it a "common plan or scheme" to admit the same evidence under the lower standard. To do so would render the stricter standard all but illusory.

In this case, the prosecution proffered evidence—ostensibly for the purpose of showing a common scheme or plan under MRE 404(b)—that the defendant had been convicted of armed robbery a decade before. The Court of Appeals found that a common scheme or plan existed based on certain similarities between the two robberies: both happened at gas stations in the city of Ann Arbor, both occurred late at night, and both were committed by two people wearing bandannas and holding pellet guns. The panel concluded that the trial court had not abused its discretion by admitting the evidence because it was "highly probative to demonstrate that defendant had a characteristic pattern that he employed in robbing stores." *People v Nicholson*, unpublished per curiam opinion of the Court of Appeals, issued August 10, 2017 (Docket No. 333546), p 5.

This was error. The only element in dispute was the identity of the robbers, so the logical relevance of the defendant's *previous* armed-robbery conviction was only to show it was more likely than not that he committed *this* robbery. The trial court should have considered whether there was such a " 'striking similarity' " between the two robberies as to constitute a signature. *Denson*, 500 Mich at 403, quoting *VanderVliet*, 444 Mich at 67. Instead, the prosecutor was allowed to do an end run around that difficult standard by labeling the evidence a common

scheme or plan. Therefore, I would hold that the trial court's failure to scrutinize the logical relevance of the evidence and evaluate it under the standard for identity was an abuse of discretion. I concur in the Court's denial of leave, however, because the defendant cannot show that the error of admitting the evidence was more probably than not outcome-determinative. *Denson*, 500 Mich at 409.

BERNSTEIN, J., joins the statement of MCCORMACK, J.

Leave to Appeal Denied March 27, 2018:

In re PETITION OF WAYNE COUNTY TREASURER FOR FORECLOSURE, No. 155889; Court of Appeals No. 337847.

In re ANGEL BARTLETT, No. 157184; Court of Appeals No. 341488.

Summary Disposition March 28, 2018:

PEOPLE V CHARLES TAYLOR, No. 155518; Court of Appeals No. 336572. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the Court of Appeals March 7, 2017 order of dismissal and we remand this case to that court for reconsideration of the defendant's delayed application for leave to appeal. On remand, while retaining jurisdiction, the Court of Appeals shall remand this case to the Wayne Circuit Court for further proceedings. We note that the circuit court record is incomplete and in disarray. First, the file contains the defendant's timely submitted motion for rehearing of the circuit court's February 9, 2016 order denying the defendant's first motion for judgment relief under MCR subchapter 6.500, but there is no order resolving the motion for rehearing. Second, the file contains the defendant's timely submitted motion for reconsideration of the court's April 26, 2016 order denying the defendant's successive motion for relief from judgment, but there is no order resolving the motion for reconsideration. It appears that as a result of these errors by the circuit court, the Court of Appeals erred in dismissing as untimely filed the defendant's delayed application for leave to appeal from the Wayne Circuit Court's February 9 and April 26, 2016 orders. See MCR 7.205(G)(3)(b). On remand, the Wayne Circuit Court shall resolve the defendant's motions, and forward copies of those orders to the parties and the Court of Appeals, which shall then reconsider the defendant's delayed application for leave to appeal. We do not retain jurisdiction.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered March 28, 2018:

PEOPLE V MEAD, No. 156376; reported below: 320 Mich App 613. We further order the Jackson Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint attorney Michael A. Faraone, 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.

The appellant shall file a supplemental brief within 42 days of the date of the order appointing counsel addressing: (1) whether *Illinois v Rodriguez*, 497 US 177, 181, 183-189; 110 S Ct 2793; 111 L Ed 2d 148 (1990), should control the resolution of the question whether the police officer had lawful consent to search the backpack found in the vehicle; (2) whether the record demonstrates that the officer reasonably believed that the driver had common authority over the backpack in order for the driver's consent to justify the search; and (3) whether there are any other grounds upon which the search may be justified or the evidence may be deemed admissible. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

THIEL v GOYINGS, No. 156708; Court of Appeals No. 333000. The appellants shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the defendants' home is a "modular home" as defined by Timber Ridge Bay's "Declaration of Restrictions, Covenants and Conditions"; and (2) if so, whether the violation was a technical violation that did not cause substantial injury, *Cooper v Kovan*, 349 Mich 520, 530 (1957). In addition to the brief, the appellants shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellants' brief. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellants. A reply, if any, must be filed by the appellants within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

The Modular Home Builders Association is invited to file a brief 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 March 28, 2018:

HOME-OWNERS INSURANCE COMPANY v ANDRIACCHI, Nos. 156151, 156152, 156153, and 156154; reported below: 320 Mich App 52.

BERNSTEIN, J., would grant leave to appeal.

PEOPLE v MCGEE, No. 156289; Court of Appeals No. 338610.

RUBBA v AGNONE, No. 156317; Court of Appeals No. 330330.

BERNSTEIN, J., would grant leave to appeal.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

RUBBA v AGNONE, No. 156319; Court of Appeals No. 330416.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v LANGE, No. 156343; Court of Appeals No. 336592.

PEOPLE v EUGENE BROWN, No. 156453; Court of Appeals No. 338944.

PEOPLE v FAQUA, No. 156522; Court of Appeals No. 331478.

PEOPLE v DICKINSON, No. 156602; reported below: 321 Mich App 1.

PEOPLE v MYERS, No. 156882; Court of Appeals No. 339885.

Summary Disposition March 30, 2018:

PEOPLE v HEWITT-EL, No. 155239; Court of Appeals No. 332946. Pursuant to MCR 7.305(H)(1), and in light of the prosecutor's concession that defendant's argument that trial counsel was ineffective for failing to seek suppression of his prior convictions under MRE 609 was not decided against him on direct appeal, we vacate the Court of Appeals opinion and remand this case to that court for reconsideration. On remand, the Court of Appeals shall consider all of the defendant's claims of error in light of the prosecutor's concession and determine whether he is entitled to relief under MCR 6.508(D) under the proper standard, namely reviewing the Wayne Circuit Court's decision to grant the motion for relief from judgment for an abuse of discretion and reviewing its factual findings for clear error. See *People v Swain*, 288 Mich App 609, 628 (2010); *People v McSwain*, 259 Mich App 654, 681 (2003).

The Court of Appeals shall forward its decision on remand to the Clerk of this Court within 60 days of the date of this order. We retain jurisdiction.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered March 30, 2018:

PEOPLE v BRIAN ROBERTS, No. 156223; Court of Appeals No. 327296. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the Court of Appeals correctly held that the defendant was denied the effective assistance of trial counsel. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also

electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Order Granting Leave to Appeal Vacated and Leave to Appeal Denied March 30, 2018:

COLOMA CHARTER TOWNSHIP v BERRIEN COUNTY and HERMAN v BERRIEN COUNTY, Nos. 154556 and 154557; reported below: 317 Mich App 127. Leave to appeal granted at 501 Mich 868. 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 September 22, 2017. The application for leave to appeal the September 6, 2016 judgment of the Court of Appeals is denied.

Leave to Appeal Denied March 30, 2018:

PEOPLE v COHOON, No. 155984; Court of Appeals No. 336032.

ANDRUSZ v ANDRUSZ, No. 156364; reported below: 320 Mich App 445.

ZAHRA, J. (*dissenting*). I respectfully dissent from this Court's order denying plaintiff's application for leave to appeal. I write separately because I question the Court of Appeals' conclusion that the consent judgment of divorce is ambiguous.

A consent judgment of divorce is to be construed using the same contractual construction principles that apply to any other species of contract. See generally *Sweebe v Sweebe*, 474 Mich 151 (2006); see also *Laffin v Laffin*, 280 Mich App 513, 517 (2008); *In re Lobaina Estate*, 267 Mich App 415, 417-418 (2005). Accordingly, the parties' consent judgment is ambiguous if two provisions irreconcilably conflict with each other, *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467 (2003), or if a term is equally susceptible to more than a single meaning, *Barton-Spencer v Farm Bureau Life Ins Co of Mich*, 500 Mich 32, 40 (2017); *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503 (2007).

The relevant portion of the parties' consent judgment in this case provides:

> Defendant is awarded modifiable spousal support that shall terminate upon the death or remarriage of the Defendant. Commencing January 1, 2009, Plaintiff shall pay $6,000 per month from Plaintiff's salary directly to Defendant on the first of each month based on Plaintiff's base income of $204,000 annually and Defendant having no income. Additionally, in the event Plaintiff's salary from employment is greater than $204,000 in a given year (January 1 through December 31), he shall pay 25% of said amount from employment-related bonus or commission via elec-

tronic fund transfer to Defendant as additional spousal support within 7 (seven) days of receiving same.

The Court of Appeals concluded that, considering the four corners of the document, this consent judgment was ambiguous because "salary" in the third sentence could be reasonably understood as meaning plaintiff's "base salary" or "income." To support this conclusion, the Court of Appeals noted that the second sentence of the relevant paragraph appeared to treat "salary" and "base income" as being synonymous with one another and that "salary from employment" and "employment-related bonus or commission" in the third sentence appeared to be related. Oddly enough, in concluding that the consent judgment was ambiguous, the Court of Appeals never held that provisions of the consent judgment irreconcilably conflict with each other. Nor did it expressly hold that any term was *equally susceptible* to more than a single meaning.

Moreover, a court cannot create an ambiguity where none exists in order to reach a desired result, see *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 82 (2007), nor can a court refuse to enforce an unambiguous contractual provision on the basis of a judicial assessment of "reasonableness," *Rory v Continental Ins Co*, 473 Mich 457, 469 (2005). When the terms in the consent judgment are afforded their plain and ordinary meaning, the parties' consent judgment is unambiguous and must be enforced as written. See *Rory*, 473 Mich at 464, 468.

To begin, the second sentence of the relevant paragraph of the consent judgment requires plaintiff to pay $6,000 per month from his "*salary* . . . based on Plaintiff's *base income* of $204,000 annually . . . ." (Emphasis added.) Given this language and sentence structure, I agree with the Court of Appeals that the consent judgment appears to treat the word "salary" and the phrase "base income" as being synonymous with one another, which, at first blush, might suggest some ambiguity. The plain meaning of "salary" is a "fixed compensation paid regularly for services," while "income" means either "a gain or recurrent benefit usu[ally] measured in money that derives from capital or labor" or "the amount of such gain received in a period of time[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed). Thus, income is more encompassing than salary in terms of financial gain. However, the consent judgment's use of the qualifier "base," which has definitions including "a first or bottom layer of something on which other elements are added" and "the starting point," *Merriam-Webster Dictionary* (accessed March 21, 2018) [https://perma.cc/GJZ6-F9A6], connotes that the minimum amount or starting point of plaintiff's total "income" was his annual "salary" of $204,000. Thus far, there is no ambiguity based on the plain and ordinary meaning of the word "salary" or the phrase "base income."

Next, the third sentence provides that, if "Plaintiff's *salary from employment* is greater than $204,000 in a given year (January 1 through December 31), he shall pay 25% of said amount from *employment-related bonus or commission* . . . ." (Emphasis added.) Affording the

words "bonus"[1] and "commission"[2] their plain and ordinary meaning, this sentence simply provides that plaintiff must pay 25 percent of a bonus or commission related to his employment if his salary is greater than $204,000. Again, there is no ambiguity.

Because a strong argument may be made that the parties' consent judgment is unambiguous, I would grant leave to appeal in this matter.

MARKMAN, C.J., joins the statement of ZAHRA, J.

In re FAISON and *In re* BRAGG, Nos. 157169 and 157170; Court of Appeals Nos. 338808 and 338811.

Summary Disposition April 3, 2018:

MEGERIAN v UNITED SERVICES AUTOMOBILE ASSOCIATION, No. 156484; Court of Appeals No. 336483. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v DYLAN MISIEWICZ, No. 156801; Court of Appeals No. 339326. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

In re PAROLE OF LAYMAN, No. 157104; Court of Appeals No. 341112. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied April 3, 2018:

ALLEN v KINROSS CORRECTIONAL FACILITY WARDEN, No. 153300; Court of Appeals No. 330153.

PEOPLE v TROOST, No. 153520; Court of Appeals No. 330106.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v JOMIAH WASHINGTON, No. 155007; Court of Appeals No. 334514.

WILDER, J., did not participate because he was on the Court of Appeals panel.

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[1] *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "bonus" as "something in addition to what is expected or strictly due," such as "money or an equivalent given in addition to an employee's usual compensation[.]"

[2] *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "commission" as "a fee paid to an agent or employee for transacting a piece of business or performing a service; *esp*[*ecially*] : a percentage of the money received from a total paid to the agent responsible for the business[.]"

PEOPLE v GARNES, No. 155431; Court of Appeals No. 334992.

PEOPLE v MARK CARTER, No. 155440; Court of Appeals No. 335712. By order of February 20, 2018, the prosecuting attorney was directed to answer the application for leave to appeal the January 4, 2017 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered, and it is denied as moot. Because the defendant did not file a motion for relief from judgment, the Wayne Circuit Court order that the defendant seeks leave to appeal has now been set aside in the June 29, 2017 order of that court, and the defendant has already received the hearing on remand that this Court ordered on March 8, 2016. The motion to amend the application for leave to appeal is denied, without prejudice to the defendant pursuing appellate relief from the Wayne Circuit Court order of December 21, 2016.

WILLIAMS v JERVISS-FETHKE INSURANCE AGENCY, No. 155783; Court of Appeals No. 330378.

PEOPLE v DENNIS BROWN, No. 155809; Court of Appeals No. 336865.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v STEVEN ANDERSON, No. 155810; Court of Appeals No. 335589.

PEOPLE v RENYATTA HAMILTON, No. 155821; Court of Appeals No. 335761.

PEOPLE v TINSLEY, No. 155837; Court of Appeals No. 335752.

PEOPLE v ARNETT, No. 155841; Court of Appeals No. 336177.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v RICHARD MILLER, No. 155857; Court of Appeals No. 336100.

PEOPLE v TERRENCE TAYLOR, No. 155859; Court of Appeals No. 336322.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v CRUMMIE, No. 155890; Court of Appeals No. 335982.

PEOPLE v MUHAMMAD, No. 155901; Court of Appeals No. 336628.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v KNAPP, No. 155947; Court of Appeals No. 336670.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v DONALD FLOWERS, No. 155976; Court of Appeals No. 337810.

PEOPLE v THOMAS SMITH, No. 156005; Court of Appeals No. 337776.

PEOPLE v ARENZA HUBBARD, No. 156006; Court of Appeals No. 336624.

PEOPLE v WILLIE JOHNSON, No. 156015; Court of Appeals No. 336531.

PEOPLE v STEVEN WEBSTER, No. 156025; Court of Appeals No. 336484.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v REED-BEY, No. 156037; Court of Appeals No. 337991.

PEOPLE v STEIN, No. 156039; Court of Appeals No. 337326.

PEOPLE v EBY, No. 156042; Court of Appeals No. 335298.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v LIPSEY, No. 156056; Court of Appeals No. 329875.

PEOPLE v DONALD BUSH, No. 156064; Court of Appeals No. 331716.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v ORR, No. 156121; Court of Appeals No. 331523.

PEOPLE v KEWAUNTE JONES, No. 156129; Court of Appeals No. 338215.

PEOPLE v ANTONIO JACKSON, No. 156130; Court of Appeals No. 337888.

PEOPLE v DERIC MARTIN, No. 156144; Court of Appeals No. 332334.

PEOPLE v MAURICE JONES, No. 156158; Court of Appeals No. 338072.

PEOPLE v DAVID WILSON, No. 156172; Court of Appeals No. 330333.

ESCH v YACOB, No. 156181; Court of Appeals No. 332933.

PEOPLE v DAMON PORTER, No. 156222; Court of Appeals No. 335346.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v TREVINO, No. 156228; Court of Appeals No. 338062.

NOLEN v LAURA, No. 156235; Court of Appeals No. 330621.

PEOPLE v GRENAWALT, No. 156238; Court of Appeals No. 336926.

PEOPLE v RAY COLE, No. 156242; Court of Appeals No. 332258.

PEOPLE v MICHAEL ANDERSON, No. 156287; Court of Appeals No. 330652.

PENNY v SCHULTZ, No. 156344; Court of Appeals No. 331641.

BASSETT v STATE COURT ADMINISTRATOR, Nos. 156347 and 156348; Court of Appeals Nos. 329688 and 329999.

DAVIS v FLINT HOUSING COMMISSION, No. 156391; Court of Appeals No. 330975.

MASSEY v MARLAINA, LLC, No. 156399; Court of Appeals No. 332562.

CINCINNATI INSURANCE COMPANY v KAEDING, No. 156410; Court of Appeals No. 332559.

PEOPLE v WALLER, No. 156420; Court of Appeals No. 333056.

PEOPLE v HOWELL, No. 156427; Court of Appeals No. 323671.

PEOPLE v KENNETH RICHARDSON, No. 156433; Court of Appeals No. 330504.

PEOPLE v SWEENEY, No. 156448; Court of Appeals No. 330662.

PEOPLE v BONDS, No. 156454; Court of Appeals No. 331776.

PEOPLE v MACKENZIE, No. 156461; Court of Appeals No. 324893.

FILAS v SALISBURY, No. 156462; Court of Appeals No. 331458.

PEOPLE v ANTONIO JACKSON, No. 156464; Court of Appeals No. 338713.

PEOPLE v WORLEY, No. 156468; Court of Appeals No. 331343.

PEOPLE v JENKINS, No. 156481; Court of Appeals No. 338886.

PEOPLE v WILLIE CURTIS, No. 156491; Court of Appeals No. 337529.

NAGLE v DEPARTMENT OF TREASURY, No. 156493; Court of Appeals No. 333850.

BEEMER v TAVARONE, No. 156496; Court of Appeals No. 338148.

MILLS v CITY XPRESS, LLC, No. 156497; Court of Appeals No. 331460.

KISH v CITY OF OAK PARK, No. 156499; Court of Appeals No. 336880.

MCCRUMB v MCALOON-LAMPMAN, No. 156507; Court of Appeals No. 333357.

PEOPLE v DARNEL WALKER, No. 156511; Court of Appeals No. 338993.

REDFORD TOWNSHIP v BOROWIAK, No. 156515; Court of Appeals No. 339611.

PEOPLE v PURNELL, No. 156518; Court of Appeals No. 333288.

PEOPLE v CURRINGTON, No. 156523; Court of Appeals No. 331954.

PEOPLE v CHRISTOPHER RODRIGUEZ, No. 156530; Court of Appeals No. 338971.

PEOPLE v ZAMUDIO, No. 156535; Court of Appeals No. 333290.

PEOPLE v AARON DAVIS, No. 156539; Court of Appeals No. 333147.

BASSETT v WAYNE COUNTY, Nos. 156545 and 156546; Court of Appeals Nos. 337065 and 338761.

PEOPLE v KREAGER, No. 156554; Court of Appeals No. 332120.

PEOPLE v THOMAS-DAWSON, No. 156559; Court of Appeals No. 332339.

PEOPLE v TIMOTHY MISIEWICZ, No. 156570; Court of Appeals No. 338928.

ALTMAN v WARD-ROOF, No. 156577; Court of Appeals No. 337786.

PEOPLE v HOUGHTALING, No. 156581; Court of Appeals No. 330547.

PEOPLE v HUEY, No. 156585; Court of Appeals No. 332955.

PEOPLE v MESSER, No. 156592; Court of Appeals No. 332080.

PEOPLE v JERRY WORTHY, No. 156594; Court of Appeals No. 339051.

PEOPLE v MENDEZ, No. 156596; Court of Appeals No. 339489.

PEOPLE v DILLARD, No. 156600; Court of Appeals No. 332340.

In re PAROLE OF MCBRAYER, No. 156613; Court of Appeals No. 336084.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v RUFFIN, No. 156614; Court of Appeals No. 339408.

PEOPLE v AQUARIUS JOHNSON, No. 156615; Court of Appeals No. 332043.

KENNEY v BOSS, No. 156618; Court of Appeals No. 331905.

PEOPLE v DILLON, No. 156629; Court of Appeals No. 332406.

PEOPLE v MCGOWAN, No. 156630; Court of Appeals No. 339235.

PEOPLE v ISOM, No. 156631; Court of Appeals No. 332296.

PEOPLE v DONELL JACKSON, No. 156632; Court of Appeals No. 332421.

PEOPLE v SEAY, No. 156634; Court of Appeals No. 332004.

PEOPLE v KORBIN THOMAS, No. 156635; Court of Appeals No. 338689.

PEOPLE v WELLS, No. 156642; Court of Appeals No. 339542.

PEOPLE v HOOSE, No. 156659; Court of Appeals No. 339380.

PEOPLE v FOX, No. 156660; Court of Appeals No. 339277.

PEOPLE v HEFLIN, No. 156661; Court of Appeals No. 332338.

PEOPLE v DENMAN, No. 156676; Court of Appeals No. 332210.

GARFIELD MART, INC v DEPARTMENT OF TREASURY, No. 156678; reported below: 320 Mich App 628.

PEOPLE v LOOSE, No. 156682; Court of Appeals No. 339691.

PEOPLE v DURMON BUTLER, Nos. 156686 and 156687; Court of Appeals Nos. 339183 and 339184.

GRR CAPITAL FUNDING LLC v BENNER, No. 156702; Court of Appeals No. 333017.

PEOPLE v WIGGINS, No. 156710; Court of Appeals No. 333567.

PEOPLE v TERRIS HENRY, No. 156718; Court of Appeals No. 339677.

PEOPLE v BURNS, No. 156727; Court of Appeals No. 339454.

PEOPLE v PETERS, No. 156729; Court of Appeals No. 333785.

PEOPLE v PACKARD, No. 156732; Court of Appeals No. 339207.

DORFMAN v PIERCE MARTIN LLC, No. 156735; Court of Appeals No. 333428.

PEOPLE v BARKMAN, No. 156745; Court of Appeals No. 339665.

PEOPLE v RIVERA, No. 156747; Court of Appeals No. 330405.

DONALDSON v DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 156758; Court of Appeals No. 337502.

DONALDSON v DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 156760; Court of Appeals No. 337586.

PEOPLE v DALLAS ANDERSON, No. 156774; Court of Appeals No. 339287.

PEOPLE v WARDEN, No. 156798; Court of Appeals No. 340001.

PEOPLE v MORICH, No. 156809; Court of Appeals No. 332970.

PEOPLE v JAMES WALTON, No. 156810; Court of Appeals No. 332901.

UNUVAR v FLEMING, No. 156815; Court of Appeals No. 334064.

ALLY FINANCIAL, INC v ELLIS, No. 156816; Court of Appeals No. 332408.

LV 204, LLC v GATMAITAN, No. 156817; Court of Appeals No. 332916.

PEOPLE v LORENZO HARRIS, No. 156819; Court of Appeals No. 332769.

ARNOLD v HABER, No. 156820; Court of Appeals No. 338616.

PEOPLE v WHORTON, No. 156825; Court of Appeals No. 339736.

PEOPLE v DEVOWE, No. 156826; Court of Appeals No. 332768.

PEOPLE v DEON JOHNSON, No. 156829; Court of Appeals No. 339469.

PEOPLE v GIVENS, No. 156838; Court of Appeals No. 331999.

PEOPLE v HARE, No. 156848; Court of Appeals No. 333876.

PEOPLE v FILIPUNAS, No. 156852; Court of Appeals No. 338900. The application for leave to appeal the October 6, 2017 order of the Court of Appeals is considered, and it is denied. The motion to add issues is denied; however, this denial is without prejudice to the defendant raising the issues in a motion for relief from judgment under MCR Subchapter 6.500.

RITARI v PETER E O'DOVERO, INC, No. 156855; Court of Appeals No. 335870.

PEOPLE v ADAM REYNOLDS, No. 156864; Court of Appeals No. 339741.

BASS v PETERS, No. 156869; Court of Appeals No. 332217.

PEOPLE v JAMES WASHINGTON, No. 156878; Court of Appeals No. 334512.

PEOPLE v DURMON BUTLER, No. 156890; Court of Appeals No. 339995.

PEOPLE v LOURIS, No. 156891; Court of Appeals No. 333123.

PEOPLE v SHERI WILSON, No. 156899; Court of Appeals No. 333126.

PEOPLE v ALBERT WALKER, No. 156947; Court of Appeals No. 340819.

In re MOORE ESTATE, No. 156963; Court of Appeals No. 338553.

PEOPLE v WHEAT, No. 156973; Court of Appeals No. 333925.

PEOPLE v JAQUA, No. 156991; Court of Appeals No. 334962.

PEOPLE v DAMON BROWN, No. 156992; Court of Appeals No. 333313.

PEOPLE v LARRY LEE, No. 156994; Court of Appeals No. 333664.

CUMMINGS v GIRTMAN, No. 157034; Court of Appeals No. 334015.

PEOPLE v STEVENS, No. 157046; Court of Appeals No. 339042.

PEOPLE v JOSEPH SMITH, No. 157060; Court of Appeals No. 334953.

Reconsideration Denied April 3, 2018:

PEOPLE v REEDY, No. 152977; Court of Appeals No. 329783. Leave to appeal denied at 501 Mich 923.

PEOPLE v SOCK, No. 154874; Court of Appeals No. 334136. Leave to appeal denied at 501 Mich 923.

PEOPLE v ROUSE, No. 154957; Court of Appeals No. 333701. Leave to appeal denied at 501 Mich 923.

PEOPLE v SHANE MOORE 155052; Court of Appeals No. 334768. Summary disposition order entered at 501 Mich ___.

PEOPLE v JULIAN, No. 155101; Court of Appeals No. 334079. Leave to appeal denied at 501 Mich 924.

WILDER, J., did not participate because he was on the Court of Appeals panel.

WILLIAMSON v SULEIMAN, No. 155147; Court of Appeals No. 334456. Leave to appeal denied at 501 Mich 924.

PEOPLE v CORY NELSON, No. 155175; Court of Appeals No. 335200. Leave to appeal denied at 501 Mich 924.

PEOPLE v DELL, No. 155232; Court of Appeals No. 333223. Leave to appeal denied at 501 Mich 924.

PEOPLE v KELLEY, No. 155302; Court of Appeals No. 334239. Leave to appeal denied at 501 Mich 924.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v DERRICK SMITH, No. 155334; Court of Appeals No. 335215. Leave to appeal denied at 501 Mich 945.

PEOPLE v LEROY SCOTT, No. 155414; Court of Appeals No. 336219. Leave to appeal denied at 501 Mich 946.

PEOPLE v PHILLIP PAYNE, No. 155668; Court of Appeals No. 336002. Leave to appeal denied at 501 Mich 947.

ROWE v AINSLIE, No. 155709; Court of Appeals No. 332566. Leave to appeal denied at 501 Mich 920.

BRAZOS HIGHER EDUCATION SERVICE CORPORATION v STINNETT, No. 155732; Court of Appeals No. 329780. Leave to appeal denied at 501 Mich 926.

PEOPLE v SEBASTIAN WILSON, No. 155936; Court of Appeals No. 330883. Leave to appeal denied at 501 Mich 947.

PEOPLE v VAZQUEZ, No. 156451; Court of Appeals No. 331181. Summary disposition order entered at 501 Mich 940.

Summary Disposition April 4, 2018:

PEOPLE v GARCIA-MANDUJANO, No. 153697; Court of Appeals No. 324963. In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals holding that trial counsel provided constitutionally effective representation, we vacate the defendant's convictions and sentences, and we remand this case to the Van Buren Circuit Court for a new trial. To establish that trial counsel was ineffective, defendant must first establish that counsel's performance was deficient. *Strickland v Washington,* 466 US 668, 687 (1984). This requires a showing that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment because his performance fell below an objective standard of reasonableness under prevailing professional norms. *Id*.; *People v LeBlanc*, 465 Mich 575, 578 (2002); *People v Effinger*, 212 Mich App 67, 69 (1995). Once defendant has established that counsel's performance was deficient, he must establish that the deficient performance prejudiced the defense. *Strickland*, 466 US at 687; *LeBlanc*, 465 Mich at 578. To do this, he must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. This requires a showing that counsel's errors were so serious that they deprived defendant of a fair trial with a reliable result. *Id*.

Here, defense counsel was provided in pretrial discovery a medical report prepared by a physician assistant who examined the complainant and who was listed on the prosecution's witness list. The report, while repeating the claims of the complainant, was generally favorable to the defense in that it did not document any tearing, bruising, bleeding, lacerations, DNA evidence, or evidence of any sexually transmitted disease found on the complainant. Defense counsel did not attempt to interview this critical witness before trial and did not reasonably prepare to cross-examine the trial testimony of the physician assistant by relying on the report to ask targeted questions to elicit the exculpatory evidence. Rather, defense counsel asked the witness during cross-examination the open-ended question whether there was "no medical evidence" to support the complainant's claim of assault. The witness responded that an adult speculum had easily been used to examine the 12-year-old complainant. Defense counsel testified at the *Ginther* hearing[1] that he thought he had elicited evidence from the witness that she had not mentioned the speculum in her report. But review of the record finds no such impeachment. Further, instead of using the report to impeach the witness on the failure to document the adult speculum in the report, defense counsel aggravated this inadequacy when, in his own words, he "tried to be the expert" on female anatomy.[2] That was not a reasonable trial strategy. Here, "[a]ny attorney acting reasonably" would have elicited the favorable exculpatory evidence from the report and then, if necessary, used the report to impeach the witness by presenting to the jury her failure to mention the speculum in her report documenting the complainant's examination. *People v Armstrong*, 490 Mich 281, 290 (2011). This is particularly true when, as here, attacking the witness's credibility "offered the most promising defense strategy." *Id*. at 291.

Moreover, defense counsel's conduct was not only deficient, it also prejudiced defendant. This case was solely a credibility contest between defendant and the complainant, and the physician assistant's testimony that she used an adult speculum to examine the 12-year-old complainant was the only medical evidence admitted at trial. Because defense counsel not only allowed this testimony to stand unchecked but also highlighted the testimony, there exists a reasonable probability of a different result.

Leave to Appeal Granted April 4, 2018:

STENZEL V BEST BUY COMPANY, INC, No. 156262; reported below: 320 Mich App 262. The parties shall address: (1) whether the Court of Appeals special panel correctly held that there is a conflict between MCL 600.2957(2) and MCR 2.112(K); (2) whether, in any event, a party

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

[2] Defense counsel admitted this was "[n]ot my finest moment, as the jurors told me at the end that I know nothing about the female anatomy . . . ."

may amend a complaint upon receipt of a notice of nonparty fault without first filing a motion to amend; and (3) if so, whether the amendment relates back to the date the complaint was filed. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The Michigan Association for Justice, Michigan Defense Trial Counsel, Inc., and the Negligence Law Section of the State Bar 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 April 4, 2018:

PEOPLE v KEVIN JOHNSON, No. 155535; Court of Appeals No. 334764.

In re LAWHORN, No. 156061; Court of Appeals No. 330655.

CARR v ROGER A REED, INC, No. 156221; Court of Appeals No. 330115.

COFFEY v WILSON VETERINARY HOSPITAL PC, No. 156227; Court of Appeals No. 336391.

PEOPLE v HUMPHRIES, No. 156327; Court of Appeals No. 338274. For purposes of MCR 6.502(G)(1), the Court notes that, although the defendant's writ of coram nobis has been styled a motion for relief from judgment by the courts below, it should not be regarded as a motion for relief from judgment in any future case. Nevertheless, the trial court did not err in denying the defendant's writ of coram nobis because the writ was not sought under subchapter 6.500 of the Michigan Court Rules. MCR 6.501 provides that "a judgment of conviction and sentence entered by the circuit court not subject to appellate review under subchapters 7.200 or 7.300 may be reviewed only in accordance with the provisions of this subchapter." Defendant's direct appeal has already concluded and the instant motion challenges the validity of her judgment of conviction, and therefore, the trial court did not err in denying the motion for failing to be brought under the proper rules. Accordingly, the application for leave to appeal to the Court of Appeals was properly denied, not under the rules of MCR 6.501 *et seq*. (because the motion was not brought under subchapter 6.500), but, rather, due to lack of merit in the grounds presented.

PEOPLE v DASHAWN CARTER, No. 156459; Court of Appeals No. 332414.

PEOPLE v KLINGBAIL, No. 156469; Court of Appeals No. 332903.

PEOPLE v BRADLEY, No. 156489; Court of Appeals No. 331146.

GALAXY SOFTWARE SOLUTIONS, INC v PANDEY, No. 156513; Court of Appeals No. 331660.

SMITH v K COLE, INC, No. 156743; Court of Appeals No. 338518.

Summary Disposition April 6, 2018:

PEOPLE v DEVAUN LOPEZ, No. 154566; reported below: 316 Mich App 704. In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. We understand the Court of Appeals as having decided the case on evidentiary grounds. MRE 804(a) provides, in relevant part, that "[a] declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement *for the purpose of* preventing the witness from attending or testifying." (Emphasis added.) In finding error requiring a new trial, the Court of Appeals determined that the trial court record established that the prosecutor's conduct procured the unavailability of the witness and could not be justified. But that is a factual determination that should first be decided by the trial court, and it fails to address the text of the rule. The plain language of the exception to "unavailability" under MRE 804(a) mandates that the court consider whether the conduct of the proponent of the statement was *for the purpose of* causing the declarant to be unavailable. The trial court found that the witness was unavailable because he felt threatened by the prosecutor, but did not consider whether the prosecutor intended to cause the declarant to refuse to testify when engaging in that conduct. We therefore remand this case to the Saginaw Circuit Court for a determination of whether the witness was unavailable due to the prosecutor's procurement or wrongdoing for the purpose of preventing the witness from attending or testifying, consistent with MRE 804(a). We express no opinion on any constitutional issues that the defendant may have argued. We do not retain jurisdiction.

OTTO v INN AT WATERVALE, INC, No. 155380; Court of Appeals No. 330214. 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 reverse the January 17, 2017 judgment of the Court of Appeals and we reinstate the September 21, 2015 summary disposition order of the Benzie Circuit Court. The circuit court correctly ruled that the recreational land use act (RUA), MCL 324.73301, applies to this case. That statute provides in relevant part that gross negligence or willful and wanton misconduct by an owner, tenant, or lessee must be shown in order to bring a cause of action "for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use . . . ." MCL 324.73301(1). Plaintiff's next friend and daughter injured herself on defendant's beachfront property on Lake Michigan after stepping on hot coals that were the remnants of a beach fire. A witness testified that the girl had been at the beach with a friend, "building sand castles, throwing stones in the water, and splashing around." The issue in this case is whether these activities fall within the RUA's general category of "any other outdoor recreational use[.]"

The Court of Appeals interpreted the RUA using the *ejusdem generis* canon, which provides that when specific words precede general words

in a statute, " 'the meaning of the general words will ordinarily be presumed to be and construed as restricted by the particular designation and as including only things of the same kind, class, character or nature as those specifically enumerated.' " *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 242 (2000), quoting *People v Brown*, 406 Mich 215, 221 (1979). The Court of Appeals then interpreted the RUA's enumerated list to involve activities that require a higher degree of risk and intensity than beach play, which it thus found to be outside the scope of the RUA's general category. Consequently, the Court held that the RUA did not apply and that plaintiff's negligence action could go forward.

We disagree. The activities at issue here fall within the plain meaning of the general phrase "any other outdoor recreational use." They occurred outdoors and were done for refreshment or diversion, and consequently were recreational. See *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "recreation" as, among other things, "a means of refreshment or diversion"). We reject the Court of Appeals' limitations on the scope of the general category fashioned by using the *ejusdem generis* canon. We do not agree that all of the listed activities involve any particular heightened degree of physical intensity or inherent risk. And even if they did, beach play would be encompassed, as it is at least as intense and risky as "sightseeing" or "fishing," two of the listed activities. Nor do we find any need to define what limitations any other common characteristic of the RUA's enumerated items might impose on the general phrase, because the parties have identified no such characteristic that would limit the scope of the general category in a manner that would exclude beach play. Therefore, because the activities here fit the plain meaning of "any other outdoor recreational use" and are not excluded by any interpretation of the RUA's general provision under the *ejusdem generis* canon, we conclude that the RUA applies.[1] Accordingly, we reverse the Court of Appeals' decision and reinstate the Benzie Circuit Court's order.

WILDER, J., did not participate because he was on the Court of Appeals panel.

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[1] As noted above and by the Court of Appeals, the doctrine of *ejusdem generis* provides that " 'the meaning of the general words will ordinarily be presumed to be and construed as restricted by the particular designation and as including only things of the same kind, class, character or nature as those specifically enumerated.' " *Sands Appliance Servs*, 463 Mich at 242, quoting *Brown*, 406 Mich at 221. This doctrine is often applied to avoid rendering the list of specific words superfluous. See 2A Singer & Singer, Sutherland Statutory Construction (7th ed), § 47:17 ("If the general words are given their full and natural abstract meaning, they would include the objects designated by the specific words, making the latter superfluous."). While the doctrine may have applicability to a statute, it is nonetheless unnecessary to define the outer parameters of the common class in a given case. See Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 208 (explaining that there are times when it is unnecessary "to identify the genus [i.e., the common class] with specificity in order to

CORMIER v PF FITNESS-MIDLAND, LLC, No. 156116; Court of Appeals No. 331286. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment concluding that the plaintiff had abandoned her claims under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. The plaintiff attached her complaint to her brief, cited the governing statute, MCL 445.901 *et seq*., and provided a two-page discussion of her theory supporting her claims. Thus, the plaintiff did not simply announce her position and leave it to the court to rationalize her basis, nor did she require the court to search for authority either to sustain or reject her position in this statutory cause of action. *Cf. Wilson v Taylor*, 457 Mich 232, 243 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203 (1959). Accordingly, the Court of Appeals erred in declining to consider the plaintiff's MCPA claims. Therefore, we remand this case to that court for consideration of the trial court's grant of summary disposition on those claims. See *Brownlow v McCall Enterprises, Inc*, 315 Mich App 103 (2016).

In all other respects, leave to appeal is denied. We do not retain jurisdiction.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered April 6, 2018:

HENDERSON v CIVIL SERVICE COMMISSION, No. 156270; Court of Appeals No. 332314. The appellants shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the "authorized by law" scope of review under Const 1963, art 6, § 28 applied to the appellants' judicial review of the Civil Service Commission's final decision made without a hearing; (2) if so, whether the Court of Appeals gave proper meaning to the "authorized by law" constitutional standard; and (3) whether the Court of Appeals correctly applied that scope of review to the appellants' challenge. In addition to the brief, the appellants shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellants' brief. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellants. A reply, if any, must be filed by the appellants within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

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.

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decide the case at hand"). Because this case involves beach play, which clearly falls within whatever the proper common class may be among the specifically enumerated land uses, it is unnecessary in this case to define the outer limits of the common class.

BAUSERMAN v UNEMPLOYMENT INSURANCE AGENCY, No. 156389; Court of Appeals No. 333181. The appellants shall file a supplemental brief within 42 days of the date of this order addressing whether "the happening of the event giving rise to [appellants'] cause of action" for the deprivation of property without due process occurred when the appellee issued its allegedly wrongful notice of redetermination, or when the appellee actually seized the appellants' property. MCL 600.6431(3); MCL 600.5827; cf. *Frank v Linkner*, 500 Mich 133, 149-153 (2017). In addition to the brief, the appellants shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellants' brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellants. A reply, if any, must be filed by the appellants within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Michigan League for Public Policy 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.

Leave to Appeal Denied April 6, 2018:

In re HILL, No. 155152; Court of Appeals No. 332923. On November 8, 2017, the Court heard oral argument on the application for leave to appeal the December 27, 2016 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, there being no majority in favor of granting leave to appeal or taking other action.

MCCORMACK, J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal. I would grant leave and overrule *In re Hatcher*, 443 Mich 426 (1993), or in the alternative, hold that the collateral bar rule must give way to due process.

The respondent-mother's children were removed in May 2013 by the Department of Health and Human Services (DHHS) and an initial disposition hearing was held in August, at which the respondent admitted several allegations and pleaded no contest to several others. The parties do not dispute that her plea was defective, as the trial court did not inform her of her rights as required by MCR 3.971(B): the respondent was not told she was giving up the right to conduct a trial, force the DHHS to prove its allegations, confront witnesses against her, and compel attendance of favorable witnesses. Nor—importantly here—was she told that her plea could be used against her in a later proceeding to terminate her parental rights. As a result of the defective plea, the court took jurisdiction over her children and adopted the DHHS's recommended service plan. Over the next two and a half

years, the court held a series of review hearings to assess the respondent's progress. In 2016, DHHS sought to terminate the respondent's rights and the court did so.

The respondent appealed. She argued that because her plea was defective, the court lacked jurisdiction to terminate her parental rights. The Court of Appeals affirmed, holding that she was precluded from complaining about her plea by the collateral bar rule, citing *Hatcher*. *In re Hill, Minors*, unpublished per curiam opinion of the Court of Appeals, issued December 27, 2016 (Docket No. 332923). We ordered arguments on the application and asked the parties to address whether *Hatcher* correctly held that the collateral bar rule could prevent a parent from challenging the court's initial exercise of jurisdiction after the court terminated her parental rights, if not what standard courts should apply in this context, and whether *Hatcher* was correctly decided. I would answer those questions now.

A child protective action is started by a petition alleging parental abuse or neglect, and then proceeds in two phases: adjudication and disposition. *In re Sanders*, 495 Mich 394, 404 (2014), citing *In re Brock*, 442 Mich 101, 108 (1993). At the adjudicative phase, a parent can either enter a plea to the allegations in the petition, MCR 3.971, or demand a trial, MCR 3.972. If the court finds the allegations proven, whether by plea or trial, it assumes jurisdiction over the child. *Sanders*, 495 Mich at 405. "Once the court has jurisdiction, it determines during the dispositional phase what course of action will ensure the child's safety and well-being." *Id*. at 404; see also MCR 3.973.

During the dispositional phase the court monitors and assesses a parent's progress under the DHHS case service plan in review hearings. MCR 3.975. If the parent cannot make progress under the plan, DHHS may seek to terminate his or her parental rights. At the end of the process, the court may decide to reunify the family or terminate the parent's rights. MCR 3.976; MCR 3.977(H). It is then that the proceeding is completed.

The collateral bar rule requires a litigant to challenge a trial court's erroneous decision in a direct appeal of that decision and forbids an attack in a different (collateral) proceeding.[1] *Hatcher* first applied the collateral bar rule to child-protective proceedings but its application was novel. *Hatcher* effectively held that a child-protective action is really multiple actions with multiple final orders, each of which must be appealed immediately and separately. This view of a child-protective

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[1] This rule is longstanding and common across legal disciplines. See, e.g., *People v Ingram*, 439 Mich 288, 291 n 1 (1992) ("Collateral attacks encompass those challenges raised other than by initial appeal of the conviction in question."); *People v Howard*, 212 Mich App 366, 369 (1995) ("[A] challenge brought in any subsequent proceeding or action is a collateral attack."); *Workers' Compensation Agency Dir v MacDonald's Indus Prod, Inc (On Reconsideration)*, 305 Mich App 460, 474 (2014) (describing a collateral attack as using "a second proceeding to attack a tribunal's decision in a previous proceeding").

action misunderstands the processes and rules that govern it, and disserves children and families by that misunderstanding.

Hatcher's rule is that a parent who appeals a defect in the adjudicative phase at the end of the proceeding is "collaterally" attacking that very same proceeding. But as then Justice CORRIGAN has explained, "[a] child protective action is 'a single continuous proceeding.' " *In re Hudson*, 483 Mich 928, 935 (2009) (CORRIGAN, J., concurring), quoting *In re LaFlure*, 48 Mich App 377, 391 (1973). Each proceeding starts with the filing of a petition, and ends with a determination of whether a parent's rights will be terminated.

This understanding is reinforced by our Court Rules. To the extent that MCR 3.993 can be read as permitting a parent to appeal a nonfinal order at the adjudication phase, there is no rule requiring that a parent be advised of that fact, much less any rule advising that if the parent does not appeal they will be barred from doing so at the end of the proceeding. Nor is there a rule requiring appointment of counsel to pursue such an appeal, as there is when a parent's rights are terminated. MCR 3.977(J). As a result, *Hatcher*'s *requirement* that a parent appeal immediately after a court issues a nonfinal order in the adjudication phase is not made plain to a parent until it is too late.

These important differences set *Hatcher* apart from the precedent on which it relied. The *Hatcher* opinion cited *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538 (1935), to justify applying the collateral bar rule within a child protective action. But *Jackson City Bank* presented a typical collateral bar question—a party challenging a final judgment from a previous case in a subsequent and separate case. In that case, the parties were granted a judgment of divorce and did not contest or appeal it. *Id*. at 545. In a new lawsuit, the plaintiffs—who were not parties to the divorce proceeding but the heirs of the wife's second husband—sought to challenge the validity of the divorce, and the Court barred their claims. *Id.* at 546. The same setup—a party using a subsequent lawsuit to attack a prior judgment—underlies the other cases cited in *Hatcher*. See *Life Ins Co of Detroit v Burton*, 306 Mich 81, 84-85 (1943) (defendant filed to set aside a sheriff's levy and sale several months after it occurred, claiming the court lacked jurisdiction); *Edwards v Meinberg*, 334 Mich 355 (1952) (defendant lost a jury trial and then attacked the court's jurisdiction in a separate and subsequent proceeding).

Given the inapt application of the collateral bar rule to the direct appeal of a single child-protective proceeding, not surprisingly, we have already carved out many exceptions to the *Hatcher* rule. See, e.g., *Sanders*, 495 Mich 394 (reversing a termination in which one parent was improperly adjudicated as unfit and holding the one-parent doctrine unconstitutional); *In re Mays*, 490 Mich 993 (2012) (reversing a termination after the trial court made an erroneous factual finding during the adjudication phase); *In re Mason*, 486 Mich 142 (2010) (reversing a termination for failure to facilitate the parent's involvement during the adjudication and dispositional phases); *In re Hudson*, 483 Mich 928 (2009) (remanding where the trial court failed to advise the respondent that her plea could be used in a proceeding to terminate her parental rights); *In re Mitchell*, 485 Mich 922 (2009) (same). Cf. *In re Rood*, 483

Mich 73, 111 (2009) (opinion by CORRIGAN, J.) (reversing a termination order because the trial court did not provide parent with proper notice of dispositional hearings). In each of these cases we did not view *Hatcher* as an impediment to each parent's challenge to an error from the adjudication phase *after* termination. And we have recently summarily reversed parental termination orders on due process grounds despite *Hatcher*. See, e.g., *In re Jones*, 499 Mich 862 (2016) (reversing a parental termination order after the Court of Appeals held the respondent's claims were barred by *Hatcher*); *In re Wangler*, 498 Mich 911 (2015) (same). With all of these carve-outs, it is hard to say what is left of the *Hatcher* rule.

Which makes sense, given the *Hatcher* rule's flimsy foundation; an intraproceeding collateral bar rule will be no match for the constitutional concerns at issue when a court terminates a parent's rights. The rule also undermines the first principle of the juvenile code, MCL 712A.1 *et seq*. to support children in their own homes. See MCL 712A.1(3) ("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."). Achieving finality for children in child-protective proceedings as soon as possible is a critical goal too. But the *Hatcher* rule disserves even that goal. Incentivizing parents to file interlocutory appeals for fear of waiving an issue instead of promoting a parent's timely cooperation with DHHS will only make coming to a final determination in a proceeding a longer process.

A parent's right to raise his or her children is ancient, profound, and firmly established in our jurisprudence. "The right to parent one's children is essential to the orderly pursuit of happiness by free men and is perhaps the oldest of the fundamental liberty interests[.]" *Sanders*, 495 Mich at 409, quoting *Meyer v Nebraska*, 262 US 390, 399-400 (1923) and *Troxel v Granville*, 530 US 57, 65 (2000) (cleaned up). And the right "does not evaporate simply because" one has not been a model parent. *Santosky v Kramer*, 455 US 745, 753 (1982). As a result, the termination of the right is "unique in the kind, the degree, and the severity of the deprivation [it] inflict[s]." *In re Sanchez*, 422 Mich 758, 765 (1985) (quotation marks and citation omitted). And robust protection of parental rights furthers the best interests of children, because "[w]hen a child is parented by a fit parent, the state's interest in the child's welfare is perfectly aligned with the parent's liberty interest." *Sanders*, 495 Mich at 416. A court-fashioned rule that prevents a parent from having a court consider a meritorious claim of a defect in the governmental process that permanently separates a parent from a child is one we should disavow affirmatively, rather than whittle away one case at a time.

For all of these reasons, I believe *Hatcher* was wrongly decided and I would say so here. But short of that, I would hold that the *Hatcher* rule must yield to due process here, as we have held that it does in so many similar contexts. See *Sanders*, 495 Mich 394; *Hudson*, 483 Mich 928; *Mitchell*, 485 Mich 922.

VIVIANO and BERNSTEIN, JJ., join the statement of MCCORMACK, J.

CLEMENT, J., did not participate in the disposition of this matter because the Court considered it before she assumed office.

KARUNGI v EJALU, No. 156644; Court of Appeals No. 337152.

MCCORMACK, J. (*concurring*). I agree with the Court's order denying leave to appeal, which properly leaves it to the trial court to resolve several fact-intensive legal questions in the first instance. Among those questions are, as the Court of Appeals noted, whether the contracts between the parties and the in vitro fertilization clinic affect the proper disposition of this case. While I express no opinion on the correct resolution of that issue, it is possible those contracts alone could prove outcome-determinative.

I write separately to note that the trial court should not avoid the question argued by the parties: whether frozen embryos are persons subject to a custody determination. The answer to that question could prove dispositive regarding whether the contracts resolve this dispute. See *Harvey v Harvey*, 470 Mich 186, 194 (2004) (stating that "parties cannot stipulate to circumvent the authority of the circuit court in determining the custody of children"). And if the trial court concludes that embryos are not subject to a custody determination, it is still bound to make a determination about the proper legal disposition of those embryos, if not under contract law or child custody law. Under Const 1963, art 6, § 1, it has an obligation to exercise the judicial power to decide the dispute before it. See also MCL 600.605 (circuit courts "have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state").

Should it become necessary to determine the disposition of the embryos outside contract law or child custody law, the trial court may wish to avail itself of the nonbinding authorities that have grappled with these difficult questions. See, e.g., *Davis v Davis*, 842 SW2d 588, 604 (Tenn, 1992) (applying a balancing-of-interests test to determine the disposition of frozen embryos); Flannery, *"Rethinking" Embryo Disposition Upon Divorce*, 29 J Contemp Health L & Pol'y 233 (2013) (discussing three different approaches to the disposition of frozen embryos upon divorce).

In re JONES, No. 157372; Court of Appeals No. 339128.

In re SMITH, No. 157405; Court of Appeals No. 339148.

Leave to Appeal Denied April 13, 2018:

FIGURSKI v TRINITY HEALTH-MICHIGAN, No. 154390; Court of Appeals No. 318115.

MARKMAN, C.J. (*dissenting*). Plaintiff brought a medical malpractice action against defendants. The trial court granted defendants' motion to exclude plaintiff's causation experts and granted defendants' motion for partial summary disposition, but the Court of Appeals reversed. Because I would reverse the Court of Appeals judgment, I respectfully dissent from this Court's order denying leave to appeal.

Plaintiff's complaint alleged that defendants' malpractice during his mother's labor and delivery caused two injuries: a general hypoxic-ischemic injury to his entire brain and a perinatal arterial ischemic stroke (PAIS). More specifically, the complaint alleged that these injuries were caused by the compression of plaintiff's head during contractions resulting from the administration of Pitocin to his mother during labor. Plaintiff sought to admit expert testimony to prove this theory of causation.

The admissibility of expert witness testimony is governed by MRE 702, which provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Additionally, trial courts must consider the factors described in MCL 600.2955 when adjudicating medical malpractice cases:

> (1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
>
> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
>
> (d) The known or potential error rate of the opinion and its basis.
>
> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.

(f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.

(g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

We have repeatedly stated that trial courts are gatekeepers with respect to expert testimony. *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067, 1067-1068 (2007); *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780 (2004). In accordance with this responsibility, they must ensure that expert testimony is not only relevant, but also reliable. *Edry v Adelman*, 486 Mich 634, 640 (2010), citing *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 589 (1993). This fundamental duty has remained the same regardless of the precise standard by which reliability has been judged. *Gilbert*, 470 Mich at 782. Indeed, when MRE 702 was last amended to conform with its federal counterpart, the words "the court determines that" in the first sentence of MRE 702 were retained specifically to emphasize "the centrality of the court's gatekeeping role . . . ." MRE 702, 469 Mich cxci-cxcii (staff comment).

This Court has recognized that the gatekeeping task necessitates a " 'searching inquiry.' " *Clerc*, 477 Mich at 1068, quoting *Gilbert*, 470 Mich at 782. Above all, it demands that a court adequately sort the scientific from the "junky." *Kumho Tire Co, Ltd v Carmichael*, 526 US 137, 159 (1999) (Scalia, J., concurring). This is despite the reality that most judges are general practitioners, not medical specialists. So while a court may not abandon its gatekeeping function, *Gilbert*, 470 Mich at 780, it can do no more than rule on the strength of the record presented, see *Edry*, 486 Mich at 640-642. And it is invariably for the *proponents* of expert testimony to demonstrate that such evidence is sufficiently reliable. *Elher v Misra*, 499 Mich 11, 22 (2016).

Recognizing that trial courts are in the best position to conduct this inquiry, we have held that the admission of expert testimony is within their reasonable discretion. See *Craig v Oakwood Hosp*, 471 Mich 67, 76 (2004). An abuse of discretion occurs when a court's decision falls outside the range of principled outcomes or, alternatively, when an unprejudiced person considering the facts on which the trial court acted would say that there was no justification for the ruling. *Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254 (2005), citing *People v Babcock*, 469 Mich 247, 269 (2003), and *Gilbert*, 470 Mich at 762.

With these principles in mind, it is clear that the trial court here was acting within its reasonable discretion when it excluded plaintiff's experts. The court considered all of the factors described in MCL 600.2955(1) and determined that plaintiff's experts did not present sufficient evidence to support plaintiff's theory of causation. At the most, plaintiff's *own* evidence indicated only that pressure on the fetal head constitutes one "risk factor" for hypoxic/ischemic injury and stroke, along with a host of other "risk factors," and that, even when *three or more* "risk factors" are present, hypoxic/ischemic injury or stroke results in no more than 0.5% of cases. Plaintiff did not present any evidence that head compression, rather than another risk factor, caused his

injuries and none of the articles cited by plaintiff's experts directly supported their conclusion that pressure on the fetal head during labor and delivery causes either brain damage and/or strokes. See *Elher*, 499 Mich at 23 ("A lack of supporting literature, while not dispositive, is an important factor in determining the admissibility of expert witness testimony."). Ultimately, the trial court ruled that plaintiff's experts had not adequately demonstrated the reliability of their testimony. Considering the underlying facts, this was a principled exercise of judgment, discussed at length in a thoughtful 30-page opinion.

The Court of Appeals criticized the trial court for misunderstanding the gatekeeper role and resolving the issue of causation instead of determining whether plaintiff's experts could offer a reliable opinion. In particular, the Court of Appeals relied heavily on its prior decision in *VanSlembrouck v Halperin*, unpublished per curiam opinion of the Court of Appeals, issued Oct 28, 2014 (Docket No. 309680),[1] in which similar testimony was admitted. Yet the trial court here was obliged to rule on the record of this case, not some other. And on this record, it clearly stated that plaintiff's experts failed to explain why their testimony was reliable. Indeed, the trial court noted that plaintiff's experts had argued in a conclusory way that the testimony was admissible under applicable standards, despite the court's prompting that they do so in a more robust manner. This does not mean that the experts were wrong or fabricated their theory. It simply means that they failed to adequately justify it in *this* proceeding. The Court of Appeals thus erred by relying so heavily on *VanSlembrouck*. What mattered was that the trial court reached a principled decision on the facts before it.

Because I do not believe that the trial court abused its discretion by excluding plaintiff's causation experts, I would reverse the Court of Appeals judgment and reinstate the trial court's order granting defendants' motion to exclude plaintiff's causation experts and granting defendants' motion for partial summary disposition.

ZAHRA and WILDER, JJ., join the statement of MARKMAN, C.J.

In re ILAYAN, No. 157395; Court of Appeals No. 339413.

In re ILAYAN, No. 157397; Court of Appeals No. 339414.

Summary Disposition April 20, 2018:

PEOPLE v THABO JONES, No. 156776; Court of Appeals No. 330759. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment holding that the exclusion of the victim's blood alcohol content was not harmless error, and we remand this case to that court for reconsideration of the

[1] The defendants in *VanSlembrouck* sought leave to appeal the Court of Appeals decision in this Court, but the parties filed a stipulation to dismiss the application before any action was taken. *VanSlembrouck*, 868 NW2d 914 (2015).

issue. While the Court of Appeals identified potential consequences for defendant's trial strategy as a result of the exclusion of the disputed evidence, it erroneously equated such consequences with an assessment of whether it is "more probable than not that a different outcome would have resulted" had the evidence been admitted. *People v Lukity*, 460 Mich 484, 495 (1999). See MCL 769.26. While defendant's defense strategy is one pertinent consideration, on remand the Court of Appeals must consider it alongside the weight and strength of the untainted evidence and the proofs as a whole. *People v Lyles*, 501 Mich 107, 118 (2017). We do not retain jurisdiction.

Leave to Appeal Denied April 24, 2018:

POPE v BARTLETT, No. 157353; Court of Appeals No. 342446.

Summary Disposition April 26, 2018:

BURNETT v AHOLA, No. 157047 and 157049; Court of Appeals No. 338618. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate parts B.II. and B.III. of the Court of Appeals judgment, and we remand this case to that court for further consideration. We express no opinion on the lower courts' waiver analysis; however, given the unusual facts of this case, we believe the lower courts should address the defendants' remaining arguments. Therefore, on remand, while retaining jurisdiction, the Court of Appeals shall remand this case to the Genesee Circuit Court for further consideration. The trial court shall: (1) determine whether the defendants should be estopped from arguing that the plaintiff committed intrinsic fraud or fraud on the court during the proceedings under the Revocation of Paternity Act (ROPA), MCL 722.1431 *et seq*., given the entry into or failure to object to custody and parenting time orders with knowledge that the ROPA judgment was obtained through intrinsic fraud or fraud on the court; (2) conduct an evidentiary hearing to determine whether the plaintiff committed intrinsic fraud or fraud on the court during the ROPA proceedings; and (3) if so, determine to what, if any, remedy the defendants are entitled. At the conclusion of the hearing, the trial court shall forward the record and its findings to the Court of Appeals, which shall then rule on these issues.

On remand, the Genesee Circuit Court and the Court of Appeals are directed to expedite their consideration and resolution of this case. We do not retain jurisdiction.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered April 26, 2018:

PEOPLE v WORTH-MCBRIDE, No. 156430; Court of Appeals No. 331602. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether a parent/defendant, either

as a principal or as an aider and abettor, can be convicted of first-degree child abuse or second-degree murder when a child suffers serious physical harm or death as a result of the parent/defendant leaving the child in the care of the other parent with knowledge that the other parent previously injured the child and that serious physical harm or death would be caused by leaving the child with the other parent; and (2) if so, whether the evidence is sufficient in this case to establish the defendant's knowledge that serious physical harm or death would be caused by leaving the child with the other parent. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

We direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *People v Lee* (Docket No. 157176).

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.

WALKER V UNDERWOOD, No. 156651; Court of Appeals No. 333160. The appellant shall file a supplemental brief within 42 days of the date of this order addressing the meaning of paragraph 10 of the parties' agreement that is in dispute in this case and the applicability of the legal canon *expressio unius est exclusio alterius* in the interpretation of that paragraph. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

PEOPLE V JAMES LEE, No. 157176; Court of Appeals No. 334308. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether there is sufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that the defendant committed an "act" as that term is used in MCL 750.136b(3)(b). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1).

The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

We direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *People v Worth-McBride* (Docket No. 156430).

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.

Leave to Appeal Denied April 26, 2018:

PEOPLE v RAMON BRYANT, No. 155582; Court of Appeals No. 336132.

PEOPLE v DUPREE, No. 156505; Court of Appeals No. 332289.

PEOPLE v BAHAM, No. 156733; reported below: 321 Mich App 228.

PEOPLE v DONALDSON, No. 156740; Court of Appeals No. 333752.

JOHNSON v DEPARTMENT OF NATURAL RESOURCES, No. 156954; Court of Appeals No. 335645.

Summary Disposition April 27, 2018:

PEOPLE v BENTZ, No. 155361; Court of Appeals No. 329016. In lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and remand this case to the Mason Circuit Court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), for a determination of whether the defendant was denied the effective assistance of trial counsel. We do not retain jurisdiction.

Summary Disposition May 1, 2018:

In re SANDERS, No. 156052; Court of Appeals No. 337835. Pursuant to MCR 7.305(H)(1), and in light of the prosecutor's concession that the defendant was erroneously sentenced as a habitual offender, we remand this case to the Wayne Circuit Court, Family Division, for resentencing without habitual offender enhancement. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v JORGE LOPEZ, No. 156140; Court of Appeals No. 337328. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the June 19, 2017 order of the Court of Appeals, and the September 16,

2016 order of the Wayne Circuit Court denying the defendant's motion for an evidentiary hearing. We remand this case to the Wayne Circuit Court for further proceedings. The defendant filed three post-judgment motions in the circuit court: a motion to appoint counsel, a motion for an evidentiary hearing, and a motion for relief from judgment. While these motions are not listed in the register of actions, they are stamped "received" July 26, 2016, and are contained in the lower court file. The circuit court's September 16, 2016 order denied the motion for an evidentiary hearing, but there is no order in the circuit court record addressing the other motions. On remand, the circuit court shall rule on the defendant's other pending motions, and shall reconsider the motion for an evidentiary hearing in light of the arguments made in the defendant's related motion for relief from judgment. We do not retain jurisdiction.

PEOPLE v MICHAEL HARRIS, No. 157232; Court of Appeals No. 339329. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate in part the order entered by the Ingham Circuit Court on June 27, 2017. We vacate that part of the order stating, "Pursuant to MCR 2.602(A)(3), this judgment resolves the last pending claim and closes the case." Motions that do not substantially comply with the requirements of the court rules and successive motions for relief from judgment may be returned to the defendant under certain conditions. MCR 6.502(D); MCR 6.502(G)(1). But a defendant may file a second or subsequent motion for relief from judgment based on a retroactive change in law or a claim of new evidence. MCR 6.502(G)(2). In all other respects, leave to appeal is denied. The motions to remand and the motion for sanctions are denied.

Leave to Appeal Denied May 1, 2018:

PEOPLE v FELISA SIMMS, No. 154346; Court of Appeals No. 331796.

WILDER, J., did not participate because he was on the Court of Appeals panel.

BISHOP v DEPARTMENT OF CORRECTIONS DIRECTOR, No. 154693; Court of Appeals No. 333757.

PEOPLE v MARGOSIAN, No. 155674; Court of Appeals No. 335319.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v CROCKETT, No. 155694; Court of Appeals No. 335717.

PEOPLE v CLOIS BELL, No. 155695; Court of Appeals No. 335967.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v BRIAN PETERSON, No. 155708; Court of Appeals No. 336965.

PEOPLE v VONZEL SIMMONS, No. 155721; Court of Appeals No. 337140.

PEOPLE v VALIANT WHITE, No. 155798; Court of Appeals No. 336447.

PEOPLE v GIBBS, No. 155825; Court of Appeals No. 337593.

PEOPLE v DESMOND MATTHEWS, No. 155867; Court of Appeals No. 336812.

PEOPLE v TURNPAUGH, No. 155928; Court of Appeals No. 337233.

PEOPLE v KISSNER, No. 155957; Court of Appeals No. 336714.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v LIGHT, No. 155958; Court of Appeals No. 335992.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v GRANT, No. 155979; Court of Appeals No. 336776.

PEOPLE v ROGER ROBERTS, No. 155987; Court of Appeals No. 336066.

PEOPLE v ANTHONY CHANDLER, No. 156027; Court of Appeals No. 336404.

PEOPLE v STEVEN BAILEY, No. 156041; Court of Appeals No. 337528.

PEOPLE v RICARDO EDMONDS, No. 156069; Court of Appeals No. 336347.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v BINION, No. 156083; Court of Appeals No. 336929.

PEOPLE v VARGAS, No. 156098; Court of Appeals No. 335848.

PEOPLE v DALIAN, No. 156139; Court of Appeals No. 337416.

PEOPLE v OLDS, No. 156141; Court of Appeals No. 336102.

PEOPLE v SHANANAQUET, No. 156143; Court of Appeals No. 337024.

PEOPLE v KEVIN PORTER, No. 156160; Court of Appeals No. 336888.

JOHN DOES 11-18 v DEPARTMENT OF CORRECTIONS and JOHN DOES 1-10 v DEPARTMENT OF CORRECTIONS, Nos. 156178 and 156179; Court of Appeals Nos. 332182 and 332183.
CLEMENT, J., did not participate due to her prior involvement as chief legal counsel for the Governor.

PEOPLE v GATHRIGHT, No. 156205; Court of Appeals No. 337637.

PEOPLE v KEMP, No. 156208; Court of Appeals No. 336854.

PEOPLE v ERIC SMITH, No. 156244; Court of Appeals No. 336438.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v CHOATE, No. 156249; Court of Appeals No. 336180.
WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v ROY TAYLOR, No. 156277; Court of Appeals No. 337646.

PEOPLE v SYKES, No. 156333; Court of Appeals No. 330575.

PEOPLE v FAIRLEY, No. 156336; Court of Appeals No. 338167.

PEOPLE v HOUSTON, No. 156346; Court of Appeals No. 337102.

PEOPLE v BYRON ROOT, No. 156366; Court of Appeals No. 337322.

PEOPLE v NORTH, No. 156367; Court of Appeals No. 338693.

PEOPLE v DOSS, No. 156375; Court of Appeals No. 338071.

PEOPLE v DEANDRE KING, No. 156380; Court of Appeals No. 338102.

PEOPLE v GUEBARA, No. 156381; Court of Appeals No. 339396.

PEOPLE v BECHTOL, No. 156390; Court of Appeals No. 337197.

PEOPLE v DEREK BAILEY, No. 156482; Court of Appeals No. 333073.

KILLMER v DONALD J SABOURIN, DDS, PLLC, No. 156487; Court of Appeals No. 337338.

KOETS v THE AMERICAN LEGION DEPARTMENT OF MICHIGAN, No. 156503; Court of Appeals No. 333347.

PEOPLE v ANTONIO LAY, No. 156547; Court of Appeals No. 330802.

PEOPLE v ANTONIO LAY, No. 156549; Court of Appeals No. 330880.

PEOPLE v WEINERT, No. 156578; Court of Appeals No. 332744.

MGM GRAND DETROIT LLC v CITY OF DETROIT, No. 156580; Court of Appeals No. 332000.

PEOPLE v ALLEN THOMPSON, No. 156582; Court of Appeals No. 335399.

In re BUNKLEY, No. 156588; Court of Appeals No. 338842.

PEOPLE v BOGGIANO, No. 156590; Court of Appeals No. 332450.

PEOPLE v BARBARA CARTER, No. 156595; Court of Appeals No. 322207.

PEOPLE v HAMLIN, No. 156605; Court of Appeals No. 321352.

PEOPLE v DAVID GRIFFIN, No. 156655; Court of Appeals No. 333345.

PEOPLE v MARCOTTE, No. 156657; Court of Appeals No. 332852.

PEOPLE v OMAR-HILL, No. 156681; Court of Appeals No. 332490.

PEOPLE v DOUGLAS JACKSON, No. 156683; Court of Appeals No. 339242.

PEOPLE v GALA, No. 156690; Court of Appeals No. 334584.

PEOPLE v SAMUEL JONES, No. 156695; Court of Appeals No. 332238.

PEOPLE v MURRELL, No. 156699; Court of Appeals No. 339439.

PEOPLE v SAMMY HALL, No. 156700; Court of Appeals No. 332598.

PEOPLE v JOE REYNOLDS, No. 156703; Court of Appeals No. 332679.

MCADOO v CITY OF LUDINGTON, No. 156706; Court of Appeals No. 338866.

PEOPLE v TRAVELL HENRY, No. 156722; Court of Appeals No. 331326.

PEOPLE v POLLARD, No. 156728; Court of Appeals No. 339273.

PEOPLE v RAINGE, No. 156742; Court of Appeals No. 330127.

PEOPLE v AMOS, No. 156754; Court of Appeals No. 338860.

PEOPLE v JAMES KEYS, Nos. 156761, 156762 and 156763; Court of Appeals Nos. 331489, 331490, and 331493.

SCOTT v NILES COMMUNITY SCHOOLS BOARD OF EDUCATION, No. 156765; Court of Appeals No. 337706.

PISCIOTTA v KARDOS, No. 156775; Court of Appeals No. 332300.

RUSSELL v CITY OF DETROIT, No. 156791; reported below: 321 Mich App 628.

BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceeding.

PEOPLE v ROACH, No. 156797; Court of Appeals No. 339160.

TRITES v BRUNEEL, No. 156814; Court of Appeals No. 340311.

RIGGS v TRINITY HEALTH-MICHIGAN/SAINT MARY'S HOSPITAL, No. 156824; Court of Appeals No. 334641.

PEOPLE v BELINDA JONES, No. 156835; Court of Appeals No. 330113.

PEOPLE v COREY HILL, No. 156842; Court of Appeals No. 339673.

PEOPLE v FULLER, No. 156846; Court of Appeals No. 332794.

PORTLAND TOWNSHIP v MERRYFIELD, No. 156851; Court of Appeals No. 339185.

STUEBNER v RIGHTER, No. 156859; Court of Appeals No. 334973.

PEOPLE v HIEB, No. 156860; Court of Appeals No. 332426.

PEOPLE v FLUHART, No. 156861; Court of Appeals Nos. 325949 and 334112.

PEOPLE v VEGA, No. 156862; Court of Appeals No. 333143.

PEOPLE v WILLIE SIMMS, No. 156880; Court of Appeals No. 333198.

PEOPLE v PIERCE, No. 156881; Court of Appeals No. 339729.

PEOPLE v CAVALLO, No. 156884; Court of Appeals No. 339814.

PEOPLE v JERMAINE JONES, No. 156886; Court of Appeals No. 333919.

PEOPLE v LORENZ, No. 156887; Court of Appeals No. 334171.

PEOPLE v FRANK HORTON, No. 156889; Court of Appeals No. 332972.

PEOPLE v NORRIS, No. 156895; Court of Appeals No. 339897.

PEOPLE v BLUHM, No. 156905; Court of Appeals No. 339798.

PEOPLE v MARVIN, No. 156907; Court of Appeals No. 338772.

PEOPLE v EZRA RODRIGUEZ, No. 156908; Court of Appeals No. 339141.

PEOPLE v KOSINSKI, No. 156919; Court of Appeals No. 332560.

PEOPLE v NEWHOUSE, No. 156920; Court of Appeals No. 334786.

PEOPLE v HILERY MAISON, No. 156939; Court of Appeals No. 332162.

PEOPLE v BALDRIDGE, No. 156955; Court of Appeals No. 333435.

PEOPLE v DIONTA WILLIAMS, No. 156956; Court of Appeals No. 340112.

PEOPLE v ANTHONY KEITH WILLIAMS, No. 156958; Court of Appeals No. 338970.

PEOPLE v ANDREW MAISON, No. 156971; Court of Appeals No. 332164.

PEOPLE v IRBY, No. 156977; Court of Appeals No. 334470.

PEOPLE v EVERSON, No. 156982; Court of Appeals No. 340576.

LUDWIG v PILLEN, No. 156984; Court of Appeals No. 339046.

PEOPLE v SAMUEL LEE, No. 156989; Court of Appeals No. 340401.

PEOPLE v FISHER, No. 156993; Court of Appeals No. 340526.

PEOPLE v TIMOTHY WRIGHT, No. 156998; Court of Appeals No. 333488.

PEOPLE v KEVIN WASHINGTON, No. 156999; Court of Appeals No. 340469.

PEOPLE v SOTO, No. 157001; Court of Appeals No. 339797.

PEOPLE v MICAH QUINN, No. 157014; Court of Appeals No. 326738.

PEOPLE v ALBERT JACKSON, No. 157015; Court of Appeals No. 333318.

PEOPLE v PENLEY, No. 157016; Court of Appeals No. 340594.

PEOPLE v STINEBACK, No. 157021; Court of Appeals No. 334777.

PEOPLE v LOPEZ-OCHOA, No. 157023; Court of Appeals No. 335302.

PEOPLE v MASROOR, Nos. 157024, 157025, and 157026; Court of Appeals Nos. 322280, 322281, and 322282.

PEOPLE v RUBEN SCOTT, No. 157028; Court of Appeals No. 333344.

PEOPLE v DEITRICH SANDERS, No. 157029; Court of Appeals No. 332895.

PEOPLE v HORNES, No. 157030; Court of Appeals No. 333886.

PEOPLE v LETIF ALEXANDER, No. 157036; Court of Appeals No. 333496.

PEOPLE v JOHN BROWN, No. 157055; Court of Appeals No. 334498.

PEOPLE v WINFIELD, No. 157063; Court of Appeals No. 334396.

PEOPLE v DUNBAR, No. 157064; Court of Appeals No. 333510.

PEOPLE v LEROY DAVIS, No. 157067; Court of Appeals No. 334595.

PEOPLE v BRIM, No. 157072; Court of Appeals No. 333473.

PEOPLE v SAVICKAS, No. 157073; Court of Appeals No. 334610.

PEOPLE v PHILLIPS, No. 157074; Court of Appeals No. 334852.

PEOPLE v CALHOUN, No. 157078; Court of Appeals No. 334254.

PEOPLE v DEREK BAILEY, No. 157098; Court of Appeals No. 332984.

RICHARDSON v SPARK INVESTMENT LLC, No. 157117; Court of Appeals No. 335150.

PEOPLE v JAMAINE WILLIAMS, No. 157141; Court of Appeals No. 341207.

PEOPLE v FARREN, No. 157159; Court of Appeals No. 326593.

PEOPLE v SHANANAQUET, No. 157216; Court of Appeals No. 339744.

Reconsideration Denied May 1, 2018:

PEOPLE v KEVIN HILL, No. 154716; Court of Appeals No. 333566. Summary disposition order entered at 501 Mich 949.

PEOPLE v KENNETH WILLIAMS, No. 155565; Court of Appeals No. 336612. Leave to appeal denied at 501 Mich 975.

PEOPLE v DEANGELO JONES, No. 155661; Court of Appeals No. 337231. Leave to appeal denied at 501 Mich 975.

PEOPLE v CHAPLIN, No. 156053; Court of Appeals No. 331190. Leave to appeal denied at 501 Mich 982.

PEOPLE v JERRY ANDERSON, No. 156142; Court of Appeals No. 337773. Leave to appeal denied at 501 Mich 951.

PEOPLE v BAZZI, No. 156176; Court of Appeals No. 338059. Leave to appeal denied at 501 Mich 951.

PEOPLE v KENNETH JACKSON, No. 156206; Court of Appeals No. 330429. Leave to appeal denied at 501 Mich 952.

ASHEN v ASSINK, No. 156265; Court of Appeals No. 331811. Leave to appeal denied at 501 Mich 952.

PEOPLE v WEIMER, No. 156286; Court of Appeals No. 330100. Leave to appeal denied at 501 Mich 952.

PEOPLE v WEIMER, No. 156288; Court of Appeals No. 335040. Leave to appeal denied at 501 Mich 952.

Summary Disposition May 4, 2018:

BROWN v CITY OF SAULT STE MARIE, No. 154851; Court of Appeals No. 330508. On January 10, 2018, the Court heard oral argument on the application for leave to appeal the October 20, 2016 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the November 10, 2015 order of the Chippewa Circuit Court granting defendants' motion for summary disposition. Plaintiff's notice of her intent to bring a claim under the highway exception to governmental immunity merely provided, without further elaboration, that she had suffered "severe and permanent injuries." Although this vague description refers to the injuries' severity and duration, the notice contains no information at all about the particular injury that plaintiff sustained. The statute requires that the notice must "specify . . . the injury sustained," MCL 691.1404(1), and therefore some description of the injury itself beyond merely classifying it as severe or permanent is required. *Tattan v Detroit*, 128 Mich 650, 652 (1901) ("The statute, in terms, requires that the nature of the injury shall be stated in this notice. Beyond the fact that it is an injury to the person, rather than to property, there is no attempt in this notice to state the nature of the injury at all.") Plaintiff claims that her notice of the injury sustained should be deemed to include certain documents referred to in, but not attached to, her notice. We need not reach the issue whether it is appropriate to consider documents not submitted with the notice itself because, in this case, plaintiff referred to those documents for the purpose of identifying witnesses, not to provide a description of the injury sustained. Therefore, consideration of those documents in this case would not change the outcome. We conclude that plaintiff's notice was insufficient on its face because it failed to specify the injury that plaintiff sustained in accordance with MCL 691.1404(1).

BERNSTEIN, J., would deny leave to appeal.

Leave to Appeal Granted May 4, 2018:

PEOPLE v JOEL DAVIS, No. 156406; Court of Appeals No. 332081. On order of the Court, the application for leave to appeal the July 13, 2017 judgment of the Court of Appeals is considered, and it is granted, limited to the issues: (1) whether the defendant's convictions under

MCL 750.81a(3) and MCL 750.84 violate double jeopardy; (2) whether MCL 750.81a and MCL 750.84 contain contradictory and mutually exclusive provisions such that the Legislature did not intend a defendant to be convicted of both crimes for the same conduct, compare *People v Miller*, 498 Mich 13, 18-26 (2015), with *People v Doss*, 406 Mich 90, 96-99 (1979); (3) whether the Court of Appeals erred in recognizing a rule against mutually exclusive verdicts in Michigan, see generally *United States v Powell*, 469 US 57, 69 n 8 (1984); *State v Davis*, 466 SW3d 49 (Tenn, 2015); and (4) whether the Court of Appeals erred in applying this rule to the facts of this case. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

We direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *People v Price* (Docket No. 156180).

We further order the Wayne Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint Michael L. Mittlestat 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.

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.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered May 4, 2018:

PEOPLE v BECK, No. 152934; Court of Appeals No. 321806. The appellant shall file a supplemental brief within 42 days of the date of this order, addressing: (1) the appropriate basis for distinguishing between permissible trial court consideration of acquitted conduct, see *People v Ewing (After Remand)*, 435 Mich 443, 451-452 (1990) (opinion by BRICKLEY, J.); *id*. at 473 (opinion by BOYLE, J.); see also *United States v Watts*, 519 US 148 (1997), and an impermissible "independent finding of defendant's guilt" by a trial court on an acquitted charge, see *People v Grimmett*, 388 Mich 590, 608 (1972), overruled on other grounds by *People v White*, 390 Mich 245, 258 (1973); see also *People v Fortson*, 202 Mich App 13, 21 (1993); and (2) whether the trial court abused its discretion by departing from the guidelines range, where the jury acquitted the defendant of murder, but the court departed based on its finding by a preponderance of the evidence that the defendant had perpetrated the killing. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental

brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

We further direct the Clerk to schedule the oral argument in this case for the same future session of this Court when it will hear oral argument in *People v Dixon-Bey* (Docket No. 156746).

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.

PEOPLE V DORIAN PRICE, No. 156180; Court of Appeals No. 330710. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the defendant's convictions under MCL 750.82 and MCL 750.84 violate double jeopardy; (2) whether MCL 750.82 and MCL 750.84 contain contradictory and mutually exclusive provisions such that the Legislature did not intend a defendant to be convicted of both crimes for the same conduct, compare *People v Miller*, 498 Mich 13, 18-26 (2015), with *People v Doss*, 406 Mich 90, 96-99 (1979); (3) whether the Court of Appeals in *People v Davis*, 320 Mich App 484 (2017), erred in recognizing a rule against mutually exclusive verdicts in Michigan, see generally *United States v Powell*, 469 US 57, 69 n 8 (1984); *State v Davis*, 466 SW3d 49 (Tenn, 2015); and (4) whether that rule is applicable to the facts of this case.

In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

We direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *People v Davis* (Docket No. 156406).

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.

PEOPLE V DIXON-BEY, No. 156746; reported below: 321 Mich App 490. The appellant shall file a supplemental brief within 42 days of the date of this order, addressing: (1) to what extent the sentencing guidelines should be considered to determine whether the trial court

abused its discretion in applying the principle of proportionality under *People v Steanhouse*, 500 Mich 453 (2017); and (2) whether, when a jury convicted the defendant of second-degree murder, the trial court abused its discretion in applying the principle of proportionality if it either (a) sentenced the defendant according to an independent finding that she committed first-degree murder; or (b) departed upward from the sentencing guidelines for second-degree murder based on facts established by a preponderance of the evidence that the jury did not find were established beyond a reasonable doubt. See MCL 777.36(2)(a); *People v Ewing (After Remand)*, 435 Mich 443 (1990); *People v Milbourn*, 435 Mich 630, 654 (1990).

In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

We further direct the Clerk to schedule the oral argument in this case for the same future session of this Court when it will hear oral argument in *People v Beck* (Docket No. 152934).

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 May 4, 2018:

HRAPKIEWICZ v WAYNE STATE UNIVERSITY BOARD OF GOVERNORS, Nos. 155895 and 155896; Court of Appeals Nos. 328215 and 330189.

MARKMAN, C.J. (*dissenting*). I respectfully dissent. I would grant leave to appeal to further consider defendant's argument concerning the proper causation standard for discrimination cases under the Civil Rights Act (CRA), MCL 37.2101 *et seq*.

MCL 37.2202(1)(a) of the CRA prohibits an employer from discriminating "against an individual . . . *because of* religion, race, color, national origin, age, sex, height, weight, or marital status." (Emphasis added.) This Court has been inconsistent in its interpretations of this standard. For instance, in *Hazle v Ford Motor Co*, 464 Mich 456 (2001), we explained that under MCL 37.2202(1)(a), "the ultimate factual inquiry made by the jury" is "whether consideration of a protected characteristic was *a motivating factor*, namely, whether it made a difference in the contested employment decision." *Id*. at 466 (emphasis added). However, in *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586 (2016), we explained that "we have interpreted the CRA to require

' "but for causation" or "causation in fact." ' " *Id*. at 606, quoting *Matras v Amoco Oil Co*, 424 Mich 675, 682 (1986). These interpretations of the CRA are inconsistent, as *Hecht* imposes a considerably higher causation standard than *Hazle*.

Defendant here sets forth the argument that the "because of" language found in MCL 37.2202(1)(a) requires the higher standard of "but for causation" identified in cases such as *Hecht*, not the lower standard of merely requiring "a motivating factor" identified in cases such as *Hazle*. In analogous contexts, the United States Supreme Court has recognized that Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq*., "explicitly authoriz[es] discrimination claims in which an improper consideration was 'a motivating factor' for an adverse employment decision," while the Age Discrimination in Employment Act (ADEA), 29 USC 621 *et seq*., "does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor." *Gross v FBL Fin Servs, Inc*, 557 US 167, 174 (2009). That Court explained that because the ADEA employs the words "because of," "[t]o establish a disparate-treatment claim under the plain language of the ADEA . . . a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Id*. at 176. Put simply, the Supreme Court recognized that there is a difference between the "a motivating factor" causation standard and the "but-for" causation standard, and because the ADEA requires "because of" causation, it imposes the "but-for" causation standard. *Gross* is noteworthy because MCL 37.2202(1)(a), as with the ADEA, employs the words "because of," not "a motivating factor."

Furthermore, the Court of Appeals for the Sixth Circuit has also recently observed that Michigan caselaw interpreting the "because of" causation standard under MCL 37.2202(1)(a), at least in age-discrimination cases, is inconsistent with Supreme Court caselaw by imposing the lower "motivating factor" standard of causation:

> The ADEA prohibits an employer from discharging an employee "because of such individual's age." Similarly, the [CRA] provides that an employer shall not discharge an employee "because of" age. Given this similar language, we have traditionally analyzed ADEA and [CRA] claims using the same causation standard. More recently, however, the Supreme Court has clarified that an ADEA plaintiff must demonstrate that his "age was the 'but-for' cause of the challenged adverse employment action." Michigan courts, on the other hand, have held that [a CRA] plaintiff can prove discrimination if his age was merely a "motivating," or "determining factor in the employer's decision." [*Lewis v Detroit*, 702 Fed Appx 274, 278 (CA 6, 2017) (citations omitted).]

I recognize, of course, that in cases concerning interpretation of the CRA, we are not bound to follow federal caselaw interpreting a federal antidiscrimination statute, and that is as it should be. *Haynie v Dep't of State Police*, 468 Mich 302, 319 (2003) ("[W]e disagree with the dissent's assertion that this Court is somehow bound to interpret Michigan's Civil

Rights Act in accordance with the federal courts' interpretation of the federal civil rights act . . . . [T]he Michigan Legislature was clearly not bound by the federal civil rights act."). Nonetheless, a "federal precedent may often be useful as guidance in this Court's interpretation of laws with federal analogues . . . ." *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 283 (2005). Given that the United States Supreme Court has interpreted the "because of" language in the ADEA as imposing "but-for" causation, *Gross*, 557 US at 176, I would grant leave to appeal to address whether the "because of" language in MCL 37.2202(1)(a) should be interpreted in a similar manner.

ZAHRA, J., joins the statement of MARKMAN, C.J.

BERNSTEIN, J., did not participate.

WILDER, J., did not participate because he was on the Court of Appeals panel.

CROMER V JIMMY'S GAS & GO, LLC, No. 156255; Court of Appeals No. 331494.

Leave to Appeal Denied May 9, 2018:

NYLAAN V WOLVERINE WORLD WIDE, INC, ET AL, Nos. 157589 through 157640; Court of Appeals Nos. 343023 through 343074.

PEOPLE V CARLSON, No. 157672; Court of Appeals No. 342353.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered May 11, 2018:

VAN BUREN CHARTER TOWNSHIP V VISTEON CORPORATION, No. 156018; reported below: 319 Mich App 538. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the Court of Appeals: (1) properly determined that a declaratory judgment was not ripe under MCR 2.605; and (2) properly interpreted the contract to determine that "defendant is not obligated to perform [under the contract] until . . . a shortfall has occurred, and . . . property taxes paid by defendant are inadequate for plaintiff to pay that portion of the bonds that was used to fund the Village." *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 548 (2017). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied May 11, 2018:

PEOPLE v ROBIN ROOT, No. 156658; Court of Appeals No. 331123.

MARKMAN, C.J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal. Instead, I would grant leave to consider more fully the circumstances that are properly considered in determining whether an initially noncustodial interrogation has been transformed in midstream into a "custodial interrogation" for the purposes of *Miranda v Arizona*, 384 US 436 (1966). More specifically, I would grant to consider the relevance in the instant case of the following particular factors cited by the Court of Appeals: (a) the allegedly "hostile, accusatory tone employed when [one officer] entered the interrogation room and engaged in an unveiling of all the incriminating evidence"; (b) the statement by one officer that the DNA and other evidence against defendant was "compelling," that he had "the prosecutor's office watching right now," and that "if you don't want to tell us [what happened], we've got enough right here to go ahead and charge [you] with first-degree murder"; and (c) the officers' failure to apprise defendant that "she was free to leave at any time." The costs of *Miranda* are substantial where it is properly invoked—in this instance resulting in the suppression of a confession to a cold-case murder—and I am not yet persuaded that the lower court's *Miranda* analysis was in all respects properly undertaken.

Summary Disposition May 16, 2018:

PEOPLE v LAVERE BRYANT, No. 154565; Court of Appeals No. 325569. On December 7, 2017, the Court heard oral argument on the application for leave to appeal the August 23, 2016 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the defendant's convictions and sentences.

Defendant's convictions arose from the robbery of a Family Dollar store in Dearborn and the shooting deaths of two store employees, Joseph Orlando and Brenna Machus. Orlando's body was found in the store. He had been shot in the head. Two days after Orlando was found dead, Machus's body was recovered from a nearby freeway service drive. She had also been shot. The police determined that both victims were killed with the same gun. Defendant, a former store employee, was soon identified as a suspect and subsequently charged with the robbery and murders.

The prosecution's theory at trial was that defendant committed the robbery, shot Orlando in the store, and abducted and sexually assaulted Machus before also shooting her. To prove its case, the prosecution successfully moved to admit other-acts evidence against defendant under MRE 404(b). This included past convictions for criminal sexual conduct in the second degree and assault with intent to do great bodily harm to a prostitute, evidence of an arrest for violating the Sex Offenders Registration Act, MCL 28.721 *et seq*., testimony evincing

sexual harassment of prior Family Dollar coworkers, and additional testimony indicating the sexual harassment of a 7-Eleven store employee.

The prosecution argued that the other-acts evidence would demonstrate motive and intent, and provide the jury with helpful context.

Even assuming the Court of Appeals correctly held that this evidence was admitted in violation of MRE 404(b), we disagree with the Court of Appeals insofar as it concluded that the admission of such evidence was harmful. We have previously made it clear that a defendant has the burden of showing that an error entitles him to a new trial. *People v Lukity*, 460 Mich 484, 495 (1999). To meet this burden, a defendant must demonstrate that " 'it is more probable than not that the error was outcome determinative.' " *People v Lyles*, 501 Mich 107, 117-118 (2017), quoting *Lukity*, 460 Mich at 496. A reviewing court must " 'focus[] on the nature of the error and assess[] its effect in light of the weight and strength of the untainted evidence' " when conducting this analysis. *Lukity*, 460 Mich at 495, quoting *People v Mateo*, 453 Mich 203, 215 (1996). Under this standard, an error is considered harmless if there is "overwhelming evidence of a defendant's guilt . . . ." *People v Dumas*, 454 Mich 390, 409 (1997); see also *Mateo*, 453 Mich at 220-221.

In this case, the evidence of defendant's guilt was undoubtedly overwhelming. He was linked to the robbery and murders by identification testimony, as well as by physical and circumstantial evidence. A significant number of witnesses identified him as the individual seen in a surveillance video leaving the store with Machus on the evening in question. Testimony also made it clear that defendant had been previously terminated as a store employee, giving him a motive. His DNA was found on a towel in the store, with no innocent explanation for its presence months after his dismissal. Fibers recovered from his car were similar to those from Machus's pants, and fibers on Machus's clothing were also comparable to those later found in defendant's vehicle. In the days after the crime, the police observed defendant disposing of trash bags, buying cleaning supplies, washing his car, and inquiring about having the interior of his vehicle professionally detailed despite having already cleaned it. This evidence strongly implies that defendant was trying to cover up a recent wrongdoing. Additionally, defendant was arrested in possession of a quantity of small-denomination bills similar to those taken from the Family Dollar store, circumstantially connecting him to the robbery.

Viewed in its entirety, proof of defendant's guilt was so great as to render the erroneous admission of other-acts evidence harmless. In coming to the opposite conclusion, the Court of Appeals found that the inadmissible evidence "was overwhelming and worked to deprive defendant of a fair trial." This conclusion was not the product of the correct legal standard, and the Court of Appeals erred by concluding that the lower court's error was harmful. Therefore, defendant's convictions and sentences must be reinstated.

MERCHAND v CARPENTER, No. 154622; Court of Appeals No. 327272. On March 6, 2018, the Court heard oral argument on the application for leave to appeal the August 2, 2016 judgment of the Court of Appeals. On

order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to that court for consideration of the other evidentiary challenges raised by plaintiff but not addressed by that court in its initial review of this case.

In this case, plaintiff filed suit alleging that defendant committed medical malpractice during surgery by negligently injuring her right hypoglossal nerve. After a trial, the jury found defendant not professionally negligent, and the trial court entered a judgment of no cause of action. Plaintiff appealed, challenging, among other things, the trial court's ruling prohibiting plaintiff from presenting testimony from her expert witness, Dr. Michael Morris, regarding parallels between defendant's recordkeeping in the instant case and his recordkeeping in other cases in which he had been sued for malpractice. In an offer of proof, Dr. Morris opined that in the other cases, like in the instant case, defendant failed to record complications that arose during surgery or related patient complaints. Dr. Morris also opined on the accuracy of defendant's surgical methods and about other instances of defendant's alleged malpractice.

The Court of Appeals majority reversed the trial court and remanded for a new trial, holding that Dr. Morris' testimony was admissible under MRE 404(b) to demonstrate defendant's scheme, plan, or system of creating medical records that did not accurately reflect his interactions with patients when surgeries resulted in complications. But as the dissenting judge recognized, plaintiff never argued in the trial court that this evidence was admissible for a proper purpose under MRE 404(b). *Merchand v Carpenter*, unpublished per curiam opinion of the Court of Appeals, issued August, 2, 2016 (Docket No. 327272), pp 2-3 n 3 (O'BRIEN, J., dissenting). The proponent of the evidence has the burden of establishing a proper, noncharacter purpose for its admission under MRE 404(b). See *People v Denson*, 500 Mich 385, 398 (2017). Because plaintiff here failed to make a cognizable argument under MRE 404(b) before the trial court, any failure to admit this evidence on that basis would not amount to an abuse of discretion. *Rock v Crocker*, 499 Mich 247, 255 (2016) ("A trial court does not abuse its discretion when its decision falls within the range of principled outcomes."). Therefore, we reverse the Court of Appeals' judgment and remand to that court for consideration of the other evidentiary challenges raised by plaintiff but not previously addressed.

PEOPLE V BRANDON CAIN, No. 156146; Court of Appeals No. 336623. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the December 13, 2016 order of the Wayne Circuit Court relating to Wayne CC: 12-003375-FC, because it does not address the issues raised in the motion for relief from judgment that the defendant filed in that case. We remand this case to the Wayne Circuit Court to address the issues in the defendant's motion for relief from judgment. The motions for miscellaneous relief are denied. We do not retain jurisdiction.

PEOPLE V BRIAN LEE, No. 156932; Court of Appeals No. 338341. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we

remand this case to the Wayne Circuit Court to address the issues in the defendant's motion for relief from judgment that the defendant filed in Wayne CC: 12-003376-FC, which were not addressed in the court's December 13, 2016 order denying the motion. We do not retain jurisdiction.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered May 16, 2018:

PEOPLE v MOSS, No. 156616; Court of Appeals No. 338877. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether adoptive siblings are related by blood or affinity. The brief shall address whether the proper definition of "affinity" is that found in *Bliss v Caille Bros Co*, 149 Mich 601 (1907), or *People v Armstrong*, 212 Mich App 121 (1995). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties 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. 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.

PEOPLE v MCBURROWS, No. 157200; reported below: 322 Mich App 404. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether Monroe County is a proper venue for the charge of delivery of a controlled substance causing death, MCL 750.317a. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties 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. 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.

PEOPLE v HARBISON, No. 157404; Court of Appeals No. 326105. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the prosecution's admission of Dr. N. Debra Simms's expert testimony that the victim suffered "probable pediatric sexual abuse" violated this Court's decision in *People v Peterson*, 450 Mich 349 (1995), and, if so, whether this was plain error requiring reversal of the defendant's convictions. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied May 16, 2018:

PEOPLE v TERRENCE MOORE, No. 156120; Court of Appeals No. 338077.

YOCHES v CITY OF DEARBORN, ET AL, Nos. 156357 through 156363; reported below: 320 Mich App 461.

PEOPLE v BRANDON CAIN, No. 156500; Court of Appeals No. 337966.

PARKER v DOE, No. 156675; Court of Appeals No. 332461.

In re BRODY CONSERVATORSHIP, No. 156689; reported below: 321 Mich App 332. On order of the Court, the application for leave to appeal the September 19, 2017 judgment 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.

We further note that the briefs filed by the parties and the amicus discuss three sentences that were included in the Court of Appeals September 19, 2017 slip opinion but are not included in the advance sheets version of the opinion, which was released after the parties and amicus filed their briefs in this Court. The slip opinion stated: "As Rhea's husband, Robert was an individual entitled to priority consideration. However, Robert was not entitled to consideration unless the probate court considered an independent fiduciary and found him or her unsuitable. Lyneis, as trustee and independent fiduciary, had statutory priority over Robert, despite Robert's marriage to Rhea. MCL 700.5409(1)." These sentences are omitted from the advance sheets version of the Court of Appeals opinion, and are therefore not part of that court's final published opinion.

PEOPLE v STAPELS, No. 156926; Court of Appeals No. 337933.

PEOPLE v BRIAN LEE, No. 156930; Court of Appeals No. 338342.

Summary Disposition May 18, 2018:

PEOPLE v TYWON HAMILTON, No. 156411; Court of Appeals No. 329845. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate those parts of the Court of Appeals judgment addressing whether the defendant preserved his challenge to the admissibility of hearsay testimony under MRE 803A on the ground that the child complainant's disclosure to the declarant was not the first corroborative statement and whether MRE 803A's notice requirement was satisfied. Because the record establishes that defense counsel articulated a specific objection on hearsay grounds, the Court of Appeals erred in holding that the issue was unpreserved. We remand this case to that court for reconsideration of the hearsay issue under the standard for preserved evidentiary error, see *People v Burns*, 494 Mich 104 (2013), and for consideration of whether (1) the prosecutor "made known" to the defendant "the particulars" of the MRE 803A statement, and (2) the defendant was given a "fair opportunity" to prepare to meet the statement, as required by MRE 803A. On remand, the Court of Appeals shall determine whether the testimony at issue was erroneously admitted under MRE 803A, and if so, whether, upon an examination of the entire cause, it is more probable than not that the preserved error was outcome-determinative. In all other respects, leave to appeal is denied.

Summary Disposition May 23, 2018:

PEOPLE v WILLIAM ALLEN, No. 155684; Court of Appeals No. 335745. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Alpena Circuit Court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), to determine: (1) whether the defendant was denied the effective assistance of appellate counsel on direct appeal due to counsel's failure to move for plea withdrawal pursuant to *People v Cole*, 491 Mich 325 (2012); and (2) whether the defendant is entitled to relief from judgment based on this claim. We further order the trial court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint counsel to represent the defendant at the evidentiary hearing. We do not retain jurisdiction.

WILDER, J., did not participate because he was on the Court of Appeals panel.

LUDWIG v LUDWIG, Nos. 157312 and 157313; reported below: 322 Mich App 266. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. In this case, the defendant's parenting time with the minor children was suspended in 2012. In January 2017, the Oakland Circuit Court ordered the defendant and the minor children to participate in a six-month reunification process. As part of this process, the circuit court's order first required the defendant and the children to participate in a reunification video conference under the in-person supervision of two therapists. The order provided that, following the initial video conference, the "fre-

quency, duration, and method of continued contact will be at the therapists' discretion." The circuit court expressly held that its order did not constitute a modification of the defendant's parenting time. The Court of Appeals affirmed, agreeing with the circuit court that its order did not modify parenting time. We conclude that the circuit court should have held an evidentiary hearing and considered the best interests of the children before entering the reunification order. See MCL 722.27a(1); *Pierron v Pierron*, 486 Mich 81, 93 (2010); *Shade v Wright*, 291 Mich App 17, 31-32 (2010). The circuit court's order left up to the unfettered discretion of the therapists the "frequency, duration, and method" of any additional contact between the defendant and the children for a six-month period following the initial video conference. We are persuaded that the circumstances of this case warrant a hearing to determine whether the reunification process authorized by the circuit court's order is in the children's best interests. See MCL 722.27a(1). Accordingly, we remand this case to the Oakland Circuit Court to conduct an evidentiary hearing for this purpose.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered May 23, 2018:

PAQUIN V CITY OF ST IGNACE, No. 156823; reported below: 321 Mich App 673. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the plaintiff's holding elective office with and being employed by an Indian tribe constitutes "any elective office or position of employment in local, state, or federal government" under Const 1963, art 11, § 8. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file supplemental briefs within 21 days of being served with the appellant's brief. The appellees shall also electronically file appendices, or in the alternative, stipulate to the use of the appendix filed by the appellant. Replies, if any, must be filed by the appellant within 14 days of being served with the respective appellee's brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied May 23, 2018:

PEOPLE V CHRISTOPHER MITCHELL, No. 156267; Court of Appeals No. 332266.

MCCORMACK, J. (*dissenting*). I respectfully dissent from the denial of leave. I would have remanded for resentencing before a different judge.

The first principle of our justice system is that judges are impartial and independent. *In re Bennett*, 403 Mich 178, 199 (1978) ("[A] judge, whether on or off the bench, is bound to strive toward creating and preserving the image of the justice system as an independent, impartial source of reasoned actions and decisions."); *In re Haley*, 476 Mich 180, 196 (2006) (stating that the court is "an institution that the people of this state must be able to hold in the highest regard"). When a judge

expresses his personal wish that the defendant had suffered a violent death instead of being arrested and convicted, the public's confidence in the rule of law is undermined. *In re Hocking*, 451 Mich 1, 13 (1996) ("A judge's mode of articulating a basis for decision may exhibit such a degree of antagonism or other offensive conduct that a single incident would indicate that impartial judgment is not reasonably possible."); *In re Simpson*, 500 Mich 533, 543 n 6 (2017) ("Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges."), quoting Michigan Code of Judicial Conduct Canon 2(A). This is not to say that there is no role for emotion (including anger, and even vengeance) at a sentencing hearing. But that is for the people personally affected by the defendant's crime and their representatives (such as the prosecutor) to express, not the person in the courtroom charged with ensuring the proceeding's evenhandedness.

I would remand the defendant's case for a sentencing hearing before a different judge, because "the importance of preserving the appearance of justice and fairness outweigh[s] considerations of waste and duplication." *People v Garvin*, 159 Mich App 38, 47 (1987). See also *In re Disqualification of Winkler*, 135 Ohio St 3d 1271, 1276 (2013); *United States v Navarro-Flores*, 628 F2d 1178, 1185 (CA 9, 1980).

Especially in these times, when our norms of public discourse appear under stress, judges, perhaps of all officials, should discharge their duties of office without rhetoric that would validly call into question judicial impartiality. I dissent from the court's denial because there is a ready remedy for the trial court's transgression—resentencing before a different judge. The stakes here are too great and the corrective step too easy.

BERNSTEIN, J., joins the statement of MCCORMACK, J.

PEOPLE v SEIGNEUERIE, No. 156677; Court of Appeals No. 332270.

Reconsideration Denied May 23, 2018:

BURNETT v AHOLA, No. 157049; Court of Appeals No. 338618. Summary disposition order entered at 501 Mich 1055.

Leave to Appeal Granted May 25, 2018:

PEOPLE v TUCKER, No. 152798; reported below: 312 Mich App 645. The parties shall include among the issues to be briefed: (1) whether the requirements of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., amount to "punishment," see *People v Earl*, 495 Mich 33 (2014), see also *Does # 1-5 v Snyder*, 834 F3d 696, 703-706 (CA 6, 2016), cert den sub nom *Snyder v John Does # 1-5*, 138 S Ct 55 (Oct 2, 2017); (2) whether requiring the defendant to register under SORA is an ex post facto punishment, where the registry has been made public, and other requirements enacted, only after the defendant committed the listed offense that required registration under MCL 28.723(1)(e), US Const, art I, § 10; Const 1963, art 1, § 10; and (3) whether it is cruel

and/or unusual punishment to require the defendant to register under SORA, US Const, Am VIII; Const 1963, art 1, § 16.

We direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *People v Snyder* (Docket No. 153696).

The Criminal Defense Attorneys of Michigan, the Prosecuting Attorneys Association of Michigan, and the American Civil Liberties Union 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.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered May 25, 2018:

PEOPLE v SNYDER, No. 153696; Court of Appeals No. 325449. We further order the Gratiot Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint the State Appellate Defender Office, 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.

The appellant shall file a supplemental brief within 42 days of the date of the order appointing counsel, or of the ruling that the defendant is not entitled to appointed counsel, addressing: (1) whether the requirements of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., amount to "punishment," see *People v Earl*, 495 Mich 33 (2014), see also *Does # 1-5 v Snyder*, 834 F3d 696, 703-706 (CA 6, 2016), cert den sub nom *Snyder v John Does # 1-5*, 138 S Ct 55 (Oct 2, 2017); and (2) whether the defendant's conviction pursuant to MCL 28.729 for failure to register under SORA is an ex post facto punishment, where the registry has been made public, and other requirements enacted, only after the defendant committed the listed offense that required him to register, US Const, art I, § 10; Const 1963, art 1, § 10. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

We direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *People v Tucker* (Docket No. 152798).

The Criminal Defense Attorneys of Michigan, the Prosecuting Attorneys Association of Michigan, and the American Civil Liberties Union 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.

HOME-OWNERS INSURANCE COMPANY v JANKOWSKI, No. 156240; Court of Appeals No. 331934. The appellants shall file a supplemental brief within 42 days of the date of this order addressing whether, to be eligible to receive personal protection insurance (PIP) benefits, they were required to register, in Michigan, the vehicle involved in the accident, and were thus obligated to maintain security for the payment of PIP benefits pursuant to MCL 500.3101 or be precluded from receiving such benefits by MCL 500.3113(b). In addition to the brief, the appellants shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellants' brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellants. A reply, if any, must be filed by the appellants within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Coalition Protecting Auto No-Fault, the Insurance Alliance of Michigan, the Negligence Law Section of the State Bar of Michigan, and the Michigan Association for Justice 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.

W A FOOTE MEMORIAL HOSPITAL v MICHIGAN ASSIGNED CLAIMS PLAN, No. 156622; reported below: 321 Mich App 159. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether: (1) this Court's decision in *Covenant Medical Center, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191 (2017), should be applied to this case; (2) the Court of Appeals correctly concluded that this Court's decision in *Pohutski v City of Allen Park*, 465 Mich 675, 696 (2002), has been "effectively repudiated" in the context of judicial decisions of statutory interpretation, see *Spectrum Health Hospitals v Farm Bureau Mut Ins Co of Michigan*, 492 Mich 503 (2012); *Wayne County v Hathcock*, 471 Mich 445, 484 n 98 (2004); *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 587 n 57 (2005); and (3) if *Pohutski* has not been effectively repudiated, whether the *Pohutski* framework should have been applied in *Spectrum*. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

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 May 25, 2018:

PEOPLE v WARE, No. 157319; Court of Appeals No. 333988.

HERMIZ v CITIZENS INSURANCE COMPANY OF AMERICA, No. 157724; Court of Appeals No. 342189.

Leave to Appeal Denied May 29, 2018:

PEOPLE v RONNIE KIRBY, No. 155453; Court of Appeals No. 327189.

PEOPLE v LEO EVANS, No. 155675; Court of Appeals No. 336555.

PEOPLE v SCOTT SMITH, No. 155899; Court of Appeals No. 336515.

PEOPLE v OLGREN, No. 156040; Court of Appeals No. 336540.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v RHYON WALKER, No. 156046; Court of Appeals No. 336730.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v RASON HORTON, No. 156084; Court of Appeals No. 337639.

PEOPLE v BURRELL CLARK, No. 156125; Court of Appeals No. 337839.

PEOPLE v MIX, No. 156126; Court of Appeals No. 337736.

PEOPLE v GIBSON, No. 156136; Court of Appeals No. 337347.

PEOPLE v WILLIE MOORE, No. 156166; Court of Appeals No. 337170.

PEOPLE v LINT, No. 156173; Court of Appeals No. 336936.

PEOPLE v SHERMAN, No. 156175; Court of Appeals No. 337850.

PEOPLE v ROBERT RUCKER, No. 156284; Court of Appeals No. 337141.

PEOPLE v RODNEY WILLIAMS, No. 156290; Court of Appeals No. 336644.

PEOPLE v KAIRI SANDERS, No. 156294; Court of Appeals No. 337025.

PEOPLE v SPADAFORE, No. 156334; Court of Appeals No. 338144.

PEOPLE v ROLARK, No. 156378; Court of Appeals No. 338566.

PEOPLE v JESSIE GREEN, No. 156396; Court of Appeals No. 337063.

PEOPLE v RICHEY, No. 156397; Court of Appeals No. 337073.

PEOPLE v NORMAN BROWN, No. 156425; Court of Appeals No. 330761.

PEOPLE v MARCOS MARTINEZ, No. 156437; Court of Appeals No. 336856.

PEOPLE v MORRIS, No. 156438; Court of Appeals No. 338053.

PEOPLE v TAECKENS, No. 156446; Court of Appeals No. 334002.

PEOPLE v RAYFORD, No. 156450; Court of Appeals No. 338268.

WILLIAMS v FANNIE MAE, No. 156452; Court of Appeals No. 332274.

PEOPLE v VINSON, No. 156492; Court of Appeals No. 337408.

PEOPLE v MARKUS EVANS, No. 156537; Court of Appeals No. 332362.

PEOPLE v DEMARCUS YOUNG, No. 156538; Court of Appeals No. 337986.

PEOPLE v RELERFORD, No. 156553; Court of Appeals No. 338278.

PEOPLE v BORNS, No. 156565; Court of Appeals No. 338697.

PEOPLE v BECKHAM, No. 156586; Court of Appeals No. 339364.

HANNAH v BLUE CROSS BLUE SHIELD OF MICHIGAN, No. 156591; Court of Appeals No. 331940.

PEOPLE v BOWMAN, No. 156598; Court of Appeals No. 339334.

PROSE v PROSE, Nos. 156639 and 156640; Court of Appeals Nos. 330886 and 331265.

PEOPLE v BAUGH, No. 156664; Court of Appeals No. 337811.

PEOPLE v DEMARCUS SIMMONS, No. 156665; Court of Appeals No. 332677.

PEOPLE v DONALD DALE, No. 156667; Court of Appeals No. 338383.

L J & S DEVELOPMENT, LLC v BOAR'S HEAD PROVISIONS COMPANY, INC, No. 156673; Court of Appeals No. 332379.

PEOPLE v ROZENSKI, No. 156679; Court of Appeals No. 338521.

PEOPLE v BOODY, No. 156691; Court of Appeals No. 337281.

PEOPLE v DAMIEN JACKSON, No. 156694; Court of Appeals No. 337713.

PEOPLE v RANDY POOKY SMITH, No. 156696; Court of Appeals No. 337388.

PEOPLE v WALLAGER, No. 156698; Court of Appeals No. 338628.

PEOPLE v BROWNLEE, No. 156719; Court of Appeals No. 339094.

PEOPLE v TUBBS, No. 156736; Court of Appeals No. 339888.

PEOPLE v JOHNNY DAVIS, No. 156744; Court of Appeals No. 332009.

PEOPLE v JOSEPH HILL, No. 156748; Court of Appeals No. 333957.

HASSAN v MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION, No. 156788; Court of Appeals No. 332738.

BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceeding.

KING v SAWYERS, No. 156792; Court of Appeals No. 332178.

PEOPLE v BENDELE, No. 156821; Court of Appeals No. 334677.

PEOPLE v BESHIRES, No. 156856; Court of Appeals No. 340267.

PEOPLE v VASQUEZ, No. 156857; Court of Appeals No. 333697.

JON JON'S, INC v CITY OF WARREN, No. 156868; Court of Appeals No. 332504.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v RODERICK WILLIAMS, Nos. 156870 and 156871; Court of Appeals Nos. 333678 and 333679.

KOTSIS v CITY OF ROYAL OAK AND HELME v CITY OF CLAWSON, Nos. 156875 and 156876; Court of Appeals Nos. 334149 and 334388.

PEOPLE v BREDY, No. 156879; Court of Appeals No. 339964.

PEOPLE v MCRUNELS, No. 156888; Court of Appeals No. 339353.

REESE v WEINER & ASSOCIATES, PLLC, No. 156896; Court of Appeals No. 332142.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v BUFORD, Nos. 156903 and 156904; Court of Appeals Nos. 338221 and 338222.

PEOPLE v ROSE, No. 156917; Court of Appeals No. 339873.

PEOPLE v SWILLEY, No. 156934; Court of Appeals No. 333629.

KITCHEN v GUS HARRISON CORRECTIONAL FACILITY WARDEN, No. 156937; Court of Appeals No. 335499.

PEOPLE v LEE MILLER, No. 156945; Court of Appeals No. 339807.

PEOPLE v BASHARA, No. 156946; Court of Appeals No. 326324.

PEOPLE v AVENDT, No. 156949; Court of Appeals No. 332538.

In re GROSHON ESTATE AND TRUST, No. 156961; Court of Appeals No. 332445.

PEOPLE v KNAUSS, No. 156965; Court of Appeals No. 329200.

PEOPLE v LADARIUS WELCH, No. 156978; Court of Appeals No. 333571.

PEOPLE v NOLEN, No. 156997; Court of Appeals No. 332236.

PEOPLE v CRON, No. 157009; Court of Appeals No. 340173.

PEOPLE v BLACKMON, No. 157027; Court of Appeals No. 332644.

PEOPLE v TERRELL SMITH, No. 157033; Court of Appeals No. 333316.

PEOPLE v MARK TAYLOR, No. 157045; Court of Appeals No. 340613.

PEOPLE v COMBS, No. 157057; Court of Appeals No. 340603.

PEOPLE v SWITZER, No. 157086; Court of Appeals No. 335259.

PEOPLE v PETER PETERSON, No. 157089; Court of Appeals No. 329195.

PEOPLE v DEONTE ROBINSON, No. 157094; Court of Appeals No. 340233.

PEOPLE v RUTLEDGE, No. 157099; Court of Appeals No. 340695.

PEOPLE v WINTERS, No. 157102; Court of Appeals No. 334381.

SIMONS v VISTA GRANDE VILLA, No. 157109; Court of Appeals No. 337216.

PEOPLE v MEADE, No. 157113; Court of Appeals No. 340724.

PEOPLE v CORNETT, No. 157114; Court of Appeals No. 340796.

PEOPLE v SPENCER, No. 157118; Court of Appeals No. 336605.

PEOPLE v KELTY, No. 157120; Court of Appeals No. 334295.

PEOPLE v GRICE, No. 157122; Court of Appeals No. 334248.

PEOPLE v MACKSEY, No. 157127; Court of Appeals No. 333846.

PEOPLE v ANTONIO WEBSTER, No. 157133; Court of Appeals No. 333636.

PEOPLE v VEGH, No. 157140; Court of Appeals No. 333242.

PEOPLE v DAJUAN ROBINSON, No. 157150; Court of Appeals No. 334812.

PEOPLE v ROGERICK ALLEN, No. 157172; Court of Appeals No. 334787.

PEOPLE v CHARLES COX, No. 157178; Court of Appeals No. 334463.

PEOPLE v EDWARDS, No. 157179; Court of Appeals No. 333343.

PEOPLE v COWDREY, No. 157185; Court of Appeals No. 333859.

PEOPLE v DAVID CLARK, No. 157189; Court of Appeals No. 340979.

PEOPLE v O'BRIEN, No. 157195; Court of Appeals No. 333543.

PEOPLE v DEMETRIUS MITCHELL, No. 157198; Court of Appeals No. 335112.

PEOPLE v MALCOLM BENSON, No. 157201; Court of Appeals No. 333454.

CITY OF SOUTHFIELD v JORDAN DEVELOPMENT COMPANY, LLC, No. 157220; Court of Appeals No. 333970.

PEOPLE v SALAM, No. 157225; Court of Appeals No. 334875.

PEOPLE v HEINEY, No. 157230; Court of Appeals No. 333363.

PEOPLE v AMSDILL, No. 157231; Court of Appeals No. 334572.

PEOPLE v LEAF, No. 157240; Court of Appeals No. 341604.

PEOPLE v JORGENSEN, No. 157250; Court of Appeals No. 334225.

PEOPLE v DWAYNE SMITH, No. 157281; Court of Appeals No. 341552.

MICHIGAN HEAD & SPINE INSTITUTE, PC v GEICO INDEMNITY COMPANY, No. 157289; Court of Appeals No. 340273.

PEOPLE v DEZMEN JONES, No. 157302; Court of Appeals No. 334955.

PEOPLE v JOSHUA MITCHELL, No. 157351; Court of Appeals No. 334244.

TOTH v STEWART, No. 157414; Court of Appeals No. 339928.

PEOPLE v MIX, No. 157561; Court of Appeals No. 340763.

Superintending Control Denied May 29, 2018:

REFFITT v ATTORNEY GRIEVANCE COMMISSION, No. 156951.

Reconsideration Denied May 29, 2018:

PEOPLE v MARCO MARTIN, No. 153986; Court of Appeals No. 331011. Leave to appeal denied at 501 Mich 980.

WILDER, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v MCGLOTHAN, No. 155682; Court of Appeals No. 334817. Leave to appeal denied at 501 Mich 975.

PEOPLE v LEWIS, No. 155888; Court of Appeals No. 335896. Leave to appeal denied at 501 Mich 981.

HOOGENSTYN v ORTHOPAEDIC ASSOCIATES OF GRAND RAPIDS, PC, No. 156220; Court of Appeals No. 332063. Leave to appeal denied at 501 Mich 976.

FJN LLC v PARAKH, No. 156224; Court of Appeals No. 331889. Leave to appeal denied at 501 Mich 976.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

Motion to Permit a Document to be Deemed Filed Nunc Pro Tunc Denied May 29, 2018:

LANSING PARKVIEW, LLC v K2M GROUP, LLC, No. 156023; Court of Appeals No. 328507. On order of the Court, the motion for an order permitting a document to be deemed filed *nunc pro tunc* on the date of the unsuccessful electronic transmission is denied. On March 5, 2018, the Court entered an order denying the defendants' application for leave

to appeal. The defendants electronically filed a motion for reconsideration on March 27, 2018, at 12:50 a.m. The Clerk refused to accept the late-filed motion for reconsideration. MCR 7.311(G). The defendants allege that their attorneys attempted to timely transmit the motion electronically at 11:38 p.m. on March 26, 2018, but the transmission failed because of an unexpected interruption in network functionality at the attorneys' law firm. Under some circumstances, the Court may "enter an order permitting a document to be deemed filed *nunc pro tunc* on the date of the unsuccessful transmission." Administrative Order 2014-23, 497 Mich cxxviii (2014). But such relief is warranted only where the moving party proves that "the transmission failed because of the failure of the TrueFiling system to process the electronic document or because of the court's computer system's failure to receive the document." *Id*. at cxxix. Here, the transmission failure or delay was caused by the filer's equipment or system. The defendants have not alleged or shown any error in the TrueFiling system or the Court's computer system. Accordingly, the defendants are not entitled to the relief requested.

Summary Disposition May 30, 2018:

PEOPLE v STEVEN JACKSON, No. 156214; Court of Appeals No. 337403. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Shiawassee Circuit Court for consideration of defendant's claim regarding the trial court's authority to order the collection of the $1,159 in costs and assessments. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v BUNKLEY, No. 156624; Court of Appeals No. 338390. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court Chief Judge. Because defendant appears to have made a request under MCR 2.003(D)(3)(a)(i), the chief judge was required to decide the motion de novo.

PEOPLE v BRYAN, No. 157796; Court of Appeals No. 342998. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The motion for stay is granted. 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.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered May 30, 2018:

STACKER v LAUTREC, LTD, No. 155120; Court of Appeals No. 328191. By order of June 7, 2017, the application for leave to appeal the

October 27, 2016 judgment of the Court of Appeals was held in abeyance pending the decision in *Martin v Milham Meadows I Ltd Partnership* (Docket No. 154360). On order of the Court, leave to appeal having been denied in *Martin* on March 9, 2018, 501 Mich 1002 (2018), the application is again considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.305(H)(1).

The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether genuine issues of material fact preclude summary disposition on the plaintiff's claim that the driveway at issue was not "fit for the use intended by the parties." MCL 554.139(1)(a). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Michigan Association for Justice, Michigan Defense Trial Counsel, Inc., and the Negligence Law Section of the State Bar 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.

GENESEE COUNTY DRAIN COMMISSIONER JEFFREY WRIGHT v GENESEE COUNTY, No. 156579; reported below: 321 Mich App 74. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the Court of Appeals erred in holding that the plaintiff's claim of unjust enrichment was not subject to governmental immunity under the Governmental Tort Liability Act, MCL 691.1401 *et seq*., see *In re Bradley Estate*, 494 Mich 367 (2013), because it was based on the equitable doctrine of implied contract at law. See *Restatements of the Law 3d, Restitution and Unjust Enrichment* (2011). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

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.

PEOPLE v HAMMERLUND, No. 156901; Court of Appeals No. 333827. The appellant shall file a supplemental brief within 42 days of the date of

this order addressing whether it is constitutionally permissible for a police officer to compel, coerce, or otherwise entice a person located in his or her home to enter a public place to perform a warrantless arrest. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. 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. 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.

Leave to Appeal Denied May 30, 2018:

DYSON v CITY OF DETROIT, No. 156308; Court of Appeals No. 331256.

In re SADORSKI ESTATE, No. 156409; Court of Appeals No. 332416.

PEOPLE v SCOE WALTON, No. 156704; Court of Appeals No. 333309.

VULIC v DEPARTMENT OF TREASURY, No. 156725; reported below: 321 Mich App 471.

PEOPLE v O'NEILL, No. 156845; Court of Appeals No. 339959.

RAY v SWAGER, No. 156854; reported below: 321 Mich App 755.

PEOPLE v WYANT, No. 157070; Court of Appeals No. 339450.

PEOPLE v FIELD, No. 157105; Court of Appeals No. 339526.

PROTECTING MICHIGAN TAXPAYERS v BOARD OF STATE CANVASSERS, No. 157761; reported below: 324 Mich App 240.

Summary Disposition June 1, 2018:

THOMPSON v GIBSON, No. 156501; Court of Appeals No. 333755. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of Section II.B. of the judgment of the Court of Appeals addressing the plaintiff's premises-liability claim, and we remand this case to the Court of Appeals to address this Court's decision in *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1 (2016). We do not retain jurisdiction.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered June 1, 2018:

PEOPLE v HAROLD WALKER, No. 155198; Court of Appeals No. 327063. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the defendant is entitled to a new trial based on the trial judge's comments to the jury in lieu of the standard "deadlocked jury" instruction, M Crim JI 3.12; (2) whether Offense Variable 19 (OV 19), MCL 777.49, was improperly assigned 10 points for interference with the administration of justice, see *People v Hardy*, 494 Mich 430, 438 (2013), and *People v Adams*, 430 Mich 679, 689 (1988); and (3) if OV 19 was misscored, whether the defendant is entitled to resentencing before a different judge based on the judge's verbal exchange with the defendant at sentencing. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. 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. 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.

PEOPLE v MCKEEVER, No. 156161; Court of Appeals No. 331594. The parties shall file their supplemental briefs within 42 days of the date of this order addressing: (1) whether the defendant is entitled to a new trial based on either trial court error or ineffective assistance of counsel, where the defense witness that was not produced at trial also did not appear at the post-conviction evidentiary hearing; and (2) whether the witness's failure to appear at the hearing is attributable to the defense under the circumstances of this case. In addition to its supplemental brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). Each party may file a response brief within 14 days of being served with the other party's supplemental brief. Additionally, at that time, the appellee/cross-appellant shall electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. 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. 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.

The motion for bond pending appeal is denied.

PEOPLE v ALONZO CARTER, No. 156606; Court of Appeals No. 331142. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the defendant was properly assigned 10 points under Offense Variable 12 (OV 12), MCL 777.42. See *People v Light*, 290 Mich App 717 (2010). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. 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. 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.

WIGFALL v CITY OF DETROIT, No. 156793; reported below: 322 Mich App 36. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether strict or substantial compliance is required with the notice provision contained within MCL 691.1404(2), compare *Rowland v Washtenaw County Road Commission*, 477 Mich 197 (2007), with *Plunkett v Dep't of Transportation*, 286 Mich App 168 (2009); (2) whether the plaintiff's notice failed to comply with MCL 691.1404(2) under either a strict or substantial compliance standard; (3) whether an individual described in MCR 2.105(G)(2) can delegate the legal authority to accept lawful process under MCL 691.1404(2), see 1 Mich Civ Jur Agency § 1 (2018); and (4) whether the defendant should be estopped from asserting that the statutory notice requirement was not met. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

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.

We further direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *West v City of Detroit* (Docket No. 157097).

WEST v CITY OF DETROIT, No. 157097; Court of Appeals No. 335190. The appellant shall file a supplemental brief within 42 days of

the date of this order addressing: (1) whether strict or substantial compliance is required with the notice provision contained within MCL 691.1404(2), compare *Rowland v Washtenaw County Road Commission*, 477 Mich 197 (2007), with *Plunkett v Dep't of Transportation*, 286 Mich App 168 (2009); (2) whether the plaintiff's notice failed to comply with MCL 691.1404(2) under either a strict or substantial compliance standard; (3) whether the Legislature's use of the word "shall" in MCL 691.1404(1) and the word "may" in MCL 691.1404(2) indicates that service on an individual is not the only method of serving proper notice; and (4) whether an individual described in MCR 2.105(G)(2) can delegate the legal authority to accept lawful process under MCL 691.1404(2), see 1 Mich Civ Jur Agency § 1 (2018). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

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.

We further direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *Wigfall v City of Detroit* (Docket No. 156793).

Leave to Appeal Denied June 1, 2018:

PEDERSON v MEIJER STORES, INC, No. 156475; Court of Appeals No. 328855.

MARKMAN, C.J. (*dissenting*). I respectfully dissent from the order denying leave to appeal and instead would vacate the Court of Appeals' analysis regarding causation and remand to the trial court so that it can address this issue in the first instance.

This products-liability action arises out of injuries sustained by plaintiff when his hunting tree stand collapsed, resulting in an approximately 18- to 20-foot fall. Plaintiff alleged that he had purchased the tree stand from defendant and that, being on clearance sale, it did not come with its original packaging, instruction manual, or on-product warning label. The missing instruction manual warned against leaving the tree stand up for more than one season because it could place stress on the brackets and chain securing the stand. Plaintiff also testified that he left the stand up for at least one year prior to the hunting season during which he was injured and that he was not aware the stand could fail if he left it up for that period of time. His complaint alleged that a bracket on the stand apparently became bent, "allowing the chain to become dislodged and the tree stand to separate from the tree and fall to the ground." Among other things, plaintiff alleged that defendant

owed him a duty to exercise reasonable care and that defendant had made an express warranty concerning the product under MCL 600.2947(6), which provides as follows:

> (6) In a product liability action, a seller other than a manufacturer is not liable for harm allegedly caused by the product unless either of the following is true:
>
> (a) The seller failed to exercise reasonable care, including breach of any implied warranty, with respect to the product and that failure was a proximate cause of the person's injuries.
>
> (b) The seller made an express warranty as to the product, the product failed to conform to the warranty, and the failure to conform to the warranty was a proximate cause of the person's harm.

Defendant moved for summary disposition under MCR 2.116(C)(10), which motion the trial court denied in part and granted in part. As to MCL 600.2947(6)(b), the court granted summary disposition in defendant's favor, but as to MCL 600.2947(6)(a), the court held that "there exists a genuine issue of material fact on [defendant's] alleged failure to exercise reasonable care, limited to the assertion that the tree stand did not come with instructions or an on-product warning label." Although the trial court specifically addressed MCL 600.2947(6)(b) and the "reasonable care" part of MCL 600.2947(6)(a), it never addressed the causation part of the latter, which requires that a seller's failure to exercise reasonable care must be "a proximate cause of the person's injuries."

Defendant appealed, arguing that it was entitled to summary disposition under MCL 600.2947(6)(a) because plaintiff could not establish causation. However, the Court of Appeals rejected this argument, holding that a "question of fact exists with respect to whether [defendant's] failure to include product materials and on-product warning labels with the sale of the product was a proximate cause of plaintiff's injuries." To reach this conclusion, the court relied on the following evidence: (1) plaintiff's testimony that he was a "safety-conscious" individual; (2) his testimony that had the warning label been "right in front of [him], [he] would have read it"; (3) his testimony that he would not have left the tree stand up for more than one season had he known that it could fail if it were left up for more than a season; and (4) testimony that the tree stand was missing the on-product label, which contained "the manufacturer[']s name, the year the stand was manufactured, the manufacturer's address, and the model number, as well as a . . . safety warning."

These reasons are insufficient, in my judgment, to demonstrate the existence of a genuine issue of material fact regarding causation. First, although plaintiff testified that he was "safety conscious," he acknowledged that he would not have read the instruction manual even if the tree stand had come with one. Second, although plaintiff testified that he would have read the on-product warning label if it "were right in front of [him]," the label that was missing from the product did not contain a warning about leaving the tree stand up for more than one

season. Rather, the safety warning on the label merely warned against exceeding the weight limit of 300 pounds and advised users to wear the fall-arrest system while using the product. The instruction manual was the only missing source of information that contained the warning about leaving the tree stand up for more than one season, a document that plaintiff specifically acknowledged he would not have read. As a result, it does not appear that the presence of either an on-product warning label or an instruction manual would have prevented plaintiff from leaving the tree stand up for more than one year. Therefore, I would vacate this part of the judgment of the Court of Appeals.

Although I believe the Court of Appeals' causation analysis was flawed, the trial court itself never specifically addressed the causation issue. Although defendant raised the issue, it was not the focus of the parties' arguments in the trial court. Furthermore, the arguments in this regard were poorly developed, and the Court of Appeals focused only on a single aspect of plaintiff's claim: the missing on-product warning label as it related to leaving the tree stand up for more than one season. In my view, it would be beneficial for the trial court to fully address the causation issue. Therefore, in addition to vacating the causation analysis of the Court of Appeals, I would remand to the trial court for an initial ruling on this issue.

ZAHRA and WILDER, JJ., join the statement of MARKMAN, C.J.

PEOPLE v CARVER, No. 156668; Court of Appeals No. 328157.

WILDER, J. (*dissenting*). I dissent from the order denying leave to appeal. Rather, I would reverse the judgment of the Court of Appeals and reinstate defendant's conviction and sentence of first-degree criminal sexual conduct, MCL 750.520b(1)(a) and (2)(b). The lower courts erred in concluding that trial counsel rendered ineffective assistance of counsel. Defendant failed to establish his burden that trial counsel's performance fell below an objective standard of reasonableness and that there was a reasonable probability that, absent the alleged error, the result of the proceeding would have been different. See *People v Vaughn*, 491 Mich 642, 669 (2012).

As to the issue of trial counsel's performance, the Court of Appeals majority found that, had trial counsel consulted with an expert on child suggestibility, "it is virtually certain" that such an expert could have provided him with the tools he needed to rebut testimony by an expert or an investigator suggesting that it is a rare case in which a child makes a false report. Further, the Court of Appeals found that had trial counsel consulted with an expert, he would have educated himself on the issues at play and would have been in a better position to evaluate the evidence and determine whether the sexual assault occurred or occurred in the manner described by the victim.

In my view, both lower courts overlooked the crucial facts as testified to at the *Ginther*[1] hearing and compounded the error by analogizing this case to the factually distinguishable cases of *People v Ackley*, 497 Mich 381 (2015), and *People v Trakhtenberg*, 493 Mich 38 (2012).

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

"*Strickland* [*v Washington*, 466 US 668 (1984)] itself rejected the notion that the same investigation will be required in every case." *Cullen v Pinholster*, 563 US 170, 195 (2011). In fact, "[i]t is '[r]are' that constitutionally competent representation will require 'any one technique or approach.' " *Id*. (citation omitted; second alteration in original). "Under *Strickland*, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Hinton v Alabama*, 571 US 263, ___; 134 S Ct at 1088 (2014) (quotation marks and citation omitted).

Here, trial counsel testified that he met with his superiors at length about the upcoming trial and sought their advice on whether to utilize an expert. Counsel reviewed at least one study and weighed the advantages and disadvantages of putting an expert on the stand. It was only *after* he conducted an investigation and sought counsel from his superiors that trial counsel made the informed decision not to consult with and call an expert on child suggestibility. This is precisely the type of case that is virtually unchallengeable under *Strickland*. See *id*. In my opinion, the lower courts ignored well-rooted *Strickland* principles, and improperly reviewed the case with the benefit of hindsight. See *People v Unger*, 278 Mich App 210, 242-243 (2008) ("We will not substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence.").

As to the issue of prejudice, I largely agree with the dissent and merely write to make an additional point. I think it is important to remind attorneys and the lower courts that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 US at 694. "That requires a 'substantial,' not just 'conceivable,' likelihood of a different result." *Cullen*, 563 US at 189 (citation omitted).

Here, the Court of Appeals majority found that an expert "could have" explained how a child of the victim's age is susceptible to suggestion and that trial counsel "could have plausibly argued" the victim made a false report even though the victim may have honestly believed her recollection was true. In my opinion, the majority was merely conjecturing on what might have happened had trial counsel employed the strategy that it found best suited, and not whether, in the face of the whole record, a substantial likelihood of a different result existed.

Accordingly, I would conclude that defendant failed to establish his burden in demonstrating trial counsel rendered ineffective assistance of counsel entitling him to a new trial, reverse the judgment of the Court of Appeals, and reinstate defendant's conviction and sentence.

ZAHRA, J., joins the statement of WILDER, J.

PEOPLE v ANTHONY DEAN JONES, Nos. 157106 and 157107; Court of Appeals Nos. 333572 and 335157.

Motion to File an Application for Leave to Appeal in Excess of the Page Limitation Denied June 1, 2018:

PEOPLE v DOUGLAS CORNELL JACKSON, No. 157835; Court of Appeals No. 342075. On order of the Chief Justice, the motion of defendant-appellant to file an application for leave to appeal in excess of the page limitation is denied. The only issue reviewable by this Court at this time is whether the Court of Appeals erred in dismissing the defendant-appellant's delayed application for leave to appeal on jurisdictional grounds because he failed to file it within the time period required by MCR 7.205(G)(3). The substantive issues in the defendant-appellant's application that cause it to exceed the page limitation cannot be reviewed by this Court on their merits. The defendant-appellant shall file a substitute application for leave to appeal within 35 days of the date of this order addressing the jurisdictional issue only. Failure to timely file the substitute application will result in the administrative dismissal of this case.

Leave to Appeal Denied June 6, 2018:

RUDD v CITY OF NORTON SHORES, No. 157879; Court of Appeals No. 343759.

Summary Disposition June 8, 2018:

In re BRODY LIVING TRUST, No. 156670; reported below: 321 Mich App 304. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Section II of the Court of Appeals opinion, and we remand this case to the Court of Appeals for reconsideration of its standing analysis. On remand, the Court of Appeals should consider whether the terms "child" and "beneficiary" in MCL 700.1105 are modified by the phrase "and any other person that has a property right in or claim against a trust estate." If so, then the Court of Appeals shall consider whether Cathy Deutchman is an "interested person" under this reading of the statute. The Court of Appeals may also consider the arguments made in this Court by the Probate and Estate Planning Section of the State Bar of Michigan, including that Cathy Deutchman has standing in light of MCR 5.125(C)(33)(g) and MCL 700.7603(2) and is a present (not contingent) beneficiary of the trust. 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.

Leave to Appeal Denied June 8, 2018:

PEOPLE v MICHAEL HAMILTON, No. 156552; Court of Appeals No. 319980.

MCCORMACK, J. (*dissenting*). I respectfully dissent from the order denying leave to appeal. The defendant's trial included extensive speculative and prejudicial testimony from an "expert" prosecution

witness. Admission of that testimony radically changed that trial in a way that may have rendered it fundamentally unfair. I would grant leave to appeal to consider whether the error in admitting that testimony prejudiced the defendant. While I am not typically predisposed to second-guess the Court of Appeals' harmless-error analysis, see *People v Lyles*, 501 Mich 107, 159 (2017) (MCCORMACK, J., dissenting), I find this case to be one in which the trial court's decision may have denied the defendant a fair trial.

The prosecution charged the defendant with first-degree premeditated murder, assault with intent to commit murder, two counts of unlawfully driving away an automobile, and two counts of possessing a firearm during the commission of a felony. The defendant presented an insanity defense triggered by the defendant's prescription medicine, Adderall. The prosecutor's theory of the case evolved throughout the trial, and as the case neared its end, one primary theory was that the defendant had an opiate addiction and needed money to sustain his habit. Thus, the theory was that the defendant had shot the victim in order to rob him to obtain money for drugs. To support this theory, the prosecution called a certified addiction counselor, Rosemary Heise.

The trial court ruled that Heise satisfied the requirements for an expert witness in MRE 702 and that her testimony would be allowed as an expert in the area of substance abuse and addiction. Heise, who had never met the defendant or interviewed his family or friends and had no information about the defendant's alleged crimes, proceeded to tell the jury quite a lot about the defendant. For example, she opined that she "diagnosed" the defendant as an "active addict" because he had a documented episode of Vicodin abuse, that "active addicts" steal and are violent, and that the defendant would seek out drugs to pacify his addiction "at all costs." She further opined that the defendant was probably still using Vicodin at the time of the offenses (despite the absence of any evidence to support such a claim) and that it was "highly unlikely" the defendant could stop using Vicodin without going through a treatment program. And she stated in her report on the defendant, again without any evidence to support her speculation, "I wonder if Mr. Hamilton wasn't snorting" his Adderall. This report was admitted at trial.

The jury convicted the defendant as charged. On appeal, a divided Court of Appeals panel affirmed his convictions. The majority declined to address whether the trial court had erred by admitting Heise's testimony, concluding error if any was harmless. Dissenting Judge SHAPIRO disagreed, concluding both that the admission of Heise's testimony was error and that the error prejudiced the defendant. We vacated the portion of the Court of Appeals opinion addressing Heise's testimony and remanded for reconsideration.

On remand, the same majority concluded that the trial court had erred by admitting Heise's testimony, but that the error was harmless. Judge SHAPIRO again dissented.

I believe this Court should grant leave to appeal to give close consideration to whether the Court of Appeals erred by finding Heise's testimony to be harmless. Significantly, the prosecutor used her testi-

mony to argue to the jury that the defendant "was nothing but a run of the mill drug addict, out of money, out of drugs, looking for his next fix" when he murdered the victim.[1] Heise's testimony alone supported that argument, meaning that the prosecutor's theory of the case presented to the jury in closing argument had no foundation whatsoever. As Judge SHAPIRO noted, the defendant's lack of motive was a key element of his insanity defense, and the erroneous admission of Heise's testimony provided the only basis for the prosecution to rebut that element. I think this question deserves this Court's attention. I therefore respectfully dissent from the majority's decision to deny leave to appeal.

BERNSTEIN, J., joins the statement of MCCORMACK, J.

WAGNER V FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN, No. 156669; reported below: 321 Mich App 251.

MARKMAN, C.J. (*dissenting*). I respectfully dissent. I would grant leave to appeal to consider whether the Court of Appeals correctly determined that the insurance contract at issue "irreconcilably conflicted" regarding the amount of time plaintiff had to file suit for uninsured motorist (UM) benefits.

On May 17, 2010, plaintiff was injured in an automobile accident when her car was struck from behind by a vehicle driven by Conor Lewis. On May 2, 2013, plaintiff filed suit against Lewis for negligence. While that suit was pending, Lewis's insurer—defendant—filed a declaratory judgment action seeking a ruling that it had no duty to reimburse Lewis in the negligence action because of a policy exclusion, and on June 23, 2014, summary disposition was granted in defendant's favor. On August 20, 2014, plaintiff filed the instant suit against Farm Bureau (also her insurer) seeking UM benefits under her policy. Farm Bureau moved for summary disposition, arguing that plaintiff's suit was untimely because it was filed more than three years after the date of the accident. The trial court denied this motion, and the Court of Appeals affirmed. *Wagner v Farm Bureau Mut Ins Co of Mich*, 321 Mich App 251 (2017).

The issue here is whether plaintiff's suit for UM benefits is barred by the contractual period of limitations. As this Court has explained:

> Uninsured motorist insurance permits an injured motorist to obtain coverage from his or her own insurance company to the extent that a third-party claim would be permitted against the uninsured at-fault driver. Uninsured motorist coverage is optional; it is not compulsory coverage mandated by the no-fault act. Accordingly, the rights and limitations of such coverage are

[1] The prosecutor painted that picture repeatedly throughout her closing argument, repeatedly restating the "out of money, out of drugs" points and arguing that the defendant "must have thought he hit the jackpot" in encountering the victim (citing the victim's expensive jewelry and the BMW he was driving as the reason).

> purely contractual and are construed without reference to the no-fault act. [*Rory v Continental Ins Co*, 473 Mich 457, 465-466 (2005) (citations omitted).]

An unambiguous contractual provision must be enforced "as written unless the provision would violate law or public policy." *Id*. at 470. A contractual term is only "ambiguous" if the contract is "*equally* susceptible to more than a single meaning," *Barton-Spencer v Farm Bureau Life Ins Co of Mich*, 500 Mich 32, 40 (2017) (emphasis added), or if two provisions of the contract "*irreconcilably* conflict with each other," *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467 (2003) (emphasis added). "[A] finding of ambiguity is to be reached only after 'all other conventional means of [ ] interpretation' have been applied and found wanting." *Mayor of the City of Lansing v Pub Serv Comm*, 470 Mich 154, 165 (2004), quoting *Klapp*, 468 Mich at 474.

The contract at issue specifically addresses the amount of time plaintiff has to bring suit against Farm Bureau seeking UM benefits:

> 3. Time Limitation for Action Against Us
>
> Any person seeking Uninsured Motorist Coverage must:
>
> a. present the claim for compensatory damages in compliance with all the Duties After an Accident or Loss listed on page 4 of this policy and all other terms and conditions of this coverage and policy; and
>
> b. present to us a written notice of the claim for Uninsured Motorist Coverage within three years after the accident occurs.
>
> *A suit against us for Uninsured Motorist Coverage may not be commenced later than three years after the accident that caused the injuries being claimed.* [Emphasis added.]

This provision (the "three-year filing limitation") clearly prohibits plaintiff from filing a suit seeking UM benefits "later than three years after the accident that caused the injuries being claimed." However, the Court of Appeals concluded that the contract was "ambiguous" on this point because other provisions "irreconcilably conflicted." Specifically, the court noted that the contract defines an "uninsured automobile" as:

> a. an auto operated on a public highway:
>
> (1) to which no bodily injury liability policy or bond applies:
>
> (a) at the time of accident; and
>
> (b) in at least the minimum amounts required by the Financial Responsibility Laws in the State of Michigan; [or]
>
> * * *
>
> (3) insured by a company that has issued a written denial of coverage that has been sustained by final court action, or to which we agree in writing[.]

The Court of Appeals held that plaintiff could not have sustained a claim for UM benefits within three years after the accident, as Lewis's vehicle was not an "uninsured automobile" until the declaratory judgment was entered against Lewis more than three years after the accident, and therefore that the contract's definition of "uninsured automobile" "irreconcilably conflicted" with the three-year filing limitation, rendering the contract "ambiguous" regarding when such a suit must be maintained.

I question this conclusion. These provisions seemingly address two separate requirements: (a) *when* a claim must be brought; and (b) what must be *shown* to obtain benefits. That plaintiff must show that the other vehicle was uninsured to recover UM benefits does not necessarily affect the amount of time she has to bring suit. Rather, it may be that plaintiff simply bore the burden, by whatever means available, to establish the predicate for her UM claim within three years after the accident occurred. Thus, I do not see how these two provisions "irreconcilably conflict."

The Court of Appeals also reasoned that its finding of ambiguity was supported by an additional contractual provision providing:

> Failure to perform any duty or to give any notice required does not invalidate [plaintiff's] claim if [plaintiff] show[s] that it was not reasonably possible to perform such duty or give such notice promptly or within such time otherwise specified in this policy, and that [plaintiff] performed the duty or submitted the notice as soon as reasonably possible.

The Court of Appeals explained that this provision (the "reasonably possible" provision) created an "ambiguity" regarding "whether the UM filing limitations could be tolled." *Wagner*, 321 Mich App at 261.

Implicit in the court's reasoning is its premise that the "reasonably possible" provision applies to the three-year filing limitation. However, I question whether this limitation can reasonably be characterized as setting forth a "duty" that a claimant is "required" to perform under the contract that is subject to the reasonably possible provision. Rather, the provision is written in the form of a prohibition, ("A suit against us for Uninsured Motorist Coverage *may not be commenced* later than three years after the accident that caused the injuries being claimed"), rather than as an affirmative "duty" that one is "required" to perform in order to recover. (Emphasis added.) Accordingly, I believe there is a reasonable argument that the "reasonably possible" provision is not applicable to the filing limitation at all.

Even assuming that the "reasonably possible" provision *does* apply to the three-year filing limitation, I question whether it *conflicts* with the filing limitation. The filing limitation could be read as the general requirement while the "reasonably possible" provision could be read as *excusing* a "failure to perform" in a timely matter. In other words, these provisions could possibly be harmonized such that a claimant must bring suit within three years after the accident occurred *unless* it was not "reasonably possible to perform such duty . . . within such time

otherwise specified in this policy . . . .” Thus, I am not certain that the “reasonably possible” provision and the limitation are in irreconcilable conflict.

A genuine “ambiguity” is rare because “a diligent application of the rules of interpretation will normally yield a ‘better,’ albeit perhaps imperfect, interpretation of the” contract at issue. *Mayor*, 470 Mich at 166. Because I am not yet persuaded that this is one of those rare cases involving an ambiguous contractual term in which there is an “irreconcilable conflict,” I would grant leave to appeal to ascertain whether the Court of Appeals should have resolved the motion for summary disposition on the basis of the actual language of the contract rather than remanding for further factual development in light of its findings of “ambiguity.”

ZAHRA and WILDER, JJ., join the statement of MARKMAN, C.J.

In re LETTS, Nos. 157788, 157790, and 157789; Court of Appeals Nos. 337432, 338755, and 338619.

In re LETTS, No. 157794; Court of Appeals No. 337432.

Leave to Appeal Denied June 13, 2018:

O’BRIEN v D’ANNUNZIO, No. 157865; Court of Appeals No. 343115.

Leave to Appeal Before Decision by the Court of Appeals Denied June 13, 2018:

ELLISON v DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 157880; Court of Appeals No. 344091.

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the Supreme Court
(other than orders entered in cases before the Court)
of general interest to the bench and bar of the state.

Order Entered September 20, 2017:

PROPOSED AMENDMENT OF MCR 2.602.

On order of the Court, this is to advise that the Court is considering alternative amendments of Rule 2.602 of the Michigan Court Rules. Alternative A was previously published by the Court; Alternative B was developed after the public comment period expired. It is the Court's hope that by publishing both proposals together, the relative merits of each approach will be fully explored.

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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 to the text are indicated in underlining
and deleted text is shown by strikeover.]

ALTERNATIVE A

RULE 2.602. ENTRY OF JUDGMENTS AND ORDERS.

(A) [Unchanged.]

(B) Procedure of Entry of Judgments and Orders. An order or judgment shall be entered by one of the following methods:

(1)-(4) [Unchanged.]

(5) Upon presentation to the court of a proposed judgment that is otherwise lawful, signed, and approved by the parties bound by the judgment or their counsel of record, and if an action is pending between those parties or was pending previously.

(a) If so provided in the proposed judgment, no notice to the opposing party of submission for entry is required, and submission of the judgment to the court for entry shall serve to reopen the prior case if closed.

(b) If the proposed judgment does not provide for entry without prior notice to the debtor, the submitting party must file a motion and give

notice to the debtor under MCR 2.107(C) at least 14 days before the date of the motion hearing. The presenting party shall file and serve a notice of hearing for entry of the proposed judgment. If the debtor does not file and serve specific objections within that time, the court shall enter the judgment.

(c) The proposed judgment must be accompanied by an affidavit of the submitting party or its counsel averring as to the basis for entry of the judgment.

(d) Service of the entered judgment shall be as provided for in the judgment or else in accordance with MCR 2.602(D) and the manner prescribed in MCR 2.105. Within 21 days of service, the judgment debtor may file a motion to challenge the propriety of the entry of the judgment or the calculation of the judgment amount. The motion must be heard within 14 days of filing. The filing of such a motion does not extend the stay of MCR 2.614(A)(1) or prevent the court from enjoining the transfer of assets under MCR 2.621(C). The court may modify or set aside the judgment or enter such other relief as it deems appropriate.

(C)-(D) [Unchanged.]

ALTERNATIVE B

(A)-(B) [Unchanged.]

(C) Conditional Dismissal. The court may enter a consent order for conditional dismissal under the following conditions:

(1) A consent order for conditional dismissal shall be signed and approved by all parties and shall clearly state the terms of the settlement agreement and provide for an order for reinstatement of the case and entry of judgment if defendant defaults on the terms of the settlement agreement.

(2) If the defendant defaults on the terms of the settlement agreement, the plaintiff may seek entry of an order for reinstatement of the case and entry of judgment.

(a) To obtain an order for reinstatement of the case and entry of judgment, the plaintiff shall file with the court an affidavit stating that the defendant defaulted on the terms of the settlement agreement.

(b) Plaintiff shall serve a copy of an affidavit of non-compliance on defendant at defendant's current address listed in the court records and file proof of service with the court.

(c) The affidavit shall be accompanied by a notice to defendant that an order for reinstatement and for entry of judgment is being submitted to the court for entry if no written objections to its accuracy or completeness are filed with the court clerk within 14 days after service of the notice. Unless defendant requests a hearing within 14 days after service of the notice, an order for reinstatement of the case and entry of judgment shall be signed by the court and entered.

(d) A request for hearing must state with specificity the reasons that an order for reinstatement of the case and entry of judgment should not enter.

(e) The court shall set a hearing to determine whether the defendant has complied with the settlement agreement and mail notice of that hearing to all parties.

(3) For the purposes of any statute of limitation, an action conditionally dismissed under this rule is deemed to have been initiated on date the original complaint was properly filed.

(4) All parties to a conditional dismissal bear the affirmative duty to inform the court with jurisdiction over that case of any change of address until the terms of the settlement agreement have been satisfied.

(C)-(D) [Unchanged but relettered as (D) and (E).]

Staff Comment: The proposed amendments of MCR 2.602(B) would provide procedural rules regarding entry of consent judgments. Alternative A was submitted by the Representative Assembly of the State Bar of Michigan and was previously published for comment. Alternative B was developed by the Michigan District Judges Association and the Michigan Creditors Bar Association as an alternative to the published version.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Office of Administrative Counsel in writing or electronically by January 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-29. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered October 17, 2017:

PROPOSED ADOPTION OF MCR 3.808.

On order of the Court, this is to advise that the Court is considering an addition of Rule 3.808 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

RULE 3.808. FINALIZING ADOPTION; FINDINGS OF COURT.

Before entering a final order of adoption, the trial court shall determine that the adoptee is not the subject of any pending proceedings on rehearing or reconsideration, or on appeal from a decision to terminate parental rights. The trial court shall make the following findings on the record:

> That any appeal of the decision to terminate parental rights has reached disposition; that no appeal, application for leave to appeal, or motion for rehearing or reconsideration is pending; and that the time for all appellate proceedings in this matter has expired.

Staff Comment: The proposed addition of Rule 3.808 is consistent with § 56 of the Michigan Adoption Code, MCL 710.56. This new rule arises out of *In re JK*, 468 Mich 202 (2003), and *In re Jackson*, 498 Mich 943 (2015), which involved cases where a final order of adoption was entered despite pending appellate proceedings involving the adoptee children. Although the Michigan Court of Appeals has adopted a policy to suppress in its register of actions and online case search tool the names of children (and parents) who are the subject of appeals from proceedings involving the termination of parental rights, this information remains open to the public. Therefore, in order to make the determination required of this new rule, a trial court may contact the clerk of the Michigan Court of Appeals, the Michigan Supreme Court, or any other court where proceedings may be pending.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Office of Administrative Counsel in writing or electronically by February 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-26. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered October 17, 2017:

PROPOSED ADOPTION OF MCR 3.810.

On order of the Court, this is to advise that the Court is considering adoption of a new Rule 3.810 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

RULE 3.810. TRANSCRIPTS FOR PURPOSES OF APPEAL.

In an appeal following the involuntary termination of the parental rights of a putative father, if the court finds that the respondent is financially unable to pay for the preparation of transcripts for appeal, the court must order transcripts prepared at public expense.

Staff Comment: The proposed new rule would require a court to provide an indigent putative father whose rights are terminated under the Adoption Code with transcripts for the purposes of appeal, similar to the requirement in MCR 3.977(J) for putative fathers whose rights are terminated under the Juvenile Code.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Office of Administrative Counsel in writing or electronically by February 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-13. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered October 17, 2017:

PROPOSED AMENDMENT OF MCR 7.212.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.212 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.212. BRIEFS.

(A)-(B) [Unchanged.]

(C) Appellant's Brief; Contents. The appellant's brief must contain, in the following order:

(1)-(7) [Unchanged.]

(8) The relief, stating in a distinct, concluding section the order or judgment requested; ~~and~~

(9) A signature.; and

(10) Only as provided in section (J) of this rule, an appendix.

(D)-(I) [Unchanged.]

(J) Appendix.

(1) The purpose of an appendix is to permit the parties to prepare and transmit to the court copies of those portions of the record deemed necessary to an understanding of the issues presented.

(2) In all civil cases (except those pertaining to child protection proceedings, including termination of parental rights, and non-criminal delinquency proceedings under chapter XIIA of the Probate Code and adoptions under chapter X), and in all appeals from administrative agencies, except those described in section (J)(6) of this rule, the appellant shall file and serve an appendix no later than 14 days after the date the principal brief is filed. The appellant's appendix shall contain a table of contents and copies of the following documents if they exist:

(a) The judgment or order(s) appealed from, including any written opinion, memorandum, findings of fact and conclusions of law stated on the record, in conjunction with the judgment or order(s) appealed from;

(b) A copy of the trial court docket sheet;

(c) The relevant pages of any transcripts cited in support of the appellant's position on appeal. Where appropriate, the appellant may attach pages preceding and succeeding the page cited if helpful to provide context to the citation. If a complete trial, deposition, or administrative transcript is filed, the index to such transcript must be included;

(d) If a jury instruction is challenged, a copy of the instruction, any portion of the transcript containing a discussion of the instruction, and any relevant request for the instruction; and

(e) Any other exhibit, pleading, or other evidence that was submitted to the trial court and that is relevant and necessary for the Court to consider in deciding the appeal. Briefs submitted in the trial court are not required to be included in the appendix unless they pertain to a contested preservation issue.

For material that is subject to an existing protective order, or for evidence that is not subject to such an order, but which contains information that is confidential or privileged, the procedures of MCR 7.211(C)(9) apply.

(3) The appellee shall file and serve an appendix with its responsive brief only if the appellant's appendix does not contain all the informa-

tion set forth in section (J)(2) of this rule. The appellee's appendix shall not contain any of the documents contained in the appellant's appendix, but shall only contain additional information described in section (J)(2) that is relevant and necessary to the determination of the issues raised in the appeal.

(4) Each volume of any appendix shall contain no more than 250 pages. The table of contents shall identify each document with reasonable definiteness, and indicate the volume and page of the appendix where the document is located. The cover to the appendix shall indicate in bold type whether it is the "Appellant's Appendix" or "Appellee's Appendix."

(a) For a paper appendix, each document shall also be tabbed. A paper appendix shall be bound separate from the brief.

(b) If an appendix is to be filed electronically, it must be filed as an independent .pdf file or a series of independent .pdf files. The table of contents for electronically filed appendixes shall contain bookmarks, linking to each document in the appendix.

(5) In cases involving more than one appellant or appellee, including cases consolidated for appeal, to avoid duplication each side shall, where practicable, file a joint rather than separate appendixes.

(6) This subsection does not apply to appeals arising from the Michigan Public Service Commission in which the record is available on the Commission's e-docket. In those cases, the parties shall cite to the document number and relevant pages.

(7) Failure to comply with any part of this rule may result in monetary sanctions against the attorney that failed to comply.

Staff Comment: The proposed amendment of MCR 7.212 was submitted by the Court of Appeals. Proposed amendments of MCR 7.212 would require an appellant to file an appendix with specific documents within 14 days after filing the appellant's principal brief. The proposal is intended to identify for practitioners the key portions of the record that the Court deems necessary for thorough and efficient review of the issues on appeal.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-25. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered October 17, 2017:

PROPOSED AMENDMENTS OF MCR 3.977 and 6.425.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.977 and Rule 6.425 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.977. TERMINATION OF PARENTAL RIGHTS.

(A)-(I) [Unchanged.]

(J) Respondent's Rights Following Termination.

(1) Advice. Immediately after entry of an order terminating parental rights, the court shall advise the respondent parent orally or in writing that:

(a) The respondent is entitled to appellate review of the order.

(b) If the respondent is financially unable to provide an attorney to perfect an appeal, the court will appoint an attorney and furnish the attorney with the ~~portions of the~~ complete transcript and record of all proceedings ~~the attorney requires to appeal~~.

(c)-(d) [Unchanged.]

(2) [Unchanged.]

(3) Transcripts. If the court finds that the respondent is financially unable to pay for the preparation of transcripts for appeal, the court must order the complete transcripts of all proceedings prepared at public expense.

(K) [Unchanged.]

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A)-(F) [Unchanged.]

(G) Appointment of Lawyer; Trial Court Responsibilities in Connection with Appeal.

(1) [Unchanged.]

(2) Order to Prepare Transcript. The appointment order also must

(a) direct the court reporter to prepare and file, within the time limits specified in MCR 7.210, the complete transcript of all proceedings, and

~~(i) the trial or plea proceeding transcript,~~

~~(ii) the sentencing transcript, and~~

~~(iii) such transcripts of other proceedings, not previously transcribed, that the court directs or the parties request, and~~

(b) provide for the payment of the reporter's fees.

The court must promptly serve a copy of the order on the prosecutor, the defendant, the appointed lawyer, the court reporter, and the Michigan Appellate Assigned Counsel System. If the appointed lawyer timely requests additional transcripts that were not in the initial order, the trial court shall order such transcripts within 14 days after receiving the request.

(3) [Unchanged.]

Staff Comment: The proposed amendments of MCR 3.977(J) and MCR 6.425(G) were submitted by the Court of Appeals. The proposed amendments would require the production of the complete transcript in criminal appeals and appeals from termination of parental rights proceedings when counsel is appointed by the court. The proposed amendments would codify existing practice in many courts, and the Court of Appeals believes they would promote proper consideration of appeal issues and eliminate unnecessary delays to the appellate process.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-08. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered October 17, 2017:

PROPOSED AMENDMENT OF MCR 3.903.

On order of the Court, this is to advise that the Court is considering an amendment of Rules 3.903 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 to the text are indicated in underlining and deleted text is shown by strikeover.]

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.]

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

(4)-(27) [Unchanged.]

(B)-(F) [Unchanged.]

Staff Comment: The proposed amendment of MCR 3.903 would make juvenile guardianship information public. This change would resolve the conflict between the child protective proceeding social file (which is considered nonpublic) and the juvenile guardianship file (which is public) and would make the rule consistent with current court practices.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Office of Administrative Counsel in writing or electronically by February 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-18. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Orders Entered October 17, 2017:

PROPOSED AMENDMENTS OF MCR 2.410 and 2.411 and PROPOSED ADOPTION OF MCR 3.970.

On order of the Court, this is to advise that the Court is considering an amendment of Rules MCR 2.410 and 2.411 of the Michigan Court Rules

and adoption of MCR 3.970. 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2.410. ALTERNATIVE DISPUTE RESOLUTION.

(A) Scope and Applicability of Rule; Definitions.

(1) [Unchanged.]

(2) For the purposes of this rule, alternative dispute resolution (ADR) means any process designed to resolve a legal dispute in the place of court adjudication, and includes settlement conferences ordered under MCR 2.401; case evaluation under MCR 2.403; mediation under MCR 2.411; domestic relations mediation under MCR 3.216; child protection mediation under MCR 3.974; and other procedures provided by local court rule or ordered on stipulation of the parties.

(B)-(F) [Unchanged.]

RULE 2.411. MEDIATION.

(A) Scope and Applicability of Rule; Definitions.

(1) This rule applies to cases that the court refers to mediation as provided in MCR 2.410. MCR 3.216 governs mediation of domestic relations cases. MCR 3.970 governs mediation in child protective proceedings.

(2) [Unchanged.]

(B)-(G) [Unchanged.]

RULE 3.970. CHILD PROTECTION MEDIATION.

(A) Scope and Applicability of Rule; Definitions.

(1) This rule applies to the mediation of child protective proceedings.

(2) "Mediation" includes dispute resolution processes in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement. A mediator or facilitator has no authoritative decision-making power.

(B) ADR Plan. Each trial court that submits child protective proceedings to mediation processes under this rule shall either incorporate the process into its current ADR plan, or if the court does not have an approved ADR plan, adopt an ADR plan by local administrative order under MCR 2.410(B).

(C) Order for Mediation.

(1) At any stage in the proceedings, after consultation with the parties, the court may order that a case be submitted to mediation.

(2) Unless a court first conducts a hearing to determine whether mediation is appropriate, the court shall not refer a case to mediation if the parties are subject to a personal protection order or other protective order. The court may order mediation without a hearing if a protected party requests mediation.

(3) Unless the specific rule under which the case is referred provides otherwise, in addition to other provisions the court considers appropriate, the order shall:

(a) specify, or make provision for selection of, the mediation provider; and

(b) provide time limits for initiation and completion of the mediation process.

(4) The order may require attendance at mediation proceedings as provided in subrule (D).

(D) Objections to Mediation. A party may object to an order to mediate by filing a motion.

A motion must be decided before the parties meet at a mediation session.

(E) Attendance at Mediation Proceedings.

(1) Attendance of Counsel. The court may direct that the attorneys representing the parties attend mediation proceedings. If the attorney representing a party is unable to attend, another attorney associated with the representing attorney may attend, but must be familiar with the case.

(2) Presence of Parties. The court may direct that the parties to the action and other persons:

(a) be present at the mediation proceeding or be immediately available by some other means at the time of the proceeding; and

(b) have information and authority adequate for responsible and effective participation in the proceeding for all purposes.

The court's order may specify whether the availability is to be in person or by other means.

(3) Except for legal counsel, the parties may not bring other persons to the mediation session unless permission is first obtained from the mediator, after notice to opposing counsel.

(4) Failure to appear. The failure of a party to appear in accordance with this rule may be considered a contempt of court.

(F) Selection of the Mediator.

(1) The parties may stipulate to the selection of a mediator. A mediator selected by agreement of the parties need not meet the qualifications set forth in subrule (H). The court must appoint a mediator stipulated to by the parties, provided the mediator is willing to serve within a period that would not interfere with the court's scheduling of the case. If the parties do not stipulate to a particular mediator, the court may select a Community Dispute Resolution Program (CDRP) center or other mediator who meets the requirements of subrule (H).

(2) The rule for disqualification of a mediator is the same as that provided in MCR 2.003 for the disqualification of a judge. The mediator must promptly disclose any potential basis for disqualification.

(G) Scheduling and Mediation Process.

(1) Scheduling. The order referring the case for mediation shall specify the time within which the mediation is to be completed. A copy of the order shall be sent to each party, the CDRP center or the mediator selected. Upon receipt of the court's order, the CDRP center or mediator shall promptly confer with the parties to schedule mediation in accordance with the order. The mediator may direct the parties to submit in advance, or bring to the mediation, documents or summaries providing information about the case.

(2) The mediator must make reasonable inquiry as to whether either party has a history of a coercive or violent relationship with the other party. Throughout the mediation process, the mediator must make reasonable efforts to screen for the presence of coercion or violence that would make mediation physically or emotionally unsafe for any participant or that would impede achieving a voluntary and safe resolution of issues. A reasonable inquiry includes the use of the domestic violence screening protocol for mediators provided by the State Court Administrative Office as directed by the Supreme Court.

(3) Mediation Process. The mediator shall discuss with the parties and counsel, if any, the facts and issues involved. Mediation participants may ask to meet separately with the mediator throughout the mediation process. The mediation will continue until: an agreement is reached, the mediator determines that an agreement is not likely to be reached, the end of the first mediation session, or until a time agreed to by the parties. Additional sessions may be held as long as it appears to the mediator that the process may result in an agreement.

(4) Following their attendance at a mediation session, a party may withdraw from mediation without penalty at any time.

(5) Completion of Mediation. Within two days after the completion of the mediation process, the CDRP center or the mediator shall so advise the court, stating only: the date of completion of the process, who appeared at the mediation, whether an agreement was reached, and whether further mediation proceedings are contemplated. If an agreement was reached, the CDRP center or the mediator shall submit the agreement to the court within 14 days of the completion of mediation.

(6) Agreements reached in mediation are not binding unless the terms are incorporated in an order of the court or placed on the record.

(7) Confidentiality. Confidentiality in the mediation process is governed by MCR 2.412. However, previously uninvestigated allegations of abuse or neglect identified during the mediation process are not confidential and may be disclosed.

(H) Qualification of Mediators.

(1) To be eligible to serve as a mediator in child protection cases, a person must meet the following minimum qualifications:

(a) Complete a general civil or domestic relations mediation training program approved by the State Court Administrator providing the generally accepted components of mediation skills;

(b) Have one or more of the following:

(i) Juris doctor degree, graduate degree in conflict resolution or a behavioral science, or 5 years of experience in the child protection field; or

(ii) 40 hours of mediation experience over two years, including mediation, co-mediation, observation, and role-playing in the context of mediation.

(c) Upon completion of the training required under subrule (H)(1)(a), observe two general civil or domestic relations mediation proceedings conducted by an approved mediator, and conduct one general civil or domestic relations mediation to conclusion under the supervision and observation of an approved mediator.

(d) Complete a 15-hour advanced training program on child protection mediation practice and an 8-hour training program on domestic violence screening approved by the State Court Administrator.

(2) Approved mediators are required to complete 8 hours of advanced mediation training during each 2-year period.

(3) Additional requirements may not be imposed upon mediators.

Staff Comment: The proposed amendments of MCR 2.410 and MCR 2.411 and adoption of the new MCR 3.970 would provide explicit authority for judges to order mediation in child protection proceedings.

The staff comment is not authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-19. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered November 1, 2017:

PROPOSED AMENDMENTS OF MCR 3.804, 3.971, AND 3.977 AND PROPOSED ADOPTION OF MCR 3.809.

On order of the Court, this is to advise that the Court is considering an amendment of Rules 3.804, 3.971, and 3.977 and addition of new Rule 3.809 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 will also be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts/mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.804. CONSENT AND RELEASE.

(A) Contents and Execution of Consent or Release.; Indian Child.

In addition to the requirements of MCL 710.29 or MCL 710.44, if a parent of an Indian child intends to voluntarily consent to adoptive placement or the termination of his or her parental rights for the express purpose of adoption pursuant to MCL 712B.13, the following requirements must be met:

(1)-(4) [Unchanged.]

(B) Hearing. on Consent to Adopt.

(1)-(3) [Unchanged.]

(C) Notice of Child Support Obligation.

(1) Before executing a release, as part of the explanation of the parent's legal rights, the parent shall be informed that the obligation to support the child will continue until a court of competent jurisdiction modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated by operation of law.

(2) Before executing the consent, as part of the explanation of the parent's legal rights, the parent shall be informed that the obligation to support the child will continue until a court of competent jurisdiction modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated by operation of law.

(3) Failure to provide required notice under this subsection does not affect the obligation imposed by law or otherwise establish a remedy or cause of action on behalf of the parent.

(CD) [Relettered by otherwise unchanged.]

RULE 3.809. NOTICE FOLLOWING INVOLUNTARY TERMINATION OF PARENTAL RIGHTS.

(A) If the parental rights of a parent whose identity and whereabouts are known are involuntarily terminated, the court shall notify the parent, either orally or in a writing, that the obligation to support the child will continue until a court of competent jurisdiction modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated by operation of law.

(B) If the whereabouts of a parent are unknown, the notice required by subsection (A) may be provided in a notice of hearing provided pursuant to MCR 3.802(C).

(C) Failure to provide required notice under this subsection does not affect the obligation imposed by law or otherwise establish a remedy or cause of action on behalf of the parent.

RULE 3.971. PLEAS OF ADMISSION OR NO CONTEST.

(A) [Unchanged.]

(B) Advice of Rights and Possible Disposition. Before accepting a plea of admission or plea of no contest, the court must advise the respondent on the record or in a writing that is made a part of the file:

(1)-(4) [Unchanged.]

(5) if parental rights are subsequently terminated, the obligation to support the child will continue until a court of competent jurisdiction modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated by operation of law. Failure to provide required notice under this subsection does not affect the obligation imposed by law or otherwise establish a remedy or cause of action on behalf of the parent.

(C) [Unchanged.]

RULE 3.977. TERMINATION OF PARENTAL RIGHTS.

(A)-(I) [Unchanged.]

(J) Respondent's Rights Following Termination.

(1) Advice. Immediately after entry of an order terminating parental rights, the court shall advise the respondent parent orally or in writing that:

(a)-(d) [Unchanged.]

(e) The respondent's obligation to support the child will continue until a court of competent jurisdiction modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated by operation of law. Failure to provide required notice under this subsection does not affect the obligation imposed by law or otherwise establish a remedy or cause of action on behalf of the parent.

(2)-(3) [Unchanged.]

(K) [Unchanged.]

Staff Comment: The proposed amendments would incorporate into both the rules concerning juvenile proceedings and adoption proceedings the requirement to notify parents that the termination of parental rights does not automatically terminate the obligation to provide support for a child. The proposed amendments also would make clear that failure to provide the notice would not affect the parent's obligation to continue to pay child support.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Office of Administrative Counsel in writing or electronically by March 1,

2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-09. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered November 15, 2017:

PROPOSED AMENDMENT OF MCR 6.425.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.425 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A)-(F) [Unchanged.]

(G) Appointment of Lawyer and Preparation of Transcript; Scope of Appellate Lawyer's Responsibilities; ~~Trial Court Responsibilities in Connection with Appeal~~.

(1) Appointment of Lawyer and Preparation of Transcript.

(a) All requests for the appointment of appellate counsel must be granted or denied on forms approved by the State Court Administrative Office and provided through the Michigan Appellate Assigned Counsel System (MAACS).~~Unless there is a postjudgment motion pending, the court must rule on a defendant's request for a lawyer within 14 days after receiving it. If there is a postjudgment motion pending, the court must rule on the request after the court's disposition of the pending motion and within 14 days after that disposition.~~

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

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

(~~b~~d) Within 7 days after receiving a proposed order from MAACS, the trial court must rule on the request for a lawyer. ~~In a case involving a conviction following a trial, i~~If the defendant is indigent, the court must enter an order appointing a lawyer if the request for a lawyer is filed within 42 days after entry of the judgment of sentence ~~sentencing~~ or, if applicable, within the time for filing an appeal of right. The court should liberally grant an untimely request as long as the defendant may file an application for leave to appeal. A denial of counsel must include a statement of reasons.

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

~~(c) In a case involving a conviction following a plea of guilty or nolo contendere, if the defendant is indigent, the court must enter an order appointing a lawyer if the request is filed within 42 days after sentencing.~~

(f) An appointment order must direct the court reporter to prepare and file, within the time limits specified in MCR 7.210, the full transcript of all proceedings, and provide for the payment of the reporter's fees.

(g) The trial court must serve MAACS with a copy of its order granting or denying a request for a lawyer. Unless MAACS has agreed to provide the order to any of the following, the trial court must also serve a copy of its order on the defendant, defense counsel, the prosecutor, and, if the order includes transcripts, the court reporter(s)/recorder(s). If the order is in the form of a Claim of Appeal and Appointment of Counsel, the court must also serve the Court of Appeals with a copy of the order and the judgment being appealed.

(~~d~~2) Scope of Appellate Lawyer's Responsibilities. The responsibilities of the appellate lawyer appointed to represent the defendant include representing the defendant

(~~i~~a) in available postconviction proceedings in the trial court the lawyer deems appropriate,

(~~ii~~b) in postconviction proceedings in the Court of Appeals,

(~~iii~~c) in available proceedings in the trial court the lawyer deems appropriate under MCR 7.208(B) or 7.211(C)(1), and

(~~iv~~d) as appellee in relation to any postconviction appeal taken by the prosecutor.

~~(2) Order to Prepare Transcript. The appointment order also must~~

~~(a) direct the court reporter to prepare and file, within the time limits specified in MCR 7.210,~~

~~(i) the trial or plea proceeding transcript,~~

~~(ii) the sentencing transcript, and~~

~~(iii) such transcripts of other proceedings, not previously transcribed, that the court directs or the parties request, and~~

~~(b) provide for the payment of the reporter's fees.~~

~~The court must promptly serve a copy of the order on the prosecutor, the defendant, the appointed lawyer, the court reporter, and the Michigan Appellate Assigned Counsel System. If the appointed lawyer timely requests additional transcripts, the trial court shall order such transcripts within 14 days after receiving the request.~~

~~(3) Order as Claim of Appeal; Trial Cases. In a case involving a conviction following a trial, if the defendant's request for a lawyer, timely or not, was made within the time for filing a claim of appeal, the order described in subrules (G)(1) and (2) must be entered on a form approved by the State Court Administrative Office, entitled "Claim of Appeal and Appointment of Counsel," and the court must immediately send to the Court of Appeals a copy of the order and a copy of the judgment being appealed. The court also must file in the Court of Appeals proof of having made service of the order as required in subrule (G)(2). Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204.~~

Staff Comment: The proposed amendments of MCR 6.425(G) would reflect recent changes to the appellate counsel assignment process by extending and segmenting the timeframe for courts to respond to appointment requests, requiring judges to provide a statement of reason when appellate counsel is denied, encouraging courts to liberally grant untimely requests for appellate counsel in guilty plea cases, requiring the filing of all lower court transcripts and clarifying MAACS assumption of the trial courts service obligations.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Office of Administrative Counsel in writing or electronically by March 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-36. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered November 15, 2017:

PROPOSED AMENDMENTS OF MCR 6.310, 6.428, 6.429, 6.431, 7.205, 7.211, AND 7.212.

On order of the Court, this is to advise that the Court is considering amendments of Rules 6.310, 6.428, 6.429, 6.431, 7.205, 7.211 and 7.212 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.310. WITHDRAWAL OR VACATION OF PLEA.

(A)-(B) [Unchanged.]

(C) Motion to Withdraw Plea After Sentence.

(1) The defendant may file a motion to withdraw the plea within 6 months after sentence or within the time provided by subrule (C)(2).

(2) If 6 months have elapsed since sentencing, the defendant may file a motion to withdraw the plea if:

(a) the defendant has filed a timely request for the appointment of counsel pursuant to MCR 6.425(F),

(b) the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the request for counsel or substitute counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G)(2), and

(c) the motion to withdraw the plea is filed in accordance with the provisions of this subrule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing counsel or substitute counsel, or the order denying the appointment of counsel, the 42-day period runs from the date of that order.

(3) Thereafter, the defendant may seek relief only in accordance with the procedure set forth in subchapter 6.500.

(4) If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the plea and sentence to stand, the additional advice

given and inquiries made become part of the plea proceeding for the purposes of further proceedings, including appeals.

(D)-(E) [Unchanged.]

RULE 6.428. REISSUANCE OF JUDGMENT.

(A) If the defendant was entitled to an appeal of right and did not claim that appeal of right within the time allowed by MCR 7.204(A)(2) or the defendant attempted to claim that appeal of right but it was rejected or dismissed, and the defendant demonstrates any of the following:

(1) ~~that~~ the attorney or attorneys retained or appointed to represent the defendant on direct appeal from the judgment either disregarded the defendant's instruction to perfect a timely claim of appeal ~~of right~~, or otherwise failed to provide effective assistance, and, but for counsel's deficient performance, the defendant would have perfected a timely claim of appeal of right~~;~~; or

(2) the defendant timely filed a request for the appointment of appellate counsel pursuant to MCR 6.425(F), and either the trial court made an error in processing that request or the counsel that the court appointed in response to the request provided ineffective assistance and counsel's deficiency resulted in the defendant's claim being rejected or dismissed;

then the trial court shall issue an order restarting the time in which to file a claim of ~~an~~ appeal ~~of right~~.

(B) If the defendant was convicted by plea and thus was entitled to seek post-conviction relief pursuant to MCR 6.311 and/or MCR 6.429 and/or to seek leave to appeal pursuant to MCR 7.205, but did not do so within the time constraints of those rules and the defendant demonstrates any of the following:

(1) the attorney or attorneys retained or appointed to represent the defendant to pursue post-conviction relief and/or seek leave to appeal on direct appeal from the judgment either disregarded the defendant's instructions to do so, or otherwise failed to provide effective assistance, and, but for counsel's deficient performance, the defendant would have pursued relief within the time constraints of the applicable rules; or

(2) the defendant timely filed a request for the appointment of appellate counsel, and either the trial court made an error in processing that request or the counsel that the court appointed in response to the request provided ineffective assistance and counsel's deficiency resulted in the defendant losing the ability to file the appropriate pleading within the time constraints of MCR 6.311, 6.429, and/or 7.205;

then the trial court shall issue an order restarting the time in which to file any appropriate post-conviction motion and to seek leave to appeal.

RULE 6.429. CORRECTION AND APPEAL OF SENTENCE.

(A) [Unchanged.]

(B) Time For Filing Motion.

(1)-(2) [Unchanged.]

(3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion to correct an invalid sentence may be filed:

(a) within 6 months of entry of the judgment of conviction and sentence., or,

(b) if 6 months have elapsed since entry of the judgment of conviction and sentence, the defendant may file a motion to correct an invalid sentence if:

(i) the defendant has filed a timely request for the appointment of counsel pursuant to MCR 6.425(F),

(ii) The defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the request for counsel or substitute counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G)(2), and

(iii) The motion to correct invalid sentence is filed in accordance with the provisions of this subrule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing counsel or substitute counsel, or the order or denying the appointment of counsel, the 42-day period runs from the date of that order.

(4) [Unchanged.]

(C) [Unchanged.]

RULE 6.431. NEW TRIAL.

(A) Time for Making Motion.

(1)-(2) [Unchanged.]

(3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion for a new trial may be filed:

(a) within 6 months of entry of the judgment of conviction and sentence., or

(b) If 6 months have elapsed since entry of the judgment of conviction and sentence, the defendant may file a motion for new trial if:

(i) the defendant has filed a timely request for the appointment of counsel pursuant to MCR 6.425(F),

(ii) the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the request for counsel or substitute counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G)(2), and

(iii) the motion for a new trial is filed in accordance with the provisions of this subrule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing counsel or substitute counsel, or the order denying the appointment of counsel, the 42-day period runs from the date of that order.

(4) [Unchanged.]

(B)-(D) [Unchanged.]

RULE 7.205. APPLICATION FOR LEAVE TO APPEAL.

(A)-(F) [Unchanged.]

(G) Late Appeal.

(1)-(3) [Unchanged.]

(4) The limitation provided in subrule (G)(3) does not apply to an application for leave to appeal by a criminal defendant if the defendant files an application for leave to appeal within 21 days after the trial court decides a motion for a new trial, for directed verdict of acquittal, to withdraw a plea, or to correct an invalid sentence, if the motion was filed within the time provided in MCR 6.310(C), MCR 6.419(B), MCR 6.429(B), and MCR 6.431(A), or if

(a) [Unchanged.]

(b) the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the delayed request for counsel or for substitute counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G)(2), and

(c) the application for leave to appeal is filed in accordance with the provisions of this rule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing counsel, or substitute counsel, or the order denying the appointment of counsel, the 42-day period runs from the date of that order.

A motion for rehearing or reconsideration of a motion mentioned in subrule (G)(4) does not extend the time for filing an application for leave to appeal, unless the motion for rehearing or reconsideration was itself filed within 21 days after the trial court decides the motion mentioned in subrule (G)(4), and the application for leave to appeal is filed within 21 days after the court decides the motion for rehearing or reconsideration.

A defendant who seeks to rely on one of the exceptions in subrule (G)(4) must file with the application for leave to appeal an affidavit stating the relevant docket entries, a copy of the register of actions of the lower court, tribunal, or agency, or other documentation showing that the application is filed within the time allowed.

(5)-(6) [Unchanged.]

(H) [Unchanged.]

RULE 7.211. MOTIONS IN COURT OF APPEALS.

(A)-(B) [Unchanged.]

(C) Special Motions. If the record on appeal has not been sent to the Court of Appeals, except as provided in subrule (C)(6), the party making a special motion shall request the clerk of the trial court or tribunal to send the record to the Court of Appeals. A copy of the request must be filed with the motion.

(1) Motion to Remand.

(a)-(c) [Unchanged.]

(d) If a motion to remand is granted, further proceedings in the Court of Appeals are stayed until completion of the proceedings in the trial court pursuant to the remand, unless the Court of Appeals orders otherwise. ~~Unless the Court of Appeals sets another time, the appellant's brief must be filed within 21 days after the trial court's decision or after the filing of the transcript of any hearing held, whichever is later.~~

(e) If the trial court grants the defendant-appellant relief in whole or in part,

(i) Unless the Court of Appeals orders otherwise, defendant-appellant must file the brief on appeal or notice of withdrawal of appeal within 21 days after the trial court's decision or after the filing of the transcript of any hearing held, whichever is later.

(ii) The prosecuting attorney may file a cross appeal in the manner provided by MCR 7.207 within 21 days after the trial court's decision. If the defendant has withdrawn the appeal before the prosecuting attorney has filed a cross appeal, the prosecuting attorney may file a claim of appeal or an application for leave to appeal within the 21 day period.

(f) If the trial court denies the defendant-appellant's request for relief, defendant-appellant's brief must be filed within 21 days after the decision by the trial court, or the filing of the transcript of any trial court hearing, whichever is later.

(2)-(9) [Unchanged.]

(D)-(E) [Unchanged.]

RULE 7.212. BRIEFS.

(A) [Unchanged.]

(B) Length and Form of Briefs. Except as permitted by order of the Court of Appeals, and except as provided in subrule (G), briefs are limited to 50 pages double-spaced, exclusive of tables, indexes, and appendixes. Quotations and footnotes may be single-spaced. At least one-inch margins must be used, and printing shall not be smaller than 12-point type. A motion for leave to file a brief in excess of the page limitations of this subrule must be filed ~~at least 21 days before the due date of the brief.~~ by the due date of the brief and shall accompany the proposed brief. Such motions are disfavored and will be granted only for extraordinary and compelling reasons. If the motion is denied, the movant shall file a conforming brief within 21 days after the date of the order deciding the motion.

(C)-(I) [Unchanged.]

Staff Comment: The proposed amendments were submitted to the Court by the State Appellate Defender Office, which argues that they would clarify practices and provide protections for criminal defendants represented by assigned appellate counsel. The proposed amendments would allow an additional 42 days to file post-judgment motions in certain circumstances, expand MCR 6.428 to apply to both plea and trial appeals and where delay is due to the trial court, clarify in proposed amendment of MCR 7.205 that in certain circumstances, substitute appellate counsel may file a delayed application for leave to appeal within 42 days of appointment (even if later than six months after sentencing), add language to MCR 7.211 to guide parties and courts if relief is granted in the trial court, and change the procedure for seeking permission to file a brief longer than 50 pages in length.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Office of Administrative Counsel in writing or electronically by March 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-07. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered November 15, 2017:

PROPOSED AMENDMENT OF MCR 8.119.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 8.119. COURT RECORDS AND REPORTS; DUTIES OF CLERKS.

(A)-(H) [Unchanged.]

(I) Sealed Records.

(1)-(3) [Unchanged.]

(4) ~~For purposes of this rule, "court records" includes all documents and records of any nature that are filed with or maintained by the clerk in connection with the action. Nothing in this rule is intended to limit the court's authority to issue protective orders pursuant to MCR 2.302(C).~~ Materials that are subject to a motion to seal a record in whole or in part shall be held under seal pending the court's disposition of the motion.

(5) For purposes of this rule, "court records" includes all documents and records of any nature that are filed with or maintained by the clerk in connection with the action.

~~(5)~~(6) A court may not seal a court order or opinion, including an order or opinion that disposes of a motion to seal the record.

(7) [Unchanged.]

(8) Nothing in this rule is intended to limit the court's authority to issue protective orders pursuant to MCR 2.302(C) without a motion to seal or require that a protective order issued under MCR 2.302(C) be filed with the Clerk of the Supreme Court and the State Court Administrative Office. A protective order issued under MCR 2.302(C) may authorize parties to file materials under seal in accordance with the provisions of the protective order without the necessity of filing a motion to seal under this rule.

~~(6)~~(9) Any person may file a motion to set aside an order that disposes of a motion to seal the record, to unseal a document filed under seal pursuant to MCR 2.302(C), or an objection to entry of a proposed order. MCR 2.119 governs the proceedings on such a motion or objection. If the court denies a motion to set aside the order or enters the order after objection is filed, the moving or objecting person may file an application for leave to appeal in the same manner as a party to the action. See MCR 8.116(D).

(J)-(L) [Unchanged.]

Staff Comment: The proposed amendment of MCR 8.119 would clarify the procedure for sealing files and better accommodate protective orders issued under MCR 2.302 by clarifying that a protective order may authorize parties to file materials without also filing a motion to seal.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Office of Administrative Counsel in writing or electronically by March 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-20. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered November 17, 2017:

PROPOSED AMENDMENT OF MCR 2.105.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.105 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2.105. PROCESS; MANNER OF SERVICE.

(A)-(B) [Unchanged.]

(C) Partnerships; Limited Partnerships. Service of process on a partnership or limited partnership may be made by

(1) serving a summons and a copy of the complaint on any general partner or agent for service of process; or

(2) serving a summons and a copy of the complaint on the person in charge of a partnership office or business establishment and sending a summons and a copy of the complaint by registered mail, addressed to a general partner or agent for service of process at his or her usual residence or last known address.

(D)-(K) [Unchanged.]

Staff Comment: The proposed amendment of MCR 2.105 would reference service on the "agent for service of process" so that it is consistent with MCL 449.1105(2).

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Office of Administrative Counsel in writing or electronically by March 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-23. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered December 13, 2017:

PROPOSED AMENDMENT OF MCR 6.610.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.610 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.610. CRIMINAL PROCEDURE GENERALLY.

(A)-(D) [Unchanged.]

(E) Pleas of Guilty and Nolo Contendere. Before accepting a plea of guilty or nolo contendere, the court shall in all cases comply with this rule.

(1)-(3) [Unchanged.]

(4) A defendant or defendants may be informed of the trial rights listed in subrule (3)(b) as follows:

(a) on the record,

(b) in a writing made part of the file, or

(c) in a writing referred to on the record.

Except as provided in subrule (E)(7), if~~f~~ the court uses a writing pursuant to subrule (E)(4)(b) or (c), the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights.

(5)-(6) [Unchanged.]

(7) A plea of guilty or nolo contendere in writing is permissible without a personal appearance of the defendant and without support for a finding that defendant is guilty of the offense charged or the offense to which the defendant is pleading if

(a)-(c) [Unchanged.]

A "writing" includes digital communications, transmitted through electronic means, which are capable of being stored and printed.

(8)-(9) [Unchanged.]

(F)-(H) [Unchanged.]

Staff Comment: The proposed amendment of MCR 6.610 would eliminate an arguable conflict between MCR 6.610(E)(4) and MCR 6.610(E)(7).

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-08. Your

comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/matters/pages/default.aspx].

Order Entered December 13, 2017:

PROPOSED AMENDMENTS OF MCR 9.112 AND 9.131.

On order of the Court, this is to advise that the Court is considering amendments of Rule 9.112 and Rule 9.131 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 9.112. REQUESTS FOR INVESTIGATION.

(A)-(B) [Unchanged.]

(C) Handling by Administrator.

(1)-(2) [Unchanged].

(3) Request for Investigation of Member or Employee of Commission or Board, or the Spouse of Member or Employee of Commission. Except as modified by MCR 9.131, MCR 9.104-9.130 apply to a request for investigation of an attorney who is a member of or is employed by the board or the commission, or who is a spouse of a member or employee of the board or commission.

(D) [Unchanged.]

RULE 9.131. INVESTIGATION OF MEMBER OR EMPLOYEE OF BOARD OR COMMISSION, OR SPOUSE OF MEMBER OR EMPLOYEE OF BOARD OR COMMISSION; INVESTIGATION OF ATTORNEY REPRESENTING RESPONDENT OR WITNESS; REPRESENTATION BY MEMBER OR EMPLOYEE OF BOARD OR COMMISSION.

(A) Investigation of Commission Member or Employee, or Spouse of Member or Employee of Commission. If the request is for investigation of an attorney who is a member or employee of the commission, or a spouse of a member or employee of the commission, the following provisions apply:

(1)-(6) [Unchanged.]

(B) Investigation of Board Member or Employee or Spouse of Board Member or Employee. Before the filing of a formal complaint, the procedures regarding a request for investigation of a member or

employee of the board or spouse of a member or employee of the board, are the same as in other cases. Thereafter, the following provisions apply:

(1)-(4) [Unchanged.]

(C)-(D) [Unchanged.]

Staff Comment: The proposed amendments of MCR 9.112 and MCR 9.131 would provide that spouses of AGC or ADB members or employees would be subject to the same procedure for review of allegations of misconduct as the Board or Commission member or employee. This change would comport with recent Supreme Court practice. These proposed amendments are intended to address any perceived conflict of interest that may exist if the procedures in MCR 9.112 were to be used to review a request for investigation of the spouse of a member or employee of the Attorney Grievance Commission or Attorney Discipline Board.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-30. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered December 13, 2017:

PROPOSED AMENDMENT OF RULE 1.16.

On order of the Court, this is to advise that the Court is considering alternative amendments of Rule 1.16 of the Michigan Rules of Professional Conduct. Before determining whether either of the alternative 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 also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 to the text are indicated in underlining and deleted text is shown by strikeover.]

Alternative A

RULE 1.16. DECLINING OR TERMINATING REPRESENTATION.

(a) [Unchanged.]

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1)-(6) [Unchanged.]

If a lawyer informs a client in a criminal case that, pursuant to subsection (3), he or she will withdraw from representing the client if the client does not accept a previously offered plea bargain, then the lawyer must also inform the client that the lawyer cannot withdraw without the permission of the trial court.

(c) [Unchanged.]

(d) [Unchanged.]

Alternative B

RULE 1.16. DECLINING OR TERMINATING REPRESENTATION.

(a) [Unchanged.]

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1)-(6) [Unchanged.]

If a lawyer informs a client in a criminal case that, pursuant to subsection (3), he or she will withdraw from representing the client if the client insists on pursuing an objective that the lawyer considers repugnant or imprudent, then the lawyer must also inform the client that the lawyer cannot withdraw without the permission of the trial court.

(c) [Unchanged.]

(d) [Unchanged.]

Staff Comment: These alternative proposed amendments of MRPC 1.16(b) are intended to address the possibility of an involuntary plea as the result of an attorney's threat to withdraw as counsel for a criminal client if that client does not accept a previously offered plea (under Alternative A) or more broadly if a lawyer seeks to withdraw because the lawyer considers the client's objective repugnant or imprudent. Under the proposed amendments, the attorney would be required to advise the client that the attorney may not withdraw without permission of the court. Under Alternative A, the requirement would apply only where the client refuses to accept a previously-offered plea agreement; under Alternative B, the requirement would apply in any criminal case in

which the lawyer intends to withdraw under MRPC 1.16(b)(3). These proposed amendments arose during the Court's consideration of *People v Townsend*, docket 153153.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-31. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered December 13, 2017:

PROPOSED AMENDMENT OF MCR 9.122.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 9.122 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 9.122. REVIEW BY SUPREME COURT.

(A) Kinds Available; Time for Filing.

(1) [Unchanged.]

(2) If a request for investigation has been dismissed under MCR 9.112(C)(1)(a) or 9.114(A), a party aggrieved by the dismissal may file a complaint in the Supreme Court under MCR 7.306 <u>within 56 days after the date of the letter notifying the party of the dismissal</u>.

(B)-(E) [Unchanged.]

Staff Comment: The proposed amendment of MCR 9.122 would establish a 56-day time period within which a grievant may file a complaint in the Supreme Court after the Attorney Grievance Commission (AGC) has dismissed a request for investigation.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Office of Administrative Counsel in writing or electronically by April 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-45. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered December 20, 2017:

PROPOSED AMENDMENTS OF MCR 5.125 AND 5.409.

On order of the Court, this is to advise that the Court is considering amendments of Rules 5.125 and 5.409 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 5.125. INTERESTED PERSONS DEFINED.

(A)-(B) [Unchanged.]

(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)-(21) [Unchanged.]

(22) The persons interested in an application for appointment of a guardian of an incapacitated individual by a guardian appointed in another state or in a petition for appointment of a guardian of an alleged incapacitated individual are

(a)-(d) [Unchanged.]

(e) if no spouse, <u>adult</u> child, or parent is living, the presumptive heirs of the individual,

(f)-(h) [Unchanged.]

(23) The persons interested in receiving a copy of the report of a guardian of a minor, or of a legally incapacitated individual, on the condition of the ward are:

(a) the ward, if 14 years of age or older;

(b) the person who has principal care and custody of the ward, ~~and~~if other than the guardian;

(c) for an adult guardianship, the spouse and adult children or, if no adult children are living, the presumptive heirs of the individual.; and

(d) for a minor guardianship, the parents of the minor or, if neither of them is living, any grandparents and the adult presumptive heirs of the minor.

(24)-(33) [Unchanged.]

(D)-(E) [Unchanged.]

RULE 5.409. REPORT OF GUARDIAN; INVENTORIES AND ACCOUNTS OF CONSERVATORS.

(A)-(B) [Unchanged.]

(C) Accounts.

(1)-(4) [Unchanged.]

(5) Contents. The accounting is subject to the provisions of MCR 5.310(C)(2)(c) and (d), except that references to a personal representative shall be to a conservator. A copy of the corresponding financial institution statement must be presented to the court or a verification of funds on deposit must be filed with the court, either of which must reflect the value of all liquid assets held by a financial institution on the date of the last day~~dated within 30 days after the end~~ of the accounting period, unless waived by the court for good cause.

(6) [Unchanged.]

(D)-(F) [Unchanged.]

Staff Comment: The proposed amendment of MCR 5.125(C)(22) is intended to ensure that minor children of an alleged legally incapacitated person receive notice of a petition as presumptive heirs. The proposed amendments of MCR 5.125(C)(23) were submitted by the Representative Assembly of the State Bar of Michigan, and are intended to clarify the definition of persons interested in receiving a copy of a guardianship report for a minor, as referenced by MCL 700.5215. The proposed amendment of MCR 5.409 is intended to ensure that the financial institution statements and verification of funds reflect assets on hand as of the last day of the accounting period, not some time beyond that date.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov.

When filing a comment, please refer to ADM File No. 2016-19/2016-28. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered December 20, 2017:

PROPOSED AMENDMENTS OF MCR 6.310, 6.429, AND 6.431.

On order of the Court, this is to advise that the Court is considering amendments of Rules 6.310, 6.429, and 6.431 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 will also be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.310. WITHDRAWAL OR VACATION OF PLEA.

(A)-(B) [Unchanged.]

(C) Motion to Withdraw Plea After Sentence. The defendant may file a motion to withdraw the plea within 6 months after sentence. Thereafter, the defendant may seek relief only in accordance with the procedure set forth in subchapter 6.500. If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the plea and sentence to stand, the additional advice given and inquiries made become part of the plea proceeding for the purposes of further proceedings, including appeals.

If a motion to withdraw plea is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the motion as a pro se party, the motion shall be deemed presented for filing on the date of deposit of the motion in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to cases in which a plea was accepted on or after

the effective date of this amendment. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to withdraw a plea in a Michigan court.

(D)-(E) [Unchanged.]

RULE 6.429. CORRECTION AND APPEAL OF SENTENCE.

(A) [Unchanged.]

(B) Time For Filing Motion.

(1)-(2) [Unchanged.]

(3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion to correct an invalid sentence may be filed within 6 months of entry of the judgment of conviction and sentence.

If a motion to withdraw invalid sentence is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the motion as a pro se party, the motion shall be deemed presented for filing on the date of deposit of the motion in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to cases in which a judgment of conviction and sentence is entered on or after the effective date of this amendment. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to correct an invalid sentence in a Michigan court.

(4) [Unchanged.]

(C) [Unchanged.]

RULE 6.431. NEW TRIAL.

(A) Time for Making Motion.

(1)-(2) [Unchanged.]

(3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion for a new trial may be filed within 6 months of entry of the judgment of conviction and sentence.

If a motion for new trial is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the motion as a pro se party, the motion shall be deemed presented for filing on the date of deposit of the motion in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to cases in which the trial court rendered its decision on or after the effective date of this amendment. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks a new trial in a Michigan court.

(4) [Unchanged.]

(B)-(D) [Unchanged.]

Staff Comment: The proposed amendments of MCR 6.310, 6.429, and 6.431 would provide a "prison-mailbox" rule for post-sentencing motions to withdraw plea, motions to correct an invalid sentence and motions for new trial, filed by *in pro per* defendants in the custody of the Department of Corrections.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Office of Administrative Counsel in writing or electronically by April 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-42. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered December 20, 2017:

PROPOSED AMENDMENT OF RULE 15 OF THE RULES CONCERNING THE STATE BAR OF MICHIGAN.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 15 of the Rules Concerning the State Bar of Michigan. 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 to the text are indicated in underlining
and deleted text is shown by strikeover.]

RULE 15. ADMISSION TO THE BAR.

Section 1. Character and Fitness Committees.

(1)-(20) [Unchanged.]

(21) Every applicant for admission by examination and any other applicant whose application is submitted to the standing committee on character and fitness for evaluation and recommendation shall pay to the State Bar of Michigan a fee of ~~$225~~375 for the character and fitness investigation authorized by this rule. An additional fee of ~~$100~~175 shall

be required for character and fitness evaluations related to applications for the February examination that are ~~postmarked~~submitted after November 1, and applications for the July examination that are ~~postmarked~~submitted after March 1.

Section 2. *Foreign Attorney*; *Temporary Permission*. [Unchanged.]

Section 3. *Procedure for Admission*; *Oath of Office*. [Unchanged.]

Staff Comment: The proposed amendment of Rule 15 of the Rules Concerning the State Bar of Michigan (submitted by the SBM Representative Assembly) would increase the fee for Character & Fitness investigations to more accurately reflect the costs of performing the investigations and would update the language to reflect the online application process. According to the Bar, this would be the first increase in these fees in more than 15 years.

The staff comment is not authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-46. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered January 10, 2018:

PROPOSED AMENDMENT OF RULE 7.2 OF THE MICHIGAN RULES OF PROFESSIONAL CONDUCT.

On order of the Court, this is to advise that the Court is considering alternative amendments of Rule 7.2 of the Michigan Rules of Professional Conduct. Before determining whether either of the alternative 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 proposals or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of these proposals does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of either proposal in its present form.

[Additions to the text are indicated in underlining
and deleted text is shown by strikeover.]

Alternative A

RULE 7.2. ADVERTISING.

(a)-(c) [Unchanged.]

(d) Services of a lawyer or law firm that are advertised under the heading of a phone number, web address, image, or icon shall identify the lawyers or law firm providing the services. Any website advertising the services of a lawyer or law firm must contain the name(s) of the attorney(s) providing the services.

Alternative B

RULE 7.2. ADVERTISING.

(a)-(c) [Unchanged.]

(d) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Staff Comment: The first proposed amendment of Rule 7.2 of the Michigan Rules of Professional Conduct (Alternative A) would require certain lawyer advertisements to identify the lawyer or law firm providing services. This proposal was submitted by the State Bar of Michigan Representative Assembly. Alternative B is the model rule provision that relates to providing information about the lawyer or law firm responsible for the advertisement's content.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Office of Administrative Counsel in writing or electronically by April 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-27. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

MCCORMACK, J. (*concurring*). This topic is worth the Court's consideration and I look forward to the public comment. I hope that the public comment process will, at a minimum, address and clarify the following questions:

(1) Is MRPC 7.1 already an adequate mechanism for protecting the public?

(2) Should the proposal's first sentence be targeted only to advertisements that solely consist of a web address or a telephone number, which is how the proposal was described by the State Bar of Michigan in its

submission letter, or should it apply to all advertisements, which is how the proposal is currently styled? In other words, should the proposal read "Services of a lawyer or law firm that are advertised under the heading of a phone number, web address (i.e., law.com), image, or icon shall identify the lawyers or law firm providing the services," or should it read "Services of a lawyer or law firm that are advertised *only* under the heading of a phone number, web address (i.e., law.com), image, or icon shall identify the lawyers or law firm providing the services"?

(3) Will the proposal affect law offices that self-identify by solely listing their telephone number on their physical building or road sign, such as 1-800-LAW-FIRM in the attached photo?

(4) What is the scope of website advertising that would fall within this rule? For example, should it be limited to individual websites owned or managed by lawyers or lawfirms, or will it include third-party media advertising such as Craigslist listings, Facebook places, and Google places?

(5) What are the proper definitions of "image" and "icon" as used in the proposal?

(6) Will this rule regulate online advertising differently than the current rules regulate billboard, transit bus, television/cable, radio, and smartphone pop-up ads? If so, is that appropriate? If not, why not?

Order Entered January 17, 2018:

PROPOSED ADOPTION OF RULE 1.18 AND PROPOSED AMENDMENT OF RULE 7.3 OF THE MICHIGAN RULES OF PROFESSIONAL CONDUCT.

On order of the Court, this is to advise that the Court is considering an addition of Rule 1.18 and an amendment of Rule 7.3 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx.

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.

[Proposed Rule 1.18 is a new rule, and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.18. DUTIES TO PROSPECTIVE CLIENT.

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Comments:

Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for nonrepresentation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially

related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

RULE 7.3. SOLICITATION ~~DIRECT CONTACT WITH PROSPECTIVE CLIENTS~~.

(a) A lawyer shall not solicit professional employment from a person ~~prospective client~~ with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful, nor does the term "solicit" include "sending truthful and nondeceptive letters to potential clients known to face particular legal problems" as elucidated in *Shapero v Kentucky Bar Ass'n*, 486 US 466, 468; 108 S Ct 1916; 100 L Ed 2d 475 (1988).

(b) A lawyer shall not solicit professional employment from a person ~~prospective client~~ by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:

(1) the person~~prospective client~~ has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

Comments:

There is a potential for abuse inherent in direct contact by a lawyer with a person~~prospective client~~ known to need legal services. These forms of contact ~~between a lawyer and a prospective client~~ subject a ~~the lay~~person to the private importuning of the trained advocate in a direct interpersonal encounter. A person~~The prospective client~~, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to evaluate fully all available

alternatives with reasoned judgment and appropriate self-interest in the face of a~~the~~ lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

However, the United States Supreme Court has modified the traditional ban on written solicitation. *Shapero v Kentucky Bar Ass'n*, 486 US 466; 108 S Ct 1916; 100 L Ed 2d 475 (1988). Paragraph (a) of this rule is therefore modified to the extent required by the Shapero decision.

The potential for abuse inherent in direct solicitation ~~of prospective clients~~ justifies its partial prohibition, particularly since lawyer advertising and the communication permitted under these rules are alternative means of communicating necessary information to those who may be in need of legal services.

Advertising and permissible communication make it possible for a person~~prospective client~~ to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting a person~~the prospective client~~ to impermissible persuasion that may overwhelm a person's~~the client's~~ judgment.

The use of general advertising and communications permitted under *Shapero* ~~to transmit information from lawyer to prospective client~~, rather than impermissible direct contact, will help to assure that the information flows cleanly as well as freely. Advertising is out in public view, thus subject to scrutiny by those who know the lawyer. The contents of advertisements and communications permitted under Rule 7.2 are permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false or misleading communications, in violation of Rule 7.1. The contents of some impermissible direct conversations ~~between a lawyer and a prospective client~~ can be disputed and are not subject to third-party scrutiny. Consequently they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior family or professional relationship or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Consequently, the general prohibition in Rule 7.3(a) is not applicable in those situations.

This rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for its members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of, and detail concerning, the plan or arrangement that the lawyer or the lawyer's firm is willing to offer. This form of communication is not directed to a specific person~~prospective client~~ known to need legal services related to a particular matter. Rather, it is usually addressed to an individual acting in a fiduciary

capacity seeking a supplier of legal services for others who may, if they choose, become ~~prospective~~ clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under these rules.

Staff Comment: The proposed addition of new rule MRPC 1.18 and amendment of MRPC 7.3 would clarify the ethical duties that lawyers owe to prospective clients and create consistency in the use of the term "prospective client." This proposal was submitted to the Court by the Representative Assembly of the State Bar of Michigan.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by May 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-49. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered January 17, 2018:

PROPOSED ADOPTION OF MCR 6.417.

On order of the Court, this is to advise that the Court is considering an addition of MCR 6.417. 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 [http://courts.mi.gov/courts/michigan/supremecourt/rules/pages/default.aspx].

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.

RULE 6.417. MISTRIAL.

Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives.

Staff Comment: This proposed new rule, based on FR Crim P 26.3, would require a trial court to provide parties an opportunity to comment

on a proposed order of mistrial, to state their consent or objection, or suggest alternatives. The proposal was pursued following the Court's consideration of *People v Howard* (Docket No. 153651).

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Office of Administrative Counsel in writing or electronically by May 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-10. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered January 24, 2018:

PROPOSED AMENDMENT OF MCR 6.429.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.429 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.429. CORRECTION AND APPEAL OF SENTENCE.

(A) Authority to Modify Sentence. ~~A motion to correct an invalid sentence may be filed by either party.~~ The court may correct an invalid sentence, on its own initiative after giving the parties an opportunity to be heard, or on motion by either party. ~~b~~But the court may not modify a valid sentence after it has been imposed except as provided by law. Any correction of an invalid sentence on the court's own initiative must occur within 6 months of the entry of the judgment of conviction and sentence.

(B)-(C) [Unchanged.]

Staff Comment: This proposed amendment is intended to provide trial courts with broader authority to *sua sponte* address erroneous

judgments of sentence, following the Court's recent consideration of the issue in *People v Comer*, 500 Mich 278 (2017).

For purposes of publication, the Court included a six-month time period in which such a correction must be made *sua sponte*, and the Court is especially interested in input related to this aspect of the proposed amendments. In balancing the interest in correcting a sentence at any time against the interest in promoting finality and definiteness, adoption of a prescribed time period seems appropriate. Parties have six months to file such a motion under MCR 6.429(B)(3), and a good argument can be made that if the Court adopted a different time period for *sua sponte* corrections, the six-month period for parties would be irrelevant, as a party could simply ask the court to do *sua sponte* what the party could not do by motion.[1] But there may be good reason to adopt a time period longer than that allowed for parties, or to consider a more flexible provision that does not include a specific time period but focuses on application of a standard such as "reasonableness," "good cause," or other language that leaves the determination to the trial court. Therefore, the Court is particularly interested in comments that address this issue.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by May 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-04. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered February 28, 2018:

PROPOSED ADOPTION OF MCR 2.228.

On order of the Court, this is to advise that the Court is considering an addition of Rule 2.228 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

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[1] Note that other states have adopted rules with no time limitation on the ability of a court to correct an invalid sentence, but those states may not have, like Michigan, adopted a time limitation for parties to do so. See, for example, Nev Rev Stat 176.555; AK Cr P Rule 35(a).

matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

RULE 2.228. TRANSFER TO COURT OF CLAIMS.

A notice of transfer to the Court of Claims must be provided before or at the time the defendant files an answer. After that time, the defendant may seek a transfer to the Court of Claims by motion under MCR 2.221.

Staff Comment: MCL 600.6404(3) allows defendant to transfer a case to the Court of Claims. This proposed rule would require such a transfer to be made at or before the time the defendant files an answer, which is the same period mandated for change of venue under MCR 2.221. This proposal arose from the Court's consideration of *Baynesan v Wayne State University* (Docket No. 154435), in which defendant waited until just a month before trial before transferring a case he could have transferred nearly a year sooner.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by June 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-12. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered February 28, 2018:

PROPOSED ADOPTION OF ADMINISTRATIVE ORDER NO. 2018-XX.

On order of the Court, this is to advise that the Court is considering the adoption of an Administrative Order regarding ministerial duties to be performed by the county clerk. 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

ADMINISTRATIVE ORDER NO. 2018-XX.

The Michigan Constitution of 1963, article 6, § 14, and MCL 600.571(a) designate the county clerk as the clerk of the circuit court for that county. As such, the county clerk in their role as clerk of the circuit court, performs functions in the judicial branch of government and is therefore subject to the direction of the circuit court in all matters of court administration that are reserved exclusively for the judiciary under the Michigan Constitution, article 3, § 2, article 6, § 1, and article 6, § 5. In addition, MCL 600.571(b) requires the county clerk to attend all circuit court hearings, MCL 600.571(c) provides for the assignment of any deputy clerk to be approved by the chief judge, and MCL 600.571(f) provides for the county clerk to "have the care and custody of all the records, seals, books and papers pertaining to the office of the clerk of such court, and filed or deposited therein, and shall provide such books for entering the proceedings in said court, as the judge thereof shall direct."

In *Lapeer County Clerk v Lapeer Circuit Court*, 469 Mich 146 (2003), the Michigan Supreme Court stated:

> Beyond having the care and custody of the court's records, the circuit court clerk is also to perform noncustodial ministerial duties as directed by the court. The determination of the precise noncustodial ministerial duties that are to be performed by the clerk, including their existence, scope, and form, is a matter of court administration and is therefore reserved exclusively for the judiciary under Const 1963, art 3, § 2, Const 1963, art 6, § 1, and Const 1963, art 6, § 5. This judicial authority includes the discretion to create, abrogate, and divide between the clerk and other staff, noncustodial ministerial functions concerning court administration.

On order of the Court, in order to promote the efficient administration of justice and to clarify the extent of the responsibilities of the clerk of the circuit court that are not addressed in statute or court rule, the Michigan Supreme Court adopts this administrative order.

Each chief circuit judge shall consult with and enter into an agreement with each county clerk in their jurisdiction and submit a plan to the Supreme Court for approval that identifies the following, as applicable:

1. The case processing staff employed by the county clerk that are responsible for managing the court's records.

2. The courtroom clerks employed or deputized by the county clerk to attend court sessions.

3. The method by which the chief circuit judge and county clerk approve of the appointment of deputy clerks or employees of the court deputized by the county clerk before hiring.

4. The ministerial court duties, not subject to MCR 8.119, which are assigned to staff of the county clerk in their role as clerk of the circuit court.

5. The method by which performance issues involving county clerk staff assigned to circuit court or court staff deputized by the county clerk are addressed.

The State Court Administrative Office shall develop guidelines for the proposed plan and directions regarding the submission of the plan for approval by the Court. The chief judge and county clerk must meet before XXX, XX, 2018 and submit their plan by XXX, XX, 2018. If a circuit court and county clerk have an agreement in place on the effective date of this order, and that agreement includes the provisions required to be included in this order, that agreement may be submitted to the Supreme Court for approval. If the agreement does not include all the provisions listed herein, it shall be revised before submission to the Court.

Staff Comment: This administrative order would direct circuit courts in collaboration with county clerks to establish an agreed upon plan that outlines those duties not codified in statute or court rule that must be performed within the scope of the county clerk's role as clerk of the circuit court. The plan would be required to be approved by the Supreme Court.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by June 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-14. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered March 14, 2018:

PROPOSED AMENDMENTS OF CANONS 3 and 7 OF THE MICHIGAN CODE OF JUDICIAL CONDUCT.

On order of the Court, this is to advise that the Court is considering amendments of Canon 3 and Canon 7 of the Code of Judicial 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 will also be considered at a public hearing. The notices and

agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 to the text are indicated in underlining and deleted text is shown by strikeover.]

CANON 3. A JUDGE SHOULD PERFORM THE DUTIES OF OFFICE IMPARTIALLY AND DILIGENTLY.

The judicial duties of a judge take precedence over all other activities. Judicial duties include all the duties of office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

(1)-(5) [Unchanged.]

(6) ~~A judge should abstain from public comment about a pending or impending proceeding any court, and should require a similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court or the judge's holdings or actions.~~A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

(7) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

(8) A judge shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (6) and (7).

(9) Notwithstanding the restrictions in paragraph (6), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity.

(10) Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter.

(7)-(10) [Unchanged, but renumbered (11)-(14)].

B.-D. [Unchanged.]

CANON 7. A JUDGE OR A CANDIDATE FOR JUDICIAL OFFICE SHOULD REFRAIN FROM POLITICAL ACTIVITY INAPPROPRIATE TO JUDICIAL OFFICE.

A. [Unchanged.]

B. Campaign Conduct:

(1) A candidate, including an incumbent judge, for a judicial office:

(a)-(b) [Unchanged.]

(c) ~~should~~shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, ~~or~~ promises, or commitments of conduct in office ~~other than the faithful and~~ that are inconsistent with the impartial performance of the adjudicative duties of ~~the~~judicial office.

(d) [Unchanged.]

(2)-(3) [Unchanged.]

C. [Unchanged.]

Staff Comment: The proposed amendments of Canon 3 and Canon 7 of the Code of Judicial Conduct would incorporate the ABA Model Code of Judicial Conduct 2.10 language and clarify its application to public comments made by judges.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-26. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered March 14, 2018:

PROPOSED AMENDMENTS OF MCR 3.201, 3.210, AND 3.211 AND PROPOSED ADOPTION OF MCR 3.222 AND 3.223.

On order of the Court, this is to advise that the Court is considering amendments of MCR 3.201, 3.210, and 3.211, and proposed addition of MCR 3.222 and 3.223 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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.

[Proposed Rules 3.222 and 3.223 are new rules and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.201. APPLICABILITY OF RULES.

(A)-(C) [Unchanged.]

(D) When used in this subchapter, unless the context otherwise indicates:

(1) "Case" means an action ~~initiated~~commenced in the family division of the circuit court by:

(a) ~~submission of~~filing an original complaint~~, petition, or citation~~;

(b) ~~acceptance of~~accepting transfer of an action from another court or tribunal; ~~or~~

(c) filing or ~~registration of~~registering a foreign judgment or order~~.~~;

(d) filing a petition under MCR 3.222(C); or

(e) filing a consent judgment under MCR 3.223.

(2)-(3) [Unchanged.]

RULE 3.210. HEARINGS AND TRIALS.

(A) In General.

(1) [Unchanged.]

(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~~commencing a case regardless of any stay.

(3)-(4) [Unchanged.]

(B)-(E) [Unchanged.]

RULE 3.211. JUDGMENTS AND ORDERS.

(A)-(F) [Unchanged.]

(G) Friend of the Court Review. ~~For all judgments and orders containing provisions identified in subrules (C), (D), (E), and (F), t~~The court may require that the judgment or order be submitted to the friend of the court for review to determine that it contains the provisions required by subrules (C), (D), (E), and (F).

(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 the order or judgment and~~ file it with the friend of the court.

(2)-(3) [Unchanged.]

RULE 3.222. UNIFORM COLLABORATIVE LAW ACT PROCESS AND AGREEMENTS.

(A) Scope and Applicability of Rules. This rule and MCL 691.1331 *et seq*., the Uniform Collaborative Law Act, govern collaborative law practice in domestic relations cases.

(1) Definitions. For purposes of this rule:

(a) "Collaborative matter" means a dispute, transaction, claim, problem, or issue for resolution, including a dispute, claim, or issue in a proceeding, that is described in a collaborative law participation agreement and arises under the family or domestic relations law of this state.

(b) "Collaborative law participation agreement" means an agreement by persons to participate in a collaborative law process.

(c) "Collaborative law process" means a procedure intended to resolve a collaborative matter without intervention by a court in which persons sign a collaborative law participation agreement and are represented by collaborative lawyers.

(d) "Party A" is the equivalent of a plaintiff and means the party responsible for filing and service requirements.

(e) "Party B" is the equivalent of a defendant and means the non-filing party.

(B) Commencing an Action Involving Parties in a Collaborative Law Process.

(1) Where the parties have entered into a collaborative law participation agreement and do not already have a pending domestic relations case, the parties shall proceed under subrule (C).

(2) Where a party has filed a domestic relations case with the court under MCR 2.102 and the parties subsequently sign a collaborative law participation agreement, the parties shall file notice of the signed agreement and a motion to stay proceedings on a form approved by the State Court Administrative Office.

(a) The court shall either stay the proceedings without a hearing or schedule a hearing on the notice within 28 days after the motion is filed. An initial order granting a stay shall be effective for 364 days from the date of filing of the motion. Upon stipulation of the parties, the court may extend the stay period.

(b) The court may require the parties and collaborative lawyers to file a status report on the collaborative law process. The status report shall be on a form approved by the State Court Administrative Office and shall include only information on whether the process is ongoing, concluded, or terminated. It shall not include a report, assessment, evaluation, recommendation, finding, or other communication regarding the matter.

(c) The parties shall promptly file notice with the court when a collaborative law process concludes or terminates. The notice shall be on a form approved by the State Court Administrative Office.

(i) The stay of the proceeding is lifted when the notice is filed. If the parties reached an agreement, they shall proceed under MCR 3.222(D).

(ii) If the parties have not filed notice before the stay expires, the court shall provide notice of intent to dismiss the case for lack of progress as prescribed by subrule (E). Before dismissing the proceeding, the court shall provide parties an opportunity to be heard.

(C) Establishing Jurisdiction and Starting the Statutory Waiting Period. At any time after a collaborative law participation agreement is signed, if the parties are not already under the court's jurisdiction, the parties may commence an action to submit to the court's jurisdiction.

(1) When the parties have concluded a collaborative law process and are requesting entry of a final judgment or final order, the parties shall file a petition to submit to court jurisdiction and request for entry of a final judgment or final order on a form approved by the State Court Administrative Office.

(a) The petition shall be brought "In the Matter of" the names of Party A and Party B and the subject matter of the collaborative law agreement using the case type codes under MCR 8.117. The petition shall:

(i) contain, at a minimum, the grounds for jurisdiction, the statutory grounds to enter the judgment or order, and a request to enter the judgment or order;

(ii) comply with the provisions of MCR 2.113 and MCR 3.206(A);

(iii) be signed by both parties;

(iv) be accompanied by the proposed final judgment or proposed final order, that complies with MCR 3.211 and is signed by both parties;

(v) be accompanied by a verified statement if required by MCR 3.206(B) and judgment information form if required by MCR 3.211(F); and

(vi) under MCL 691.1345, be accompanied by domestic violence screening forms. The domestic violence screening form shall be limited to reporting personal protection actions, domestic violence criminal actions, and child protective actions involving the parties and shall be on a form approved by the State Court Administrative Office. Each party must complete a separate form.

The petition may also contain a request to waive the six-month statutory waiting period under MCL 552.9f.

(b) On the filing of the petition and request for entry of final judgment or final order and payment of the filing fees, the court clerk shall assign a case number and judge. The requirement to issue a summons under MCR 2.102(A) is not applicable. Unless requested by the parties on filing of a motion, the court clerk shall not schedule the matter until either the lifting of a stay granted under subrule (B)(2) or the conclusion of the statutory waiting period, whichever occurs first. The petition under this subrule serves as a complaint and answer and as an appearance of both attorneys, and starts the statutory waiting period(s) under MCL 552.9f.

(2) To commence an action at any time before the conclusion of the collaborative law process, the parties shall file a petition for court jurisdiction and declaration of intent to file a proposed final judgment or proposed final order on a form approved by the State Court Administrative Office.

(a) The petition shall be brought "In the Matter of" the names of Party A and Party B and shall state the type of action corresponding to the assigned case type code in MCR 8.117(A)(6). The petition shall:

(i) contain, at a minimum, the grounds for jurisdiction, the statutory grounds to enter the judgment or order, and a request to enter the judgment or order;

(ii) comply with the provisions of MCR 2.113 and MCR 3.206(A);

(iii) be signed by both parties;

(iv) be accompanied by a verified statement if required by MCR 3.206(B), and

(v) under MCL 691.1345, be accompanied by domestic violence screening forms. The domestic violence screening form shall be limited to reporting personal protection actions, domestic violence criminal actions, and child protective actions involving the parties and shall be on a form approved by the State Court Administrative Office. Each party must complete a separate form.

The petition may also contain a request to waive the six-month statutory waiting period under MCL 552.9f.

(b) On the filing of the petition and payment of the filing fees, the court clerk shall assign a case number and judge. The requirement to issue a summons under MCR 2.102(A) is not applicable. Unless requested by the parties on filing of a motion, the court clerk shall not schedule the matter for a pretrial or settlement conference. The petition under this subrule serves as a complaint and answer and as an appearance of both attorneys and starts the statutory waiting period(s) under MCL 552.9f.

(c) At any time during the collaborative law process, the parties may request the court to issue, in addition to a final judgment or final order, any other order approving an agreement resulting from the process.

(d) Unless the collaborative law process has concluded, the parties shall file a status report with the court within 182 days of the filing date of the petition and again at 364 days. The status report shall be on a form approved by the State Court Administrative Office and shall include only information on whether the process is ongoing or concluded. It may not include a report, assessment, evaluation, recommendation, finding, or other communication regarding the matter.

(e) At the conclusion of the collaborative law process, the parties shall file a proposed final judgment or proposed final order that complies with MCR 3.211 and a judgment information form if required by MCR 3.211(F).

(D) Entry of Final Judgment or Final Order.

(1) At its discretion, the court may conduct a hearing before entering the final judgment or final order.

(2) The final judgment or final order shall be served in accordance with MCR 2.602(D).

(3) Nothing in this rule precludes the court from waiving the six-month statutory waiting period in accordance with MCL 552.9f.

(E) Dismissal.

(1) Lack of Progress. The clerk shall provide notice of intent to dismiss the case for lack of progress if:

(a) the parties have not filed a notice that a collaborative law process has concluded or terminated before the expiration of a stay under subrule (B)(2)(a), or

(b) the parties have not filed a proposed final judgment or proposed final order within 28 days after the statutory waiting period has expired.

(2) Notice of Intent to Dismiss. A notice of intent to dismiss the case for lack of progress shall be given in the manner provided in MCR 2.501(C) for notice of trial. The notice shall state that the case will be dismissed no sooner than 28 days after the date of the notice unless the parties do one of the following:

(a) file a proposed final judgment or proposed final order under this rule,

(b) file a complaint under MCR 2.101, or

(c) request a hearing.

(3) Other Dismissal. A party may dismiss a collaborative law matter commenced under this rule at any time under MCR 2.504.

(F) Terminating the Collaborative Law Process. If a party files a complaint under MCL 691.1335(4)(b)(*i*), the clerk shall proceed on the complaint in accordance with MCR 2.102(A). The court shall dismiss the petition filed under subrule (C)(1) or (C)(2). Pursuant to MCL 691.1339, the attorneys in the collaborative law agreement are disqualified from representing either party in the new action.

RULE 3.223. SUMMARY PROCEEDING FOR ENTRY OF CONSENT JUDGMENT OR ORDER.

(A) Scope and Applicability of Rules. This rule governs practice and procedure for entering a consent judgment or consent order as an original action.

(B) Definitions. For purposes of this rule:

(1) "Party A" is the equivalent of a plaintiff and means the party responsible for filing and service requirements.

(2) "Party B" is the equivalent of a defendant and means the non-filing party.

(C) Commencing an Action.

(1) The parties shall file a petition to submit to court jurisdiction and request for entry of a proposed consent judgment or proposed consent order on a form approved by the State Court Administrative Office.

(a) The petition shall be brought "In the Matter of" the names of Party A and Party B and the subject matter of the proposed consent judgment or proposed consent order using the case type codes under MCR 8.117. The petition shall:

(i) contain, at a minimum, the grounds for jurisdiction, the statutory grounds to enter the judgment or order, and a request to enter the judgment or order;

(ii) comply with the provisions of MCR 2.113 and MCR 3.206(A);

(iii) be signed by both parties;

(iv) be accompanied by the proposed consent judgment or consent order, that complies with MCR 3.211 and is signed by both parties;

(v) be accompanied by a verified statement if required by MCR 3.206(B) and a judgment information form if required by MCR 3.211(F); and

(vi) under MCL 691.1345, be accompanied by domestic violence screening forms. The domestic violence screening form shall be limited to reporting personal protection actions, domestic violence criminal

actions, and child protective actions involving the parties and shall be on a form approved by the State Court Administrative Office. Each party must complete a separate form.

(b) The petition may contain a request to waive the six-month statutory waiting period under MCL 552.9f.

(2) The petition filed under subrule (1)(a) serves as a complaint and answer unless a party files an objection under subrule (5). It also serves as an appearance of the attorney who signs the petition.

(3) On the filing of the petition and request for entry of consent judgment or consent order and payment of the filing fees, the court clerk shall:

(a) assign a case number and judge, and shall issue a notice of the filing on a form approved by the State Court Administrative Office to be served by Party A as provided in MCR 2.103 and 2.105. The court clerk shall not issue a summons under MCR 2.102(A), and

(b) schedule a hearing date on the proposed consent judgment or consent order but shall not schedule the matter for any pretrial proceedings unless requested by the parties on filing of a motion. The hearing date may not be scheduled sooner than 60 days after the date of the notice of filing. Nothing in this rule precludes the court from waiving the six-month statutory waiting period in accordance with MCL 552.9f.

(4) The notice of the filing must be issued "In the name of the people of the State of Michigan," under the seal of the court that issued it. It must be directed to both parties and include:

(a) the name and address of the court,

(b) the names of the parties,

(c) the case number and name of assigned judge,

(d) the names, addresses, and bar numbers of any attorneys representing the parties,

(e) the date on which the notice of filing was issued,

(f) the date on which the proposed consent judgment or order will be heard by the court,

(g) a statement that if either party objects to this summary proceeding at any time before entry of the proposed consent judgment or consent order, the case will be dismissed, and

(h) a statement that the hearing on the proposed consent judgment or consent order will be held under MCR 3.210 at the conclusion of any applicable statutory waiting period.

(5) If either party objects to this summary proceeding any time before entry of the proposed consent judgment or proposed consent order, the court shall dismiss the case.

(6) At any time after the filing of the proposed consent judgment or proposed consent order, the parties may file stipulations and motions and the court may enter temporary orders.

(D) Entry of Final Consent Judgment or Consent Order. The court shall conduct a hearing on the proposed consent judgment or proposed consent order in accordance with MCR 3.210. The final consent judgment or final consent order shall be served in accordance with MCR 2.602(D).

(E) Dismissal. A party may dismiss a matter commenced under this rule at any time under MCR 2.504 or as provided under subrule (C)(5).

Staff Comment: The proposed amendments of MCR 3.201, 3.210, and 3.211 and proposed addition of MCR 3.222 and 3.223 would integrate the collaborate law process designed under the Uniform Collaborate Law Act (159 PA 2014; MCL 691.1331-691.1354) into the state's trial court system for practical use, and would add a similar process for parties not represented by counsel who seek to submit a consent judgment.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-03. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered April 19, 2018:

PROPOSED AMENDMENT OF MCR 7.202.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.202 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 will also be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.202. DEFINITIONS.

For purposes of this subchapter:

(1)-(5) [Unchanged.]

(6) "final judgment" or "final order" means:

(a) In a civil case,

(i)-(ii) [Unchanged.]

(iii) in a domestic relations action, a postjudgment order ~~affecting the custody of a minor,~~that, as to a minor, grants or denies a motion to change legal custody, physical custody, domicile, parenting time, grandparenting time, school enrollment or religious affiliation; or authorizes or denies medical or mental health treatment.

(iv)-(v) [Unchanged.]

(b) [Unchanged.]

Staff Comment: The proposed amendment of MCR 7.202 clarifies what constitutes a final postjudgment order in a domestic relations case for purposes of appeal by right. This issue was raised in *Marik v Marik* (Docket No. 154549) during oral arguments held earlier this term.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-20. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts/mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered May 16, 2018:

PROPOSED AMENDMENT OF MCR 6.502 AND PROPOSED AMENDMENT OF RULE 3.8 OF THE MICHIGAN RULES OF PROFESSIONAL CONDUCT.

On order of the Court, this is to advise that the Court is considering amendments of Rule 6.502 of the Michigan Court Rules and Rule 3.8 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 [http://www.courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.502. MOTION FOR RELIEF FROM JUDGMENT.

(A)-(F) [Unchanged.]

(G) Successive Motions.

(1) [Unchanged.]

(2) A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion. The clerk shall refer a successive motion that asserts that one of these exceptions is applicable to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions.

The court may waive the provisions of this rule if it concludes that there is a significant possibility that the defendant is innocent of the crime.

(3) For purposes of subrule (G)(2), "new evidence" includes new scientific evidence. This includes, but is not limited to, shifts in science entailing changes:

(a) in a field of scientific knowledge, including shifts in scientific consensus or the emergence of differing or contradictory scientific theories that were not previously available to the defendant;

(b) in a testifying expert's own scientific knowledge and opinions; or

(c) in a scientific method on which the relevant scientific evidence at trial was based.

RULE 3.8. SPECIAL RESPONSIBILITIES OF A PROSECUTOR.

The prosecutor in a criminal case shall:

(a)-(e) [Unchanged.]

(f) When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(g) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Staff Comment: The proposed amendments would make several substantive changes in MCR 6.502 regarding postjudgment relief from judgment motions. First, the proposed new language in MCR 6.502(G)(2) would insert an "actual innocence" waiver provision similar to that in MCR 6.508(D)(3). Further, MCR 6.502(G)(3) would be added to clarify that shifts in science are included in the definition of "new evidence" for purposes of the exemption from the successive motion limitation. Finally, new language would be added to MRPC 3.8 to require certain actions by a prosecutor who knows of new, credible, and

material evidence creating a reasonable likelihood that defendant did not commit the offense of which defendant was convicted, or who knows of clear and convincing evidence that shows defendant did not commit the offense. The proposed additional language of MRPC 3.8 is taken from the ABA Model Rules of Professional Conduct 3.8.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2013-05/2014-46. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered May 16, 2018:

PROPOSED AMENDMENT OF MCR 6.302.

On order of the Court, this is to advise that the Court is considering an amendment of MCR 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 will also be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.302. PLEAS OF GUILTY AND NOLO CONTENDERE.

(A) [Unchanged.]

(B) An Understanding Plea. Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that each defendant understands:

(1)-(4) [Unchanged.]

(5) if the plea is accepted, the defendant may be giving up the right to appeal issues that would otherwise be appealable if she or he were convicted at a trial. Further, any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right;

The requirements of subrules (B)(3) and (B)(5) may be satisfied by a writing on a form approved by the State Court Administrative Office. If a court uses a writing, the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights.

(C)-(F) [Unchanged.]

Staff Comment: The proposed amendment of MCR 6.302 would require a trial court judge to advise a defendant that if a plea is accepted, the defendant will give up the right to appeal issues that might have been available after the conclusion of a trial.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-16. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered May 23, 2018:

PROPOSED AMENDMENT OF RULE 7.1.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.1 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/ default.aspx].

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 to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.1. COMMUNICATIONS CONCERNING A LAWYER'S SERVICES.

A lawyer may, on the lawyer's own behalf, on behalf of a partner or associate, or on behalf of any other lawyer affiliated with the lawyer or

the lawyer's law firm, use or participate in the use of any form of public communication that is not false, fraudulent, misleading, or deceptive. A communication shall not:

(a)-(c) [Unchanged.]

Except as otherwise provided in this rule, a lawyer who is a retired or former justice, judge, referee, or magistrate may use the title ("justice," "judge," "referee," or "magistrate,") only when the title is preceded by the word "retired" or "former." A justice, judge, referee, or magistrate who is removed from office or terminated on grounds of misconduct is prohibited from using the title.

Comment: [Unchanged.]

Staff Comment: The proposed amendment of MRPC 7.1 would restrict and regulate the use of the terms "retired" or "former" for a justice, judge, referee, or magistrate who returns to the practice of law. This proposal is a narrower version than one submitted by the State Bar of Michigan Representative Assembly.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-25. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered May 23, 2018:

PROPOSED AMENDMENT OF RULE 4.4 OF THE MICHIGAN RULES OF PROFESSIONAL CONDUCT.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 4.4 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 4.4. RESPECT FOR RIGHTS OF THIRD PERSONS.

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Comment:

Responsibility to a client requires a lawyer to subordinate the interest of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationship, such as the client-lawyer relationship.

Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not

required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

Staff Comment: The proposed amendment of MRPC 4.4 would define the responsibilities of a lawyer who receives a document that was inadvertently sent. This proposal was submitted by the State Bar of Michigan. Note that the Court adopted MCR 2.302(B)(7) in 2008 to address the issue of discovery material inadvertently transmitted, and that rule requires the inadvertent recipient to return or destroy the alleged protected material, and may promptly submit the material to the trial court for a determination of the claim. To the extent that the final paragraph of the proposed new comment language apparently leaves such a decision to the discretion of the lawyer, this proposed new language may conflict (or at least exist in tension) with the existing language in MCR 2.302(B)(7).

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-29. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered June 13, 2018:

PROPOSED AMENDMENT OF MCR 2.002.

On order of the Court, this is to advise that the Court is considering alternative amendments of Rule 2.002 of the Michigan Court Rules. Before determining whether either of the alternative 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 also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx]. **Note that the comment period for these proposals is slightly shorter than the typical three-month period to enable this issue to be considered by the Court at its September 2018 public hearing.**

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 to the text are indicated in underlining and deleted text is shown by strikeover.]

ALTERNATIVE A

RULE 2.002. WAIVER ~~OR SUSPENSION~~ OF FEES ~~AND COSTS~~ FOR INDIGENT PERSONS.

(A) Applicability and Scope.

(1) Only an individual~~natural person~~ is eligible for the waiver ~~or suspension~~ of fees ~~and costs~~ under this rule. A private or public organization is not eligible for a waiver of fees.

(2) Except as provided in subrule (F), for the purpose of this rule "fees ~~and costs~~" applies only to ~~filing~~ fees required by ~~law~~MCL 600.857, MCL 600.880, MCL 600.880a, MCL 600.880b, MCL 600.880c, MCL 600.1027, MCL 600.1986, MCL 600.2529, MCL 600.5756, MCL 600.8371, and MCL 600.8420.

(3) A request to waive fees must be filed in each case for which a waiver is requested. A request cannot be applied to multiple cases involving the same individual.

(4) If fees are waived under this rule before judgment, the waiver continues through the date of judgment unless ordered otherwise under subrule (G). If fees are waived under this rule postjudgment, the waiver continues through the date of adjudication of the postjudgment proceedings. If jurisdiction of the case is transferred to another court, the order granting the waiver continues in the receiving court according to this rule unless ordered otherwise by the receiving court under subrule (G). If an interlocutory appeal is filed in another court, the order granting the waiver continues in the appellate court.

(5) If the case is appealed, the order granting the waiver is void in the appellate court. A request to waive appellate filing fees may be filed in the appellate court in accordance with this rule.

(B) Request for Waiver of Fees. A request to waive fees must accompany the documents the individual is filing with the court. The request must be on a form approved by the State Court Administrative Office. No additional documentation may be required. The information contained on the form shall be nonpublic. The request must be verified in accordance with MCR 1.109(D)(3)(b) and~~Execution of Affidavits. An affidavit required by this rule may~~ be signed either

(1) by the individual~~party~~ in whose behalf the request~~affidavit~~ is made; or

(2) by a person having personal knowledge of the facts required to be shown, if the individual~~person~~ in whose behalf the request~~affidavit~~ is made is unable to sign it because of minority or other disability. The request~~affidavit~~ must state~~recite~~ the individual's minority or other disability.

(C) Persons Receiving Public Assistance. For purposes of this subrule, public assistance means government benefits in the form of financial assistance or food stamps and can be shown by providing a public assistance case number. If an individual~~party~~ shows ~~by ex parte affidavit or otherwise~~ that he or she is receiving any form of public assistance as defined in this subrule, the payment of fees ~~and costs~~ as to that party shall be waived by the clerk of the court~~suspended~~. The clerk of the court shall certify the waiver on a form approved by the State Court Administrative Office and shall send a copy to the individual.

(D) Other Indigent Individuals~~Persons~~. If an individual~~party~~ shows ~~by ex parte affidavit or otherwise~~ that he or she is unable because of indigency~~y~~ to pay fees ~~and costs~~, the court shall order those fees ~~and costs either~~ waived ~~or suspended until the conclusion of the litigation~~.

(1) A judge shall enter an order either granting or denying the request within one business day. If required financial information is not provided in the waiver request, the judge may deny the waiver. An order denying shall indicate the reason for denial. The order granting a request must include a statement that the person for whom fees are waived is required to notify the court when the reason for waiver no longer exists.

(2) The clerk of the court shall send a copy of the order to the individual. If the court denied the request, the clerk shall also send a notice that to preserve the filing date the individual must pay the fees within three business days or the filing will be rejected.

(E) Domestic Relations Cases; Payment of Fees ~~and Costs~~ by Spouse.

~~(1)~~ If a party is entitled to relief ~~I~~in an action for divorce, separate maintenance, ~~or~~ annulment, or affirmation of marriage~~,~~ is qualified for a waiver of filing fees under subrule (C) or (D) and is also entitled to an order requiring the other party to pay attorney fees, the court shall order suspension of payment of those fees ~~and costs~~ and shall require the other party to pay them, unless the other party is also qualified to have filing fees waived under subrule (C) or (D).~~required to be paid by a party and order that they be paid by the spouse, if that party~~

~~(a) is qualified for a waiver or suspension of fees and costs under subrule (C) or (D), and~~

~~(b) is entitled to an order requiring the spouse to pay attorney fees.~~

~~(2) If the spouse is entitled to have the fees and costs waived or suspended under subrule (C) or (D), the fees and costs are waived or suspended for the spouse.~~

(F) Payment of Service Fees and Costs of Publication for Indigent Individuals~~Persons~~. If payment of fees ~~and costs~~ has been waived ~~or suspended~~ for an individual~~party~~ and service of process must be made by an official process server or by publication, the court shall order the service fees or costs of publication paid by the county or funding unit in which the action is pending, if the individual~~party~~ files~~submits~~ an ex parte affidavit stating facts showing the necessity for that type of service of process. If known at the time, the affidavit may be included in or with the request to waive fees.

(G) Reinstatement of Requirement to Pay~~for Payment of~~ Fees ~~and Costs~~. If the payment of fees ~~or costs~~ has been waived ~~or suspended~~

under this rule, the court may on its own initiative order the individualperson for whom the fees ~~or costs~~ were waived ~~or suspended~~ to pay those fees ~~or costs~~ when, upon a finding of fact, the court determines the reason for the waiver ~~or suspension~~ no longer exists. If an order to reinstate fees is entered, the individual must pay the fees as ordered.

ALTERNATIVE B

RULE 2.002. WAIVER OR SUSPENSION OF FEES AND COSTS FOR INDIGENT PERSONS.

(A) Applicability.

(1) [Unchanged.]

(2) Except as provided in subrule (F~~H~~), for the purpose of this rule "fees and costs" applies only to filing fees required by law. The granting of a fee waiver or suspension in a case waives all filing fees in the case from the date of filing the affidavit through the date of judgment in the case or the adjudication of the post-judgment proceedings, unless there is a finding of a change in circumstances pursuant to subrule (I) of this rule.

(B) Execution of Affidavits, Form (MC 20), Filing Date.

(1) An affidavit required by this rule may be signed either:

(a~~1~~) by the party in whose behalf the affidavit is made; or

(b~~2~~) by a person having personal knowledge of the facts required to be shown, if the person in whose behalf the affidavit is made is unable to sign it because of minority or other disability. The affidavit must recite the minority or other disability.

(2) Unless otherwise permitted in this court rule, no court shall require additional information prior to approval of a request to waive or suspend fees other than that information as provided in form MC 20 as approved by Michigan's State Court Administrative Office. So long as the information in form MC 20 satisfies one of the criteria for a waiver (i.e., the criteria in subrule (C), (D), or (E) of this rule, the fees shall be waived).

(3) Consistent with MCR 2.107(G), the filing date for the pleadings accompanied by a request to waive fees shall be the date the pleadings and fee waiver request are presented to the court for review. If the fee waiver is denied, the party requesting the fee waiver has 14 days from the date of the denial or the date of hearing on the denial, whichever is later, to pay the fee and preserve the original filing date for purposes of the associated pleadings.

(C) Persons Receiving Public Assistance. If a party shows by ex parte affidavit or otherwise that he or she is receiving any form of means-tested public assistance, the payment of fees and costs as to that party shall be waived~~suspended~~. For purposes of this rule, means-tested public assistance includes but is not limited to:

(1) Food Assistance Program through the State of Michigan;

(2) Medicaid;

(3) Financial Independence Program through the State of Michigan;

(4) Women, Infants, and Children benefits;

(5) Supplemental Security Income through the federal government; or

(6) any other federal, state, or locally administered means-tested income or benefit.

(D) Representation by a Legal Services Program. If a party is represented by a legal services program that is a grantee of the federal Legal Services Corporation or the Michigan State Bar Foundation, the payment of fees and costs as to that party shall be waived.

(E~~D~~) Other Indigent Persons and Financial Hardships. If a party shows by ex parte affidavit or otherwise that he or she is unable because of indigency or financial hardship to pay fees and costs, the court shall order those fees and costs either waived or suspended until the conclusion of the litigation. For purposes of this rule, indigency is defined as living in a household whose gross household income is under 200% of the federal poverty level.

(F) Denial of a Request to Waive/Suspend Fees. If the court denies a request to waive or suspend fees, the court, at the time of denial, must state the reason for the denial in writing and provide the reason for the denial to the requesting party. The requesting party has 14 days from the date of denial to request a hearing on the denial. Any hearing held as a result of a denial must be held by the court within 14 days of receiving the request for hearing.

(G~~E~~) Domestic Relations Cases; Payment of Fees and Costs by Spouse.

(1) In an action for divorce, separate maintenance, or annulment or affirmation of marriage, the court shall order suspension of payment of fees and costs required to be paid by a party and order that they be paid by the spouse, if that party

(a) is qualified for a waiver or suspension of fees and costs under subrule (C), ~~or~~ (D), or (E); and

(b) [Unchanged.]

(2) If the spouse is entitled to have the fees and costs waived or suspended under subrule (C), ~~or~~ (D), or (E) the fees and costs are waived or suspended for the spouse.

(H~~F~~) [Relettered but otherwise unchanged.]

(I~~G~~) Reinstatement of Requirement for Payment of Fees and Costs. If the payment of fees or costs has been waived or suspended under this rule, the court may on its own initiative order the person for whom the fees or costs were waived or suspended to pay those fees or costs if, during the pendency of the action, the court makes a finding of fact that there has been a change in circumstances and ~~when~~ the reason for the waiver or suspension no longer exists. A person for whom the fees or costs were waived or suspended is required to notify the court if the reason for waiving/suspending the fees and costs no longer exists.

If fees or costs are reinstated, the court shall not delay entry of orders or judgments or in any other way delay the progress of the case pending payment of the fees.

(J) Review of Fee Waiver Petitions. Only if a court finds that a request for a fee waiver is incomplete or if a court has a reasonable belief that a request is inaccurate, the court may conduct further inquiries reasonably necessary to prove indigency or financial hardship. Any hearing regarding these further inquiries shall be on the record. The notice of hearing shall indicate the specific issues that are subject to further inquiry.

Staff Comment: The Court is considering two different proposals regarding fee waivers for indigent individuals. Alternative A is a version prepared internally in anticipation of implementation of a statewide e-Filing system. Alternative B is a proposal submitted by the State Bar of Michigan. The two versions are similar in some respects, but have significant differences. For example, the Bar's version would establish a standard for indigency as living in a household whose gross household income is under 200% of the federal poverty level, would create a status of "financial hardship," would allow the court to conduct further inquiries if necessary to determine whether a party is indigent, and would create a right to request a hearing if a petition for indigency is denied. The alternative version does not include such provisions.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by **September 1, 2018**, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2002-37/2018-20. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered June 13, 2018:

PROPOSED AMENDMENT OF CANON 7 OF THE MICHIGAN CODE OF JUDICIAL CONDUCT.

On order of the Court, this is to advise that the Court is considering an amendment of Canon 7 of the Michigan Code of Judicial 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 [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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 to the text are indicated in underlining and deleted text is shown by strikeover.]

CANON 7. A JUDGE OR A CANDIDATE FOR JUDICIAL OFFICE SHOULD REFRAIN FROM POLITICAL ACTIVITY INAPPROPRIATE TO JUDICIAL OFFICE.

A. [Unchanged.]

B. Campaign Conduct:

(1) [Unchanged.]

(2) These provisions govern a candidate, including an incumbent judge, for a judicial office:

(a) [Unchanged.]

(b) A candidate may establish committees of responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support (including support from lawyers) for the candidacy.

(c) Such committees may solicit and accept~~are prohibited from soliciting~~ campaign contributions from the public, including lawyers, as permitted by law.~~in excess of $100 per lawyer, but may solicit public support from lawyers. It is not a violation of this provision for a committee, in undertaking solicitations that are not directed exclusively to lawyers but may in fact go to lawyers who are members of a group or found on a mailing list, to solicit more than $100 per person, provided that the following disclaimer appears on the letter or on a response card, in print that is at least the same size as the remainder of the print in the letter or the response card:~~

~~"Canon 7 of the Michigan Code of Judicial Conduct prohibits a judicial campaign committee from soliciting more than $100 per lawyer. If you are a lawyer, please regard this as informative and not a solicitation for more than $100."~~

(d) [Unchanged.]

Staff Comment: The proposed amendment of Canon 7 of the Code of Judicial Conduct would explicitly allow judicial campaign solicitation as permitted by law, eliminate the $100 per lawyer limitation, and remove the disclaimer requirement. This change would bring Michigan's canons into conformity with the majority of states that have moved away from solicitation restrictions and instead opted to refer to statutory campaign provisions.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this 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 the proposal may be sent to the Supreme Court Clerk in writing or electronically by

October 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-15. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].