MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

June 30, 2015, through January 31, 2016

CORBIN R. DAVIS
REPORTER OF DECISIONS

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SUPREME COURT

March 18, 2015

Back row left to right: Justices DAVID F. VIVIANO, BRIAN K. ZAHRA, BRIDGET M. MCCORMACK, and RICHARD H. BERNSTEIN

Front row left to right: Justice STEPHEN J. MARKMAN, Chief Justice ROBERT P. YOUNG, JR., and Justice MARY BETH KELLY.

SUPREME COURT

	Term Expires January 1 of
Chief Justice	
ROBERT P. YOUNG, Jr.	2019
Justices	
STEPHEN J. MARKMAN	2021
MARY BETH KELLY	2019[1]
BRIAN K. ZAHRA	2023
BRIDGET M. McCORMACK	2021
DAVID F. VIVIANO	2017
RICHARD H. BERNSTEIN	2023
JOAN L. LARSEN	2017[2]

Commissioners

DANIEL C. BRUBAKER, Chief Commissioner
SHARI M. OBERG, Deputy Chief Commissioner

TIMOTHY J. RAUBINGER	MICHAEL S. WELLMAN
LYNN K. RICHARDSON[3]	GARY L. ROGERS
NELSON S. LEAVITT	RICHARD B. LESLIE
DEBRA A. GUTIERREZ-McGUIRE	KATHLEEN M. DAWSON
ANNE-MARIE HYNOUS VOICE	SAMUEL R. SMITH
DON W. ATKINS	ANNE E. ALBERS
JÜRGEN O. SKOPPEK	AMY L. Van DYKE

AARON J. GAUTHIER[4]

State Court Administrator

MILTON L. MACK[5]

Clerk: LARRY S. ROYSTER
Reporter of Decisions: CORBIN R. DAVIS
Crier: DAVID G. PALAZZOLO

[1] To October 1, 2015.

[2] From October 5, 2015.

[3] To December 31, 2015.

[4] From December 14, 2015.

[5] From July 27, 2015.

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
MICHAEL J. TALBOT	2021
Chief Judge Pro Tem	
CHRISTOPHER M. MURRAY	2021
Judges	
DAVID H. SAWYER	2017
WILLIAM B. MURPHY	2019
MARK J. CAVANAGH	2021
KATHLEEN JANSEN	2019
HENRY WILLIAM SAAD	2021
JOEL P. HOEKSTRA	2017
JANE E. MARKEY	2021
PETER D. O'CONNELL	2019
KURTIS T. WILDER	2017
PATRICK M. METER	2021
DONALD S. OWENS	2017
KIRSTEN FRANK KELLY	2019
PAT M. DONOFRIO	2017[1]
KAREN FORT HOOD	2021
STEPHEN L. BORRELLO	2019
DEBORAH A. SERVITTO	2019
JANE M. BECKERING	2019
ELIZABETH L. GLEICHER	2019
CYNTHIA DIANE STEPHENS	2017
MICHAEL J. KELLY	2021
DOUGLAS B. SHAPIRO	2019
AMY RONAYNE KRAUSE	2021
MARK T. BOONSTRA	2021
MICHAEL J. RIORDAN	2019
MICHAEL F. GADOLA	2017
COLLEEN A. O'BRIEN	2017[2]

Chief Clerk:
JEROME W. ZIMMER, Jr.

Research Director:
JULIE ISOLA RUECKE

[1] To September 30, 2015.

[2] From October 26, 2015.

CIRCUIT JUDGES

		Term Expires January 1 of
1.	MICHAEL R. SMITH	2021
2.	JOHN M. DONAHUE	2017
	CHARLES T. LaSATA	2017
	ANGELA PASULA	2019
	SCOTT SCHOFIELD	2021
3.	DAVID J. ALLEN	2021
	ANNETTE J. BERRY	2019
	GREGORY D. BILL	2019
	ULYSSES W. BOYKIN	2021
	KAREN Y. BRAXTON	2019
	MARGIE R. BRAXTON	2017
	MEGAN MAHER BRENNAN	2021
	JAMES A. CALLAHAN	2017
	THOMAS CAMERON	2019
	JEROME C. CAVANAGH	2019
	ERIC WILLIAM CHOLACK	2017
	JAMES R. CHYLINSKI	2017
	ROBERT J. COLOMBO, Jr.	2019
	KEVIN J. COX	2019
	DAPHNE MEANS CURTIS	2021
	CHRISTOPHER D. DINGELL	2021
	CHARLENE M. ELDER	2021
	VONDA R. EVANS	2021
	EDWARD EWELL, Jr.	2019
	PATRICIA SUSAN FRESARD	2017
	SHEILA ANN GIBSON	2017
	JOHN H. GILLIS, Jr.	2021
	ALEXIS GLENDENING	2017
	DAVID ALAN GRONER	2017
	RICHARD B. HALLORAN, Jr.	2019
	ADEL A. HARB	2019[1]
	CYNTHIA GRAY HATHAWAY	2017
	DANA MARGARET HATHAWAY	2019

[1] From November 4, 2015.

		Term Expires January 1 of
	DANIEL ARTHUR HATHAWAY	2021
	MICHAEL M. HATHAWAY	2017
	CHARLES S. HEGARTY	2019
	CATHERINE HEISE	2019
	SUSAN L. HUBBARD	2017
	MURIEL D. HUGHES	2017
	EDWARD JOSEPH	2021
	CONNIE MARIE KELLEY	2021
	TIMOTHY MICHAEL KENNY	2017
	QIANA D. LILLARD	2019
	KATHLEEN I. MACDONALD	2017
	KATHLEEN M. McCARTHY	2019
	BRUCE U. MORROW	2017
	JOHN A. MURPHY	2017
	MARIA L. OXHOLM	2019
	LYNNE A. PIERCE	2021
	LITA MASINI POPKE	2017
	DANIEL P. RYAN	2019[2]
	RICHARD M. SKUTT	2021
	MARK T. SLAVENS	2017
	LESLIE KIM SMITH	2019
	VIRGIL C. SMITH	2019
	MARTHA M. SNOW	2017
	CRAIG S. STRONG	2021
	BRIAN R. SULLIVAN	2017
	LAWRENCE S. TALON	2021
	DEBORAH A. THOMAS	2019
	MARGARET MARY VANHOUTEN	2021
	SHANNON N. WALKER	2021
4.	SUSAN E. BEEBE	2017
	RICHARD N. LAFLAMME	2017
	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	2017
	LISA ORTLIEB GORCYCA	2021
	NANCI J. GRANT	2021

[2] To August 10, 2015.

		Term Expires January 1 of
	HALA Y. JARBOU	2017[3]
	SHALINA D. KUMAR	2021
	DENISE LANGFORD-MORRIS	2019
	LISA LANGTON	2023
	JEFFREY S. MATIS	2021[4]
	CHERYL A. MATTHEWS	2017
	KAREN D. McDONALD	2019
	PHYLLIS C. McMILLEN	2019
	RUDY J. NICHOLS	2021[5]
	COLLEEN A. O'BRIEN	2017[6]
	DANIEL PATRICK O'BRIEN	2017
	WENDY LYNN POTTS	2019
	MICHAEL D. WARREN, Jr.	2019
	JOAN E. YOUNG	2017
7.	DUNCAN M. BEAGLE	2017
	JOSEPH J. FARAH	2017
	JUDITH A. FULLERTON	2019
	JOHN A. GADOLA	2021
	ARCHIE L. HAYMAN	2019
	GEOFFREY L. NEITHERCUT	2019
	DAVID J. NEWBLATT	2017
	MICHAEL J. THEILE	2021
	RICHARD B. YUILLE	2021
8.	DAVID A. HOORT	2017
	SUZANNE KREEGER	2021
9.	PAUL J. BRIDENSTINE	2019
	GARY C. GIGUERE, Jr.	2021
	STEPHEN D. GORSALITZ	2017
	PAMELA L. LIGHTVOET	2019
	ALEXANDER C. LIPSEY	2017
10.	JANET M. BOES	2019
	FRED L. BORCHARD	2017
	JAMES T. BORCHARD	2017
	DARNELL JACKSON	2019
	ROBERT L. KACZMAREK	2021
11.	WILLIAM W. CARMODY	2021
12.	CHARLES R. GOODMAN	2021
13.	THOMAS G. POWER	2017
	PHILIP E. RODGERS, Jr.	2021

[3] From November 9, 2015.

[4] From November 9, 2015.

[5] To June 30, 2015.

[6] To October 25, 2015.

		Term Expires January 1 of
14.	TIMOTHY G. HICKS	2017
	KATHY HOOGSTRA	2021
	WILLIAM C. MARIETTI	2017
	ANNETTE ROSE SMEDLEY	2019
15.	P. WILLIAM O'GRADY	2021
16.	JAMES M. BIERNAT, Jr.	2019
	RICHARD L. CARETTI	2017
	DIANE M. DRUZINSKI	2021
	JENNIFER FAUNCE	2019
	JAMES M. MACERONI	2021
	EDWARD A. SERVITTO, Jr.	2019
	MARK S. SWITALSKI	2019
	MATTHEW S. SWITALSKI	2021
	JOSEPH TOIA	2021[7]
	KATHRYN A. VIVIANO	2017
	TRACEY A. YOKICH	2019
17.	GEORGE S. BUTH	2017
	PAUL J. DENENFELD	2017
	KATHLEEN A. FEENEY	2021
	DONALD A. JOHNSTON, III	2019
	DENNIS B. LEIBER	2019
	GEORGE JAY QUIST	2017
	PAUL J. SULLIVAN	2021
	MARK A. TRUSOCK	2019
	CHRISTOPHER P. YATES	2019
	DANIEL V. ZEMAITIS	2021
18.	HARRY P. GILL	2017
	KENNETH W. SCHMIDT	2019
	JOSEPH K. SHEERAN	2021
19.	DAVID A. THOMPSON	2021
20.	KENT D. ENGLE	2017
	JON H. HULSING	2021
	EDWARD R. POST	2017
	JON VAN ALLSBURG	2019
21.	PAUL H. CHAMBERLAIN	2017
	MARK H. DUTHIE	2019
22.	ARCHIE CAMERON BROWN	2017
	PATRICK J. CONLIN, Jr.	2021
	TIMOTHY P. CONNORS	2019
	CAROL ANNE KUHNKE	2019
	DAVID S. SWARTZ	2021

[7] From September 1, 2015.

		Term Expires January 1 of
23.	WILLIAM F. MYLES	2017
24.	DONALD A. TEEPLE	2021
25.	JENNIFER MAZZUCHI	2021
	THOMAS L. SOLKA	2017
26.	MICHAEL G. MACK	2021
27.	ANTHONY A. MONTON	2019
28.	WILLIAM M. FAGERMAN	2021
29.	MICHELLE M. RICK	2017
	RANDY L. TAHVONEN	2021
30.	ROSEMARIE ELIZABETH AQUILINA	2021
	LAURA BAIRD	2019
	CLINTON CANADY, III	2017
	WILLIAM E. COLLETTE	2021
	JOYCE DRAGANCHUK	2017
	JAMES S. JAMO	2019
	JANELLE A. LAWLESS	2021
31.	DANIEL J. KELLY	2021
	CYNTHIA A. LANE	2017
	MICHAEL L. WEST	2019
32.	ROY D. GOTHAM	2021[8]
33.	ROY C. HAYES, III	2021
34.	MICHAEL J. BAUMGARTNER	2017[9]
35.	ROBERT BENNETT	2017[10]
	MATTHEW J. STEWART	2021
36.	KATHLEEN BRICKLEY	2019
	JEFFREY J. DUFON	2021
37.	JOHN A. HALLACY	2019[11]
	BRIAN KIRKHAM	2017
	SARAH SOULES LINCOLN	2021
	STEPHEN B. MILLER	2017
	CONRAD J. SINDT	2019[12]
38.	MARK S. BRAUNLICH	2019
	MICHAEL A. WEIPERT	2017
	DANIEL WHITE	2021
39.	ANNA MARIE ANZALONE	2019
	MARGARET MURRAY-SCHOLZE NOE	2021
40.	NICK O. HOLOWKA	2017

[8] To December 31, 2015.

[9] To August 31, 2015.

[10] From December 7, 2015.

[11] From December 29, 2015.

[12] To September 30, 2015.

		Term Expires January 1 of
	BYRON KONSCHUH	2021
41.	MARY BROUILLETTE BARGLIND	2017
	RICHARD J. CELELLO	2021
42.	MICHAEL J. BEALE	2021
	STEPHEN CARRAS	2019
43.	MICHAEL E. DODGE	2017
44.	MICHAEL P. HATTY	2019
	DAVID READER	2017
45.	MICHELLE FREIDMAN APPEL	2023
	DAVID M. GUBOW	2021
	PAUL E. STUTESMAN	2019
46.	JANET M. ALLEN	2017
	GEORGE J. MERTZ	2021
47.	STEPHEN T. DAVIS	2017
48.	MARGARET BAKKER	2017
	KEVIN W. CRONIN	2021
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	2017
54.	AMY GIERHART	2019
55.	THOMAS R. EVANS	2021
	ROY G. MIENK	2019
56.	JANICE K. CUNNINGHAM	2019
	JEFFREY L. SAUTER	2021
57.	CHARLES W. JOHNSON	2019

DISTRICT JUDGES

		Term Expires January 1 of
1.	TERRENCE P. BRONSON	2019
	JAROD M. CALKINS	2021
	JACK VITALE	2017
2A.	JONATHAN L. POER	2021
	LAURA J. SCHAEDLER	2017
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	2017
	ARTHUR J. COTTER	2021
	DONNA B. HOWARD	2021
	STERLING R. SCHROCK	2019
	DENNIS M. WILEY	2017
7.	ARTHUR H. CLARKE, III	2021
	ROBERT T. HENTCHEL	2017
8.	ANNE E. BLATCHFORD	2019
	CHRISTOPHER HAENICKE	2019
	ROBERT C. KROPF	2021
	JULIE K. PHILLIPS	2021
	RICHARD A. SANTONI	2021
	VINCENT C. WESTRA	2017
10.	SAMUEL I. DURHAM, Jr.	2017
	JOHN A. HALLACY	2021[1]
	FRANKLIN K. LINE, Jr.	2021
	JAMES D. NORLANDER	2019
12.	JOSEPH S. FILIP	2017
	DANIEL GOOSTREY	2019
	MICHAEL J. KLAEREN	2021
	R. DARRYL MAZUR	2021
14A.	RICHARD E. CONLIN	2021
	J. CEDRIC SIMPSON	2019
	KIRK W. TABBEY	2017

[1] To December 28, 2015.

		Term Expires January 1 of
14B.	CHARLES POPE	2021
15.	JOSEPH F. BURKE	2019
	CHRISTOPHER S. EASTHOPE	2021[2]
	ELIZABETH POLLARD HINES	2017
16.	SEAN P. KAVANAGH	2021
	KATHLEEN J. McCANN	2019
17.	KAREN KHALIL	2017
	CHARLOTTE L. WIRTH	2021
18.	SANDRA A. CICIRELLI	2019
	MARK A. McCONNELL	2021
19.	WILLIAM C. HULTGREN	2017
	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	2017
25.	GREGORY A. CLIFTON	2021
	DAVID J. ZELENAK	2017
27.	RANDY L. KALMBACH	2019
28.	JAMES A. KANDREVAS	2021
29.	LAURA REDMOND MACK	2019
30.	BRIGETTE R. OFFICER-HILL	2017
31.	PAUL J. PARUK	2021
32A.	DANIEL S. PALMER	2021
33.	JENNIFER COLEMAN HESSON	2017
	JAMES KURT KERSTEN	2021
	MICHAEL K. McNALLY	2019
34.	TINA BROOKS GREEN	2019
	BRIAN A. OAKLEY	2017
	DAVID M. PARROTT	2021
35.	MICHAEL J. GEROU	2017
	RONALD W. LOWE	2019
	JAMES A. PLAKAS	2021
36.	LYDIA NANCE ADAMS	2017
	ROBERTA C. ARCHER	2019
	NANCY McCAUGHAN BLOUNT	2021
	IZETTA F. BRIGHT	2017
	DEMETRIA BRUE	2021
	ESTHER LYNISE BRYANT-WEEKES	2021
	RUTH C. CARTER	2017
	DONALD COLEMAN	2019

[2] To December 31, 2015.

		Term Expires January 1 of
	PRENTIS EDWARDS, Jr.	2019
	WANDA EVANS	2019
	DEBORAH GERALDINE FORD	2017
	RUTH ANN GARRETT	2019
	RONALD GILES	2021
	KATHERINE HANSEN	2017
	ADRIENNE HINNANT-JOHNSON	2021[3]
	SHANNON A. HOLMES	2021
	PATRICIA L. JEFFERSON	2021
	ALICIA A. JONES-COLEMAN	2019
	KENNETH J. KING	2021
	DEBORAH L. LANGSTON	2019
	LEONIA J. LLOYD	2017[4]
	MIRIAM B. MARTIN-CLARK	2017
	WILLIAM McCONICO	2019
	DONNA R. MILHOUSE	2019
	B. PENNIE MILLENDER	2017
	CYLENTHIA L. MILLER	2017
	DAVID PERKINS	2017
	KEVIN F. ROBBINS	2019
	DAVID S. ROBINSON, Jr.	2019
	BRENDA KAREN SANDERS	2021[5]
	MICHAEL E. WAGNER	2021
37.	JOHN M. CHMURA	2019
	MICHAEL CHUPA	2021
	SUZANNE M. FAUNCE	2017
	MATTHEW P. SABAUGH	2019
38.	CARL F. GERDS III	2021
39.	JOSEPH F. BOEDEKER	2021
	MARCO A. SANTIA	2019
	CATHERINE B. STEENLAND	2017
40.	MARK A. FRATARCANGELI	2019
	JOSEPH CRAIGEN OSTER	2021
41A.	MICHAEL S. MACERONI	2021
	DOUGLAS P. SHEPHERD	2019
	STEPHEN S. SIERAWSKI	2017
	KIMBERLEY ANNE WIEGAND	2019
41B.	LINDA DAVIS	2021
	CARRIE LYNN FUCA	2017
	SEBASTIAN LUCIDO	2019
42-1.	DENIS R. LeDUC	2021
42-2.	WILLIAM H. HACKELL III	2019
43.	CHARLES G. GOEDERT	2021

[3] From November 18, 2015.

[4] To January 1, 2016.

[5] To July 1, 2015.

		Term Expires January 1 of
	KEITH P. HUNT	2019
	JOSEPH LONGO	2017
44.	DEREK W. MEINECKE	2019
	JAMES L. WITTENBERG	2023
45.	MICHELLE FRIEDMAN APPEL	2023
	DAVID M. GUBOW	2021
46.	CYNTHIA ARVANT	2017[6]
	SHEILA R. JOHNSON	2021
	DEBRA NANCE	2019
	WILLIAM J. RICHARDS	2017[7]
47.	JAMES BRADY	2021
	MARLA E. PARKER	2017
48.	MARC BARRON	2017
	DIANE D'AGOSTINI	2019
	KIMBERLY SMALL	2021
50.	RONDA FOWLKES GROSS	2019
	MICHAEL C. MARTINEZ	2021
	PRESTON G. THOMAS	2017
	CYNTHIA THOMAS WALKER	2021
51.	JODI R. DEBBRECHT SWITALSKI	2019[8]
	RICHARD D. KUHN, Jr.	2021
52-1.	ROBERT BONDY	2019
	THOMAS DAVID LAW	2017
	TRAVIS REEDS	2021
52-2.	JOSEPH G. FABRIZIO	2021
	KELLEY RENAE KOSTIN	2017
52-3.	LISA L. ASADOORIAN	2019
	NANCY TOLWIN CARNIAK	2017
	JULIE A. NICHOLSON	2021
52-4.	KIRSTEN NIELSEN HARTIG	2017
	MAUREEN M. McGINNIS	2021
53.	THERESA M. BRENNAN	2021
	L. SUZANNE GEDDIS	2017
	CAROL SUE READER	2019
54A.	LOUISE ALDERSON	2017
	PATRICK F. CHERRY	2021
	HUGH B. CLARKE, Jr.	2017
	FRANK J. DeLUCA	2019
54B.	RICHARD D. BALL	2017
	ANDREA ANDREWS LARKIN	2019
55.	DONALD L. ALLEN	2017
	THOMAS P. BOYD	2021
56A.	HARVEY J. HOFFMAN	2017
	JULIE H. REINCKE	2021

[6] From July 31, 2015.

[7] To July 3, 2015.

[8] To January 31, 2016.

		Term Expires January 1 of
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
	KENNETH D. POST	2017
59.	PETER P. VERSLUIS	2017
60.	HAROLD F. CLOSZ, III	2021
	MARIA LADAS HOOPES	2021
	RAYMOND J. KOSTRZEWA	2019
	ANDREW WIERENGO	2017
61.	DAVID J. BUTER	2021
	MICHAEL J. DISTEL	2019
	JENNIFER FABER	2017
	JEANINE NEMESI LaVILLE	2019
	DONALD H. PASSENGER	2017[9]
	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	2017
	JENNIFER J. MANLEY	2021
67-3.	VIKKI BAYEH HALEY	2021
67-4.	MARK C. McCABE	2021
	CHRISTOPHER ODETTE	2019
*67-5.	TRACY L. COLLIER-NIX	2021
	WILLIAM H. CRAWFORD, II	2019
	MARY CATHERINE DOWD	2017
	HERMAN MARABLE, Jr.	2019
	NATHANIEL C. PERRY, III	2021
70-1.	TERRY L. CLARK	2019
	M. RANDALL JURRENS	2017
	M. T. THOMPSON, Jr.	2021
70-2.	ALFRED T. FRANK	2021
	KYLE HIGGS TARRANT	2019

[9] To October 25, 2015.

[*] D68 Ended January 1, 2016. D67-5 was created January 2, 2016.

		Term Expires January 1 of
71A.	LAURA CHEGER BARNARD	2021
71B.	KIM DAVID GLASPIE	2021
72.	MICHAEL L. HULEWICZ	2017
	JOHN D. MONAGHAN	2019
	CYNTHIA SIEMEN PLATZER	2021
74.	MARK E. JANER	2017
	TIMOTHY J. KELLY	2019
	DAWN A. KILDA	2021
75.	MICHAEL CARPENTER	2021
76.	ERIC JANES	2021
77.	PETER JAKLEVIC	2021[10]
78.	H. KEVIN DRAKE	2021
79.	PETER J. WADEL	2021
80.	JOSHUA M. FARRELL	2021
81.	ALLEN C. YENIOR	2021
82.	RICHARD E. NOBLE	2021
84.	AUDREY D. VAN ALST	2021
86.	THOMAS J. PHILLIPS	2019
	MICHAEL STEPKA	2017
87A.	PATRICIA A. MORSE	2021
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.	CHRISTOPHER S. NINOMIYA	2021
96.	DENNIS H. GIRARD	2017[11]
	ROGER W. KANGAS	2021
	KARL WEBER	2017[12]
97.	MARK A. WISTI	2021

[10] From January 1, 2015.

[11] To August 30, 2015.

[12] From December 30, 2015.

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	Term Expires January 1 of
RUSSELL F. ETHRIDGE	2016
CARL F. JARBOE	2018
THEODORE A. METRY	2016
MATTHEW R. RUMORA	2018

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	JOHN C. KEUVELAAR	2019
Benzie	JOHN MEAD	2019
Berrien	MABEL JOHNSON MAYFIELD	2021
Berrien	THOMAS E. NELSON	2019[1]
Branch	KIRK A. KASHIAN	2019
Calhoun	MICHAEL L. JACONETTE	2017
Cass	SUSAN L. DOBRICH	2019
Cheboygan	ROBERT JOHN BUTTS	2019
Chippewa	ELIZABETH BIOLETTE CHURCH	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	FREDERICK R. MULHAUSER	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

[1] To August 1, 2015.

Houghton	FRASER T. STROME	2019
Huron	DAVID L. CLABUESCH	2019
Huron	DAVID B. HERRINGTON	2021
Ingham	R. GEORGE ECONOMY	2019
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	2017
Kalkaska	LYNNE MARIE BUDAY	2019
Kent	TERENCE ACKERT	2017[2]
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	CARL J. MARLINGA	2019
Manistee	THOMAS N. BRUNNER	2019
Marquette	CHERYL L. HILL	2019
Mason	JEFFREY C. NELLIS	2019
Mecosta/Osceola	MARCO S. MENEZES	2019
Menominee	DANIEL E. HASS	2019[3]
Menominee	WILLIAM A. HUPY	2019[4]
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	NEIL G. MULLALLY	2017
Muskegon	GREGORY C. PITTMAN	2019

[2] From September 1, 2015.

[3] From September 29, 2015.

[4] To July 2, 2015.

Newaygo	GRAYDON W. DIMKOFF	2019
Oakland	LINDA S. HALLMARK	2019
Oakland	DANIEL A. O'BRIEN	2021
Oakland	ELIZABETH M. PEZZETTI	2017
Oakland	KATHLEEN A. RYAN	2017
Oceana	BRADLEY G. LAMBRIX	2019
Ogemaw	SHANA A. LAMBOURN	2019
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	DOUGLAS C. DOSSON	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	MILTON L. MACK, JR.	2017[5]
Wayne	LISA MARIE NEILSON	2017
Wayne	LAWRENCE PAOLUCCI	2017[6]
Wayne	FRANK S. SZYMANSKI	2019
Wexford	KENNETH L. TACOMA	2019

[5] To July 24, 2015.

[6]From November 9, 2015.

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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
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
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ADMINISTRATIVE ORDER 2015-5

ADOPTION OF ADMINISTRATIVE ORDER REQUIRING TRIAL COURTS TO COMPLY WITH CERTAIN ADA-RELATED PRACTICES

Entered September 16, 2015, effective immediately (File No. 2015-16)—REPORTER.

Trial Court Requirements for Providing Equal and Full Access to Courts for Persons with Disabilities

On order of the Court, to ensure that persons with disabilities have equal and full access to Michigan courts and that all trial courts and court-operated programs and services have implemented procedures in compliance with the Americans with Disabilities Act of 1990, the ADA Amendments Act of 2008, Michigan's Deaf Persons' Interpreters Act (1982 PA 204), and the Persons with Disabilities Civil Rights Act (1976 PA 220), the Michigan Supreme Court orders that each trial court shall:

Adopt a local administrative order that describes the procedure to be followed for a person to request accommodations in that court. The local administrative order shall include the provisions incorporated in Model LAO 35, but may include additional provisions. The local administrative order shall be submitted to and approved by the State Court Administrative Office as a local administrative order under MCR 8.112.

Designate a court employee to be the court's ADA coordinator.

Ensure that the chief judge and ADA coordinator participate in training regarding the duties and obligations of a court in compliance with the ADA, the ADA Amendments Act of 2008, the Deaf Persons' Interpreters Act, and the Persons with Disabilities Civil Rights Act.

Further, courts shall comply with any additional requirements established by the SCAO regarding compliance with these acts.

The requirements established in this order shall become effective 90 days after the date this order enters.

ADMINISTRATIVE ORDER 2015-6

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 23D CIRCUIT COURT, THE 81ST DISTRICT COURT, AND THE ALCONA, ARENAC, IOSCO, AND OSCODA COUNTY PROBATE COURTS

Entered September 16, 2015, effective immediately (File No. 2004-04)—REPORTER.

On order of the Court, adoption of this concurrent jurisdiction plan replaces the plan for the 23rd Circuit Court, the 81st District Court, and the Alcona, Arenac, Iosco, and Oscoda County Probate Courts originally adopted in Administrative Order No. 2004-4, which has been revised to eliminate references to these courts.

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 23rd Circuit Court, the 81st District Court, and the Alcona, Arenac, Iosco, and Oscoda 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 pursu-

ant 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 2015-7

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 26TH CIRCUIT COURT, THE 88TH DISTRICT COURT, AND THE MONTMORENCY COUNTY PROBATE COURT

Entered September 16, 2015, 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 26th Circuit Court, the 88th District Court, and the Montmorency County Probate Court.

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 2015-8

AUTHORIZATION OF PILOT PROJECT TO STUDY FEASIBILITY AND EFFECTIVENESS OF MEDIATION IN THE COURT OF APPEALS

Entered September 16, 2015, effective immediately (File No. 2015-02)—REPORTER.

On order of the Court, the Court of Appeals is authorized to implement a mediation pilot project. As provided below, selection for mediation before an outside mediator would be by order of the Court of Appeals and parties could request to have their appeal included in the program or removed from the program. The program is intended to afford parties an efficient and economical means of resolving their appeal. This pilot project is established to study the feasibility and effectiveness of appellate mediation. The program shall begin October 1, 2015, and shall remain in effect for 12 months. The Court of Appeals will track participation in, and effectiveness of, the program and shall report to, and make such findings available to, the Michigan Supreme Court.

(A) Selection for Mediation.

(1) At any time during the pendency of an appeal before the Court of Appeals, the chief judge or another designated judge may order an appeal submitted to mediation. When a case is selected for mediation, participation is mandatory, however, the chief judge or

another designated judge may remove the case on finding that mediation would be inappropriate.

(2) To identify cases for mediation, the Court of Appeals will review civil appeals to determine if mediation would be of assistance to the court or the parties. At any time, a party to a pending civil appeal may file a written request that the appeal be submitted to mediation. Such a request may be made without formal motion and shall be confidential.

(3) A party to a case that has been selected for mediation may file a request to have the case removed from mediation. Such a request may be made without formal motion and shall be confidential. If the request to remove is premised on a desire to avoid the cost of mediation, it is not necessary to demonstrate an inability to pay such costs.

(4) The submission of an appeal to mediation will not toll any filing deadlines in the appeal unless the court orders otherwise.

(B) Mediation Procedure.

(1) Mediation shall be conducted by a mediator selected by stipulation of the parties or designated by the court. A mediator designated by the court shall be an attorney, licensed in Michigan, who has met the qualifications of mediators provided in MCR 2.411(F).

(2) Mediation shall consider the possibility of settlement, the simplification of the issues, and any other matters which the mediator determines may aid in the handling or disposition of the appeal.

(3) The order referring the case to mediation shall specify the time within which the mediation is to be completed. Within the time stated in the order, the mediator shall file a notice with the clerk stating only the date of completion of mediation, who participated

in the mediation, whether settlement was reached, and whether any further mediation is warranted.

(4) If mediation results in full or partial settlement of the case, within 21 days after the filing of the notice by the mediator, the parties shall file a stipulation to dismiss pursuant to MCR 7.218(B).

(5) The mediator may charge a reasonable fee, which shall be divided and borne equally by the parties unless agreed otherwise and paid by the parties directly to the mediator. If a party does not agree upon the fee requested by the mediator, upon motion of the party, the chief judge or another designated judge shall set a reasonable fee. In all other respects, mediator fees shall be governed by MCR 2.411(D).

(6) The statements and comments made during mediation are confidential as provided in MCR 2.412 and may not be disclosed in the notice filed by the mediator under (B)(3) of this order or by the participants in briefs or in argument.

(7) Upon failure by a party or attorney to comply with a provision of this order or the order submitting the case to mediation, the chief judge or another designated judge may assess reasonable expenses, including attorney's fees, caused by the failure, may assess all or a portion of appellate costs, or may dismiss the appeal.

(C) Selection of Mediator.

(1) Except as otherwise provided in this order, the selection of a mediator shall be governed by MCR 2.411(B).

(2) Within the time provided in the order referring a case to mediation, the parties may stipulate to the selection of a mediator. Such stipulation shall be filed with the clerk of the court. If the parties do not file a

stipulation agreeing to a mediator within the time provided, the court shall appoint a mediator from the roster of approved mediators maintained by the circuit court in which the case originated.

ADMINISTRATIVE ORDER 2015-9

AUTHORIZATION OF A ONE-YEAR PILOT PROJECT RELATED TO THE SADO/MAACS MERGER

Entered September 16, 2015, effective immediately (File No. 2014-36)—REPORTER.

In Administrative Order No. 2014-18, the Court ordered the merger of the State Appellate Defender Office (SADO) and the Michigan Appellate Assigned Counsel System (MAACS), and further ordered the Appellate Defender 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."

On order of the Court, and upon the request of the Appellate Defender Commission, MAACS is authorized to implement a one-year pilot project to assess the feasibility, costs, and benefits associated with structural reforms currently under consideration for permanent statewide implementation. These reforms would consolidate the individual "local lists" of roster attorneys, which currently exist in all 57 circuit courts, into a smaller number of regional lists to be maintained and administered by MAACS. The pilot will assess the extent to which this consolidation results in greater speed and efficiency in the assignment process, by reducing the number of lists to maintain and

allowing MAACS to assume the responsibility of prescreening counsel, preparing appointment orders, and sending notification of appointments to defendants and their attorneys.

The reforms under consideration will depend upon the standardization of appellate assigned counsel policies among the circuit courts, most notably including the voluntary adoption of a standard attorney fee and expense policy. The pilot will assess the extent to which uniformity in attorney fee policies allows more meaningful data analysis related to attorney performance and efficiency, as well as the potential financial impact of these reforms on the circuit courts and their funding units. The pilot will also assess the extent to which standardization of attorney fees affects MAACS's attorney recruitment and retention efforts.

The pilot shall begin as soon as possible as authorized by this order and when there is participation by a sufficient number of circuit courts to constitute two geographic regions, as identified and approved by MAACS. The pilot shall remain in effect for 12 months, unless extended with the approval of this Court and participating circuit courts. MAACS shall track the effectiveness of the reforms by quantitative and qualitative analysis, and shall make its findings available to the Michigan Supreme Court.

For the duration of the pilot project, all participating circuit courts shall comply with the following regulations, which supplement Section 3 of the MAACS regulations as adopted by this Court in Administrative Order No. 1989-3:

(1) Upon the consent of all affected circuit courts and MAACS, local lists of MAACS roster attorneys may be consolidated by geographic region in whatever manner MAACS deems appropriate, with MAACS assuming

certain administrative responsibilities that have traditionally been handled by individual circuit courts.

(2) In order to facilitate the consolidation of local lists, any affected circuit court shall adopt the following administrative procedures:

(a) Within one business day after receiving a request for appellate counsel, the trial court shall provide a copy to MAACS, along with the judgment of sentence, the register of actions, and the identities of all court reporters not named on the register of actions.

(b) Within seven days after the filing of a timely request for counsel, MAACS shall provide to the trial court a proposed order of appointment naming a qualified attorney who has been selected by list rotation or approved specific selection, and directing the court reporter(s) to prepare and file all transcripts as required by MCR 6.425(G) within the time limits specified in MCR 7.210.

(c) Within seven days after receiving a proposed appointment order naming appellate counsel, and within the deadline provided by MCR 6.425(G)(1)(a), the trial court shall issue an order appointing counsel or denying the request for counsel. If the court denies the request for counsel, it shall accompany its ruling with a statement of reasons. The court shall provide copies of its order to MAACS, the prosecutor, and the court reporter(s). MAACS shall provide copies of the trial court's order to the defendant and appointed counsel, thereby satisfying the trial court's responsibilities under MCR 6.425(G)(2).

(d) Within 28 days after receiving a timely request for payment detailing the time and expenses related to the representation in a manner approved by MAACS, the trial court shall order reimbursement pursuant to

a standard attorney fee and expense policy that has been approved by the appellate defender commission and the trial court.

ADMINISTRATIVE ORDER
No. 2015-10

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 51ST CIRCUIT COURT, THE 79TH DISTRICT COURT, AND THE MASON COUNTY PROBATE COURT

Entered October 14, 2015, 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 51st Circuit Court, the 79th District Court, and the Mason County Probate Court.

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*.

AMENDED ADMINISTRATIVE ORDER No. 2004-4

REVISION OF ADMINISTRATIVE ORDER NO. 2004-4

Entered September 16, 2015, effective immediately (File No. 2004-04)—REPORTER.

On order of the Court, effective immediately, to coincide with the adoption of Administrative Order No. 2015-6 that adopts a revised concurrent jurisdiction plan in the 23rd Circuit Court, the 81st District Court, and the Alcona, Arenac, Iosco, and Oscoda County Probate Courts, the following changes in this administrative order are necessary.

[Changes are provided in overstriking.]

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 concurrent jurisdiction plans for the following trial courts effective October 1, 2004:

GENESEE COUNTY

7th Circuit Court

Genesee County Probate Court

67th District Court

68th District Court

VAN BUREN COUNTY

36th Circuit Court

Van Buren County Probate Court

7th District Court

~~ALCONA, ARENAC, IOSCO AND OSCODA COUNTIES~~

~~23rd Circuit Court~~

~~Alcona County Probate Court~~

~~Arenac County Probate Court~~

~~Iosco County Probate Court~~

~~Oscoda County Probate Court~~

~~81st District Court~~

The plans 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*.

MARKMAN, J. (concurring). I wish to incorporate by reference the views that I expressed in concurring with Administrative Order No. 2004-2.

AMENDED ADMINISTRATIVE ORDER 2007-3

E-FILING RULES FOR THE 6TH CIRCUIT COURT (OAKLAND COUNTY) AS MICHIGAN COURTS TRANSITION TO A STATEWIDE E-FILING SYSTEM

Entered December 23, 2015, effective January 1, 2016 (File No. 2002-37)—REPORTER.

On order of the Court, Administrative Order No. 2007-3 is amended as follows, effective January 1, 2016.

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

E-Filing ~~Pilot Project~~ in Oakland County

On order of the Court, the 6th Circuit Court is authorized to continue its e-filing project during a transition period while the State Court Administrative Office prepares and implements a statewide e-filing system. ~~implement an Electronic Document Filing Pilot Project. The pilot project is established to study the effectiveness of electronically filing court documents in lieu of traditional paper filings. The pilot project shall begin August 1, 2007, or as soon thereafter as is possible, and shall remain in effect until June 30, 2015 or further order of this Court.~~ The 6th Circuit Court is aware that rules regarding electronic filing

have been published for comment by this Court. If this Court adopts electronic-filing rules during the pendency of the 6th Circuit Court Electronic Document Filing ~~Pilot~~ Project, the 6th Circuit Court will, within 60 days of the effective date of the rules, comply with the requirements of those rules. In addition, it is anticipated that the 6th Circuit Court, along with other court locations that participated as e-filing pilot courts, will be among the first group of courts that will connect with any statewide system for purposes of testing and early integration.

The 6th Circuit Court will ~~track the participation and effectiveness of this pilot program and shall~~ report to and provide information as requested by the State Court Administrative Office.

1. Construction

The purpose of the transition period for e-filing ~~pilot program~~ is to continue successful e-filing efforts in the 6th Circuit and to coordinate with state efforts, through a vendor or otherwise, to build and operate a statewide system of e-filing. ~~study the effectiveness of electronically filing court documents in connection with the just, speedy, and economical determination of the actions involved in the pilot program.~~ The Sixth Circuit Court may exercise its discretion to grant necessary relief to avoid the consequences of error so as not to affect the substantial rights of the parties. Except for matters related to electronically filing or service of documents during the transition period ~~pilot program~~, the Michigan Rules of Court govern all other aspects of the cases involved in the project~~pilot~~.

2. Definitions

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

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

(c) "LAO" means all local administrative orders governing the Sixth Judicial Circuit Court.

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

(e) "Transition e-filing ~~Pilot~~ program or "project" means the initiative by the Sixth Judicial Circuit Court, the Oakland County Clerk, and the Oakland County Department of Information Technology in conjunction with the ~~Wiznet, Inc.~~ court's vendor, and under the supervision of the State Court Administrative Office. This e-filing application facilitates the electronic filing of pleadings, motions, briefs, responses, lists, orders, judgments, notices, and other documents during the period after enactment of statutory authority to fund and operate a statewide electronic filing system. All state courts in Michigan are envisioned as eventually permitting e-filing (with appropriate modifications and improvements). The Oakland County ~~pilot~~ program will begin testing with four circuit judges with "C" or "N" type civil cases. The court plans to expand the ~~pilot~~ program to all circuit judges who wish to participate.

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

3. Participation in the ~~Pilot~~ Program

(a) Participation in the ~~pilot~~ program shall be mandatory in all pending "A," "C," "P" or "N" type cases assigned to participating circuit judges. At the discretion of the judge, participation may also include post-

disposition proceedings in qualifying case types assigned to participating judges.

Until April 30, 2012, court users will have the discretion to submit the initiating documents in "A," "C," "P" and "N" type cases and any fees associated with the documents either traditionally or electronically. Beginning May 1, 2012, submission of initiating documents shall be made electronically, subject to the exception created at subsection 3.3(b) below. The court shall provide on campus computer facilities at the county clerk's office and the law library to enable a party or attorney without a computer to e-file on campus.

(b) This is a mandatory e-filing project. It is presumed that all documents will be filed electronically. However, the Court recognizes that circumstances may arise that will prevent one from e-filing. To ensure that all parties retain access to the courts, parties that demonstrate good cause will be permitted to file their documents with the clerk, who will then file the documents electronically. Among the factors that the Sixth Circuit Court will consider in determining whether good cause exists to excuse a party from mandatory e-filing are a party's access to the Internet and indigency. A self-represented party is not excused from the project merely because the individual does not have counsel. However, upon submission of proof of incarceration, a self-represented party shall be exempted from e-filing during the period of the individual's incarceration. Application for a waiver of e-filing at the time of case initiation shall be made to the chief judge or the chief judge's designate.

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

(a) In an effort to facilitate uniform service within the scope of this project, the Sixth Circuit Court strongly recommends electronic service. However, service of process for initiating documents shall be made pursuant to MCR 2.105. After the initial process has been served and the defendant has registered as a user with the Tyler (Wiznet) e-filing system for the case, amendments to the initiating documents may be served electronically subject to the limitations or restrictions otherwise imposed in this order.

(b) Program participants must submit e-filings pursuant to these rules and the ~~pilot~~ program's technical requirements. The clerk may, in accordance with MCR 8.119(C) reject documents submitted for filing that do not comply with MCR 2.113(C)(1), are not accompanied by the proper fees, clearly violate Administrative Order No. 2006-2, do not conform to the technical requirements of this ~~pilot~~ project, or are otherwise submitted in violation of a statute, an MCR, an LAO, or the program rules.

(c) E-filings may be submitted to the court at any time, but shall only be reviewed and accepted for filing by the 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). The clerk shall process electronic submissions on a first-in, first-out basis.

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

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

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

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

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

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

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

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

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

(a) All times for filing and serving e-filings shall be governed by the applicable statute, the MCR and the LAO as if the e-filings were hand delivered. Where a praecipe is required by LCR 2.119(A), it must be e-filed along with the documents that require the praecipe, unless another court-approved mechanism is approved and used by the filer.

(b) The electronic submission of a motion and brief through this ~~pilot~~ program satisfies the requirements

of filing a judge's copy under MCR 2.119(A)(2). A judge may require that one "courtesy copy" or "chambers copy" of any dispositive motion and all accompanying exhibits, as well as responses and replies, or any motion and brief in which the motion, brief, and attachments equal 40 pages or more be submitted directly to the judge's chamber in paper format. Any exhibits must be appropriately tabbed. Good practice requires that in appropriate cases, relevant portions of lengthy documents be highlighted. A printed copy of the e-filing transmission receipt must be attached to the front of the pleading. The requirement to provide a "courtesy copy" or "chambers copy" at a judge's request shall expire on May 22, 2018.

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

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

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

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

6. Service

(a) All parties shall register with the court and opposing parties one e-mail address with the functionality required for the ~~pilot~~ program through Tyler Odyssey File and Serve. All service shall originate from this registered e-mail address. Additional e-mail addresses for other attorneys or staff persons associated

with counsel for the party may be added as registered users. Service shall be perfected upon a self-represented party or counsel and any additional registered users associated with counsel at the e-mail addresses registered with the Tyler (Wiznet) e-filing system. Each individual bears the responsibility for the accuracy of the registered e-mail address.

(b) Unless otherwise agreed to by the court and the parties, all e-filings must be served electronically to the e-mail addresses of all parties. The subject matter line for the transmittal of document served by e-mail shall state: "Service of e-filing in case [insert caption of case]."

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

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

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

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

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

(d) Proof of Service shall be submitted to the Sixth Circuit Court according to MCR 2.104 and these rules.

7. Format and Form of E-filing and Service

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

(b) All e-filings shall comply with MCR 1.109 and the technical requirements of the court's vendor and, after implementation, the vendor implementing the statewide e-filing system.

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

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

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

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

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

(b) documents for case evaluation proceedings.

9. Official Court Record; Certified Copies

(a) The official record, with the exception of documents filed under seal [see subsection 8(a) of this administrative order and MCR 8.119(F)] is the electronic version of all documents filed with the court. An appellate record shall be certified in accordance with MCR 7.210(A)(1).

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

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

Participating attorneys shall provide reasonable assistance in constructing the paper record.

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

10. Court Notices, Orders, and Judgments

At the court's discretion, the court may issue, file, and serve orders, judgments, and notices as e-filings. Pursuant to a stipulation and order, the parties may agree to accept service from the court via facsimile pursuant to the procedures set forth in Rule 6(c).

11. Technical Malfunctions

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

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

12. Privacy Considerations

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

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

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

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

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

5. Driver's License Numbers and State-Issued Personal Identification Card Numbers. A person's full driver's license number and state-issued personal identification number shall not be included in e-filings. If an individual's driver's license number or state-issued personal identification card number must be referenced in an e-filing, only the last four digits of that

number should be used and the number specified in substantially the following format: X-XXX-XXX-XX1-234.

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

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

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

Or

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

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

1. Medical records, treatment and diagnosis;

2. Employment history;

3. Individual financial information;

4. Insurance information;

5. Proprietary or trade secret information;

6. Information regarding an individual's cooperation with the government; and

7. Personal information regarding the victim of any criminal activity.

13. Further, the Oakland Circuit Court shall file an annual report with the Court by January 1 of each year (or more frequently or on another date as specified by the Court) that outlines the following:

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

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

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

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

~~e. Information regarding how the filing and service fees were calculated and whether it is anticipated that~~

~~those fees will be necessary and continued after the conclusion of the pilot program.~~

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

14. Amendment

Procedural aspects of these rules may be amended upon the recommendation of the participating judges, the approval of the chief judge, and authorization by the State Court Administrator. Proposed substantive changes, including, for example, a proposed expansion of the program to permit additional case types and a proposed change in fees, must be submitted to the Supreme Court for approval.

15. Expiration

~~Unless otherwise directed by the Michigan Supreme Court, this pilot~~ This program, requiring parties to electronically file documents in cases assigned to participating judges, shall continue until ~~December 31, 2015~~further order of the Court.

AMENDED ADMINISTRATIVE ORDERS Nos. 2007-3, 2010-3, and 2011-1

AMENDMENT OF ADMINISTRATIVE ORDER NOS. 2007-3, 2010-3, AND 2011-1 (EXTENSION OF E-FILING EXPIRATION DATES IN THE 6TH CIRCUIT COURT AND THE 3D CIRCUIT COURT)

Entered September 16, 2015, effective immediately (File No. 2002-37])—REPORTER.

On order of the Court, Administrative Order No. 2007-3 (relating to general Oakland Circuit Court proceedings) and Administrative Order No. 2010-3 (relating to Oakland Circuit Court family division cases) are amended to extend their expiration dates through December 31, 2015.

On further order of the Court, Administrative Order No. 2011-1 (relating to Wayne Circuit Court proceedings) is amended to extend its expiration date through December 31, 2015.

AMENDED ADMINISTRATIVE ORDER 2010-3

E-FILING RULES FOR THE OAKLAND CIRCUIT COURT (SIXTH CIRCUIT COURT FAMILY DIVISION) AS MICHIGAN COURTS TRANSITION TO A STATEWIDE E-FILING SYSTEM

Entered December 23, 2015, effective January 1, 2016 (File No. 2002-37)—REPORTER.

On order of the Court, Administrative Order No. 2010-3 is amended as follows, effective January 1, 2016.

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

E-filing ~~Pilot~~ Project in Oakland Circuit Court, Family Division

On order of the Court, the Sixth Judicial Circuit Court, in consultation with the State Court Administrative Office (SCAO), developed this ~~pilot~~ project to study the effectiveness of electronically filing court documents in connection with the just, speedy, and economical determination of Family Division actions in a mandatory electronic filing environment. By further order of the Court, the Sixth Circuit Court Family Division is authorized to continue its e-filing project during a transition period while the State Court Ad-

ministrative Office prepares and implements a statewide e-filing system. In addition, it is anticipated that the Sixth Circuit Court Family Division, along with other court locations that participated as e-filing pilot courts, will be among the first group of courts that will connect with any statewide system for purposes of testing and early integration.

~~Beginning March 16, 2010, or as soon thereafter as is possible and effective until December 31, 2014 or further order of this court, the Sixth Judicial Circuit Court adopts an e-filing pilot program requiring parties to electronically file documents in cases assigned to one or more participating judges. Rules designed to address issues unique to the implementation of this program are attached to and incorporated by reference to this local administrative order.~~ Participation in this ~~pilot~~ program is mandatory for cases with a "DO" case code and assigned to ~~pilot~~ program judge(s), and, effective immediately, will be gradually implemented for cases with a "DM" case code.

The Sixth Judicial Circuit Court will report to and provide information as requested by the State Court Administrative Office~~track the participation and effectiveness of this pilot program and report the results to the SCAO~~.

1. Construction

The purpose of the transition period for e-filing ~~pilot~~ is to continue successful e-filing efforts in the Sixth Circuit Court Family Division and to coordinate with state efforts, through a vendor or otherwise, to build and operate a statewide system of e-filing~~study the effectiveness of electronically filing court documents in connection with the just, speedy, and economical determination of divorce actions involved in the pilot~~. The Court may exercise its discretion to grant necessary relief to avoid the consequences of error so as not to

affect the substantial rights of the parties. Except for matters related to electronically filing or service of documents during the transition period~~pilot~~, the Michigan Rules of Court govern all other aspects of the cases involved in the project~~pilot~~.

2. Definitions

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

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

(c) "LAO" means all local administrative orders governing the Sixth Judicial Circuit Court.

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

(e) "Transition e-filing program~~Pilot~~" or "project" means the initiative by the Sixth Judicial Circuit Court, the Oakland County Clerk, and the Oakland County Department of Information Technology in conjunction with the court's vendor~~Wiznet, Inc.~~ and under the supervision of the SCAO. This e-filing application facilitates the electronic filing of pleadings, motions, briefs, responses, lists, orders, judgments, notices, and other documents during the period after enactment of statutory authority to fund and operate a statewide electronic filing system. The vision is that all state courts in Michigan will eventually permit e-filing (with appropriate modifications and improvements). The Oakland County program~~pilot~~ will begin testing with two Circuit Court judges with "DO" type civil cases. "DM" type cases are also included in the scope of this ~~pilot~~ project. The Court plans to expand the program~~pilot~~ to all Family Division judges who wish to participate. ~~The pilot program is expected to last approximately two years, beginning on January 1, 2010.~~

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

(g) "Wiznet envelope" means an electronic submission that contains one or more Wiznet transactions.

(h) "Wiznet transaction" means the submission of one or more related documents which results in a single register of actions entry. A single register of actions entry is determined by the Clerk. E.g. a motion, brief, affidavit, notice of hearing, and proof of service for a single motion submitted at one time frequently constitutes a single register of actions entry.

3. Participation in the Program~~Pilot~~

(a) Participation in the ~~Pilot~~ program shall be mandatory in all pending or newly filed "DO" type cases assigned to participating Circuit Court judges. Participation for new filings shall begin following the filing of the initial complaint or other initiating document, and assignment of the case to a participating judge. At the discretion of the e-filing judge, participation in the program~~pilot~~ may also include proceedings in post-disposition cases assigned to the ~~pilot~~ judge.

In addition, this order authorizes e-filing for all "DM" cases. Recognizing the logistical challenges associated with implementing e-filing in "DM" cases, the Court authorizes the Family Division of the Sixth Circuit Court to gradually implement the program~~pilot~~ beginning with a limited number of cases assigned to a single judge and a single Friend of the Court referee team assigned to that judge. The Sixth Circuit Court may expand the scope of the program~~pilot~~ at any time to include additional judges and/or FOC referee teams without further authorization of the Court.

(b) This is a mandatory e-filing project. It is presumed that all documents will be filed electronically.

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

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

(a) Program participants must submit e-filings pursuant to these rules and the ~~Pilot~~ program's technical requirements. The Clerk may, in accordance with MCR 8.119(C) reject documents submitted for filing that do not comply with MCR 2.113(C), are not accompanied by the proper fees, clearly violate AO 2006-2, do not conform to the technical requirements of this ~~pilot~~ project, or are otherwise submitted in violation of statute, court rule, administrative order, or program rules.

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

(c) E-filings shall be treated as if they were hand delivered to the court for all purposes under statute, court rule, and administrative order.

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

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

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

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

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

(f) Proposed orders shall be submitted to the court in accordance with the provisions of the programpilot. The Court and Clerk shall exchange the documents for review and signature pursuant to MCR 2.602(B).

(g) By electronically filing the document, the electronic filer indicates compliance with these rules.

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

(a) All times for filing and serving e-filings shall be governed by the applicable statute, court rule, and administrative order as if the e-filings were hand delivered. Where a praecipe is required by LCR 2.119(A), it

must be submitted electronically to the Court through the epraecipe application at http://courts.oakgov.com/ePraecipe/.

(b) The electronic submission of a motion and brief through this ~~Pilot~~ program satisfies the requirements of filing a Judge's Copy under MCR 2.119(A)(2). A judge may require that one "courtesy copy" or "chambers copy" of any dispositive motion and all accompanying exhibits, as well as responses and replies, or any motion and brief in which the motion, brief, and attachments equal 40 pages or more be submitted directly to the judge's chamber in paper format. Any exhibits must be appropriately tabbed. Good practice requires that in appropriate cases, relevant portions of lengthy documents be highlighted. A printed copy of the e-filing transmission receipt must be attached to the front of the pleading. The requirement to provide a "courtesy copy" or "chambers copy" at a judge's request shall expire on May 22, 2018.

(c) Applicable fees, including e-file fees and service fees, shall be paid electronically through procedures established by the Oakland County Clerk's Office at the same time and in the same amount as required by statute, court rule, or administrative order.

~~(i) Each e-filing is subject to the following e-file fees.~~

~~Type of FilingFee~~

~~EFO (e-filing only)~~

~~$5.00~~

~~EFS (e-filing with service)~~

~~$8.00~~

~~SO (service only)~~

~~$5.00~~

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

6. Service

(a) All parties shall register as a service contact with the court vendor's~~Wiznet~~ application which will provide the court and opposing parties with one email address with the functionality required for the ~~Pilot~~ program.

(b) It is highly recommended that all e-filings must be served electronically to the email addresses of all parties.

(c) The parties and court may agree that, instead of eservice, e-filings may be served to the parties (but not the court) as provided in MCR 2.107.

(d) For those choosing to accept facsimile service:

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

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

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

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

(e) Proof of Service shall be submitted to the Court according to MCR 2.104 and these rules.

7. Format and Form of E-filing and Service

(a) A party may only e-file documents for one case per Wiznet envelope.

(b) A party may e-file multiple Wiznet transactions within a single Wiznet envelope, subject to subrule 7(a).

(c) All e-filings shall comply with MCR 1.109 and the technical requirements of the Court's vendor and, after implementation, the vendor implementing the statewide e-filing system.

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

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

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

The following documents shall not be e-filed during the ~~Pilot~~ program and must be filed by the traditional methods provided in the court rules and administrative orders:

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

(b) initiating documents, and

(c) documents related to divorce proceedings that are not filed in the court file, such as a verified statement of divorce and judgment information forms.

9. Official Court Record; Certified Copies

(a) For purposes of this ~~Pilot~~ program, the electronic version of all documents filed with the Court, with the exception of documents filed under seal [see 8(a) and MCR 8.119(F)] is the official court record. An appellate record shall be certified in accordance with MCR 7.210(A)(1).

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

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

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

10. Court Notices, Orders, and Judgments

The Court shall issue, file, and serve orders, judgments, and notices as e-filings. A party exempted from e-filing under this program~~pilot~~ shall be served in accordance with MCR 2.107(C).

11. Technical Malfunctions

(a) A party experiencing a technical malfunction with the party's equipment (such as PDF conversion problems or inability to access the program~~Pilot~~ sites), another party's equipment (such as an inoperable email address), or an apparent technical malfunction of the court's ~~Pilot~~ equipment, software or server shall use reasonable efforts to timely file or receive service as provided in these rules and shall provide prompt notice to the court and parties of any such malfunction.

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

malfunction and use its discretion in determining whether such relief is warranted.

12. Privacy Considerations

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

1. Social Security Numbers. Pursuant to Administrative Order 2006-2, full social security numbers shall not be included in any e-filings. If an individual's social security number must be referenced in an e-filing, only the last four digits of that number may be used and the number specified in substantially the following format: XXX-XX-1234.

2. Names of Minor Children. Unless named as a party or otherwise required by statute, court rule, or administrative order, the identity of minor children shall not be included in any e-filings. If a non-party minor child must be mentioned, only the initials of that child's name may be used.

3. Dates of Birth. Except as required by statute, court rule, or administrative order, an individual's full birth date shall not be included in any e-filings. Subject to the above limitation, if an individual's date of birth is otherwise referenced in an e-filing, only the year may be used and the date specified in substantially the following format: XX/XX/1998.

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

5. Driver's License Numbers and State-Issued Personal Identification Card Numbers. A person's full

Driver's license number and state-issued personal identification number shall not be included in any e-filings. If an individual's driver's license number or state-issued personal identification card number must be referenced in an e-filing, only the last four digits of that number should be used and the number specified in substantially the following format: X-XXX-XXX-XX1-234.

6. Home Addresses. With the exception of a self-represented party, full home addresses shall not be included in any e-filings. If an individual's home address must be referenced in an e-filing, only the city and state should be used. For a party whose address has been made confidential by court order pursuant to MCR 3.203(F), the alternative address shall be treated as specified above.

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

1. Pursuant to and in accordance with court rules and administrative orders, file a motion to file a traditional paper version of the document under seal. The Court may, in granting the motion to file the document under seal, still require that an e-filing that does not reveal the complete personal data identifier be filed for the public files.

Or

2. Pursuant to and in accordance with the applicable court rules and administrative orders, obtain a court order to file a traditional paper reference list under seal. The reference list shall contain the complete personal data identifiers and the redacted identifiers used in the e-filing. All references in the case to the redacted identifiers included in the reference list shall be construed to refer to the corresponding com-

plete personal data identifiers. The reference list must be filed under seal, and may be amended as of right.

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

1. Medical records, treatment and diagnosis;

2. Employment history;

3. Individual financial information;

4. Insurance information;

5. Proprietary or trade secret information;

6. Information regarding an individual's cooperation with the government; and

7. Personal information regarding the victim of any criminal activity.

(d) These rules are designed to protect the private personal identifiers and information of individuals involved or referenced in actions before the Court. Nothing in these rules should be interpreted as authority for counsel or a self-represented litigant to deny discovery to the opposing party under the umbrella of complying with these rules.

13. Amendment

Procedural aspects of these rules may be amended upon the recommendation of the participating judges, the approval of the chief judge, and authorization by the State Court Administrator. Proposed substantive changes, including, for example, a proposed expansion of the program to permit additional case types and a proposed change in fees, must be submitted to the Supreme Court for approval.

14. Financial data.

Detailed financial data as defined in Administrative Order No. 2009-1, including costs generated and savings realized under the terms of this e-filing ~~pilot~~ project, shall be included in the Oakland Circuit Court's annual report for submission to this Court.

15. Expiration

~~Unless otherwise directed by the Michigan Supreme Court, this pilot~~ This program, requiring parties to electronically file documents in cases assigned to participating judges, shall continue until ~~December 31, 2015 or~~ further order of this ~~c~~Court.

AMENDED ADMINISTRATIVE ORDER 2010-4

E-FILING RULES FOR THE 13TH CIRCUIT COURT (ANTRIM, GRAND TRAVERSE, AND LEELANAU COUNTIES) AS MICHIGAN COURTS TRANSITION TO A STATEWIDE E-FILING SYSTEM

Entered December 23, 2015, effective January 1, 2016 (File No. 2002-37)—REPORTER.

On order of the Court, Administrative Order No. 2010-4 is amended as follows, effective January 1, 2016.

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

~~**Adoption of Administrative Order to Implement E-filing Pilot**~~ **Project in the 13th Judicial Circuit Court**

On order of the Court, the 13th Circuit Court is authorized to continue its e-filing project during a transition period while the State Court Administrative Office prepares and implements a statewide e-filing system. ~~implement an Electronic Document Filing Pilot Project. The pilot project is established to study the effectiveness of electronically filing court documents in lieu of traditional paper filings. The pilot project shall begin July 1, 2010, or as soon thereafter as is possible, and shall remain in effect until July 1, 2017, or further order of this Court.~~ The 13th Circuit

Court is aware that rules regarding electronic filing have been published for comment by this Court. If this Court adopts electronic-filing rules during the pendency of the 13th Circuit Court Electronic Document Filing ~~Pilot~~ Project, the 13th Circuit Court will, within 60 days of the effective date of the rules, comply with the requirements of those rules. In addition, it is anticipated that the 13th Circuit Court, along with other court locations that participated as e-filing pilot courts, will be among the first group of courts that will connect with any statewide system for the purposes of testing and early integration.

The 13th Circuit Court will ~~track the participation and effectiveness of this pilot program and shall~~ report to and provide information as requested by the State Court Administrative Office.

1. Construction

The purpose of the transition period for e-filing ~~pilot program~~ is to continue successful e-filing efforts in the 13th Circuit and to coordinate with state efforts, through a vendor or otherwise, to build and operate a statewide system of e-filing. ~~study the effectiveness of electronically filing court documents in connection with the just, speedy, and economical determination of the actions involved in the pilot program.~~ The 13th Circuit Court may exercise its discretion to grant necessary relief to avoid the consequences of error so as not to affect the substantial rights of the parties. Except for matters related to electronically filing or service of documents during the transition period~~pilot program~~, the Michigan Rules of Court govern all other aspects of the cases involved in the project~~pilot~~.

2. Definitions

(a) "Clerk" means the Antrim, Grand Traverse and Leelanau County Clerks.

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

(c) "LAO" means all local administrative orders governing the 13th Judicial Circuit Court.

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

(e) "Transition e-filing ~~Pilot~~ program" or "project" means the initiative by the 13th Judicial Circuit Court, the 13th Circuits' Clerks and the Grand Traverse Information Technology Department in conjunction with OnBase Software, and under the supervision of the State Court Administrative Office. This e-filing application facilitates the electronic filing of pleadings, motions, briefs, responses, lists, orders, judgments, notices, and other documents during the period after enactment of statutory authority to fund and operate a statewide electronic filing system. All state courts in Michigan are envisioned as eventually permitting e-filing (with appropriate modifications and improvements). The 13th Circuit ~~pilot~~ program will begin testing with "C" or "N" type civil cases in Grand Traverse County. The Court plans to expand the ~~pilot~~ program to Antrim and Leelanau Counties. ~~The pilot program is expected to last approximately five (7) years, beginning on July 1, 2010.~~

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

3. Participation in the ~~Pilot~~ Program

(a) Participation in the ~~pilot~~ program shall be mandatory in all pending "C" or "N" type cases as part of Phase I and additionally in other case types as follows:

Phase II: "A" and "P" case types, including "PH" and "PP," beginning with the effective date of this order.

Phase III: "DC," "DO," "DM," and "DP" case types and all remaining divorce or family support case codes, beginning not less than one month after implementation of Phase II.

Phase IV: "FC, "FH," and all other remaining criminal case codes, beginning not less than six months after implementation of Phase III.

Participation shall be assigned following the filing and service of the initial complaint or other initial filing. At the discretion of the judge, participation may also include postdisposition proceedings in qualifying case types.

(b) This is a mandatory e-filing project. It is presumed that all documents will be filed electronically. However, the Court recognizes that circumstances may arise that will prevent one from e-filing. To ensure that all parties retain access to the courts, parties that demonstrate good cause will be permitted to file their documents with the clerk, who will then file the documents electronically. Among the factors that the 13th Circuit Court will consider in determining whether good cause exists to excuse a party from mandatory e-filing are a party's access to the Internet and indigency. A self-represented party is not excused from the project merely because the individual does not have counsel.

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

(a) In an effort to facilitate uniform service within the scope of this project, the 13th Circuit Court strongly recommends electronic service.

(b) Program participants must submit e-filings pursuant to these rules and the ~~pilot~~ program's technical requirements. The clerk may, in accordance with MCR 8.119(C) reject documents submitted for filing that do not comply with MCR 2.113(C)(1), are not accompanied by the proper fees, clearly violate Administrative Order No. 2006-2, do not conform to the technical requirements of this ~~pilot~~ project, or are otherwise submitted in violation of a statute, an MCR, an LAO, or the program rules.

(c) E-filings may be submitted to the court at any time, but shall only be reviewed and accepted for filing by the clerk's office during the normal business hours of 8 a.m. to 5 p.m. E-filings submitted after business hours shall be deemed filed on the business day the e-filing is accepted (usually the next business day). The clerk shall process electronic submissions on a first-in, first-out basis.

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

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

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

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

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

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

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

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

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

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

(b) The electronic submission of a motion and brief through this ~~pilot~~ program satisfies the requirements of filing a judge's copy under MCR 2.119(A)(2). A judge may require that one "courtesy copy" or "chambers copy" of any dispositive motion and all accompanying exhibits, as well as responses and replies, or any motion and brief in which the motion, brief, and attachments equal 40 pages or more be submitted directly to the judge's chamber in paper format. Any exhibits must be appropriately tabbed. Good practice requires that in appropriate cases, relevant portions of lengthy documents be highlighted. A printed copy of the e-filing transmission receipt must be attached to the front of the pleading. The requirement to provide a "courtesy copy" or "chambers copy" at a judge's request shall expire on May 22, 2018.

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

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

~~Type of Filing Fee~~

~~EFO (e-filing only)~~

~~$5~~

~~EFS (e-filing with service)~~

~~$8~~

~~SO (service only)~~

~~$5~~

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

6. Service

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

(b) Unless otherwise agreed to by the court and the parties, all e-filings must be served electronically to the e-mail addresses of all parties. The subject matter line for the transmittal of document served by e-mail shall state: "Service of e-filing in case [insert caption of case]."

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

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

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

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

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

(d) Proof of Service shall be submitted to the 13th Circuit Court according to MCR 2.104 and these rules.

7. Format and Form of E-filing Service

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

(b) All e-filings shall comply with MCR 1.109 and the technical requirements of the court's vendor and, after implementation, the vendor implementing the statewide e-filing system.

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

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

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

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

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

(b) initiating documents, and

(c) documents for case evaluation proceedings.

9. Official Court Record; Certified Copies

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

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

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

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

10. Court Notices, Orders, and Judgments

At the court's discretion, the court may issue, file, and serve orders, judgments and notices as e-filings. Pursuant to a stipulation and order, the parties may agree to accept service from the court via facsimile pursuant to the procedures set forth in Rule 6(c).

11. Technical Malfunctions

(a) A party experiencing a technical malfunction with the party's equipment (such as Portable Document Format [PDF] conversion problems or inability to access the program~~pilot~~ sites), another party's equipment (such as an inoperable e-mail address), or an apparent technical malfunction of the court's ~~pilot~~ equipment, software, or server shall use reasonable efforts to timely file or receive service by traditional

methods and shall provide prompt notice to the court and the parties of any such malfunction.

(b) If a technical malfunction has prevented a party from timely filing, responding to, or otherwise perfecting or receiving service of an e-filing, the affected party may petition the 13th Circuit Court for relief. Such petition shall contain an adequate proof of the technical malfunction and set forth good cause for failure to use nonelectronic means to timely file or serve a document. The Court shall liberally consider proof of the technical malfunction and use its discretion in determining whether such relief is warranted.

12. Privacy Considerations

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

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

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

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

(iv) Financial Account Numbers. Full financial account numbers shall not be included in e-filings unless

required by statute, court rule, or other authority. If a financial account number must be referenced in an e-filing, only the last four digits of these numbers may be used and the number specified in substantially the following format: XXXXX1234.

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

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

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

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

Or

(ii) Pursuant to and in accordance with the applicable MCR and LAO, obtain a court order to file a traditional paper reference list under seal. The reference list shall contain the complete personal data

identifiers and the redacted identifiers used in the e-filing. All references in the case to the redacted identifiers included in the reference list shall be construed to refer to the corresponding complete personal data identifiers. The reference list must be filed under seal, and may be amended as of right.

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

(i) Medical records, treatment and diagnosis;

(ii) Employment history;

(iii) Individual financial information;

(iv) Insurance information;

(v) Proprietary or trade secret information;

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

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

13. Records and Reports: Further, the 13th Circuit Court shall file an annual report with the Supreme Court ~~covering the project to date~~ by January 1 of each year (or more frequently or on another date as specified by the Court) that outlines the following:

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

(b) Detailed financial information regarding the distribution or retention of collected fees, including the amount paid to each vendor per document and in total for the subject period, the amount retained by the

Court per document and in total for the period, and whether the monies retained by the Court are in a separate account or commingled with other monies.

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

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

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

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

14. Amendment

These rules may be amended upon the recommendation of the participating judges, the approval of the chief judge, and authorization by the State Court Administrator.

15. Expiration

~~Unless otherwise directed by the Michigan Supreme Court, this pilot~~ This program, requiring parties to electronically file documents in cases assigned to participating judges, shall continue until further order of the Court~~July 1, 2017~~.

AMENDED ADMINISTRATIVE ORDER 2010-6

E-FILING RULES FOR THE 16TH CIRCUIT COURT (MACOMB COUNTY) AS MICHIGAN COURTS TRANSITION TO A STATEWIDE E-FILING SYSTEM

Entered December 23, 2015, effective January 1, 2016 (File No. 2002-37)—REPORTER.

On order of the Court, Administrative Order No. 2010-6 is amended as follows, effective January 1, 2016.

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

E-filing ~~Pilot Project~~ in the 16th Circuit Court (Macomb County)

On order of the Court, the 16th Circuit Court is authorized to continue its e-filing project during a transition period while the State Court Administrative Office prepares and implements a statewide e-filing system. ~~implement an Electronic Document Filing Pilot Project. The pilot project is established to study the effectiveness of electronically filing court documents in lieu of traditional paper filings. The pilot project shall begin on January 1, 2011, or as soon thereafter as is possible, and shall remain in effect until December 31, 2015, or further order of this Court.~~

The 16th Circuit Court is aware that rules regarding electronic filing have been published for comment by this Court. If this Court adopts electronic-filing rules during the pendency of the 16th Circuit Court Electronic Document Filing ~~Pilot~~ Project, the 16th Circuit Court will, within 60 days of the effective date of the rules, comply with the requirements of those rules. In addition, it is anticipated that the 16th Circuit Court, along with other court locations that participated as e-filing pilot courts, will be among the first group of courts that will connect with any statewide system for purposes of testing and early integration.

The 16th Circuit Court will ~~track the participation and effectiveness of this pilot program and shall~~ report to and provide information as requested by the State Court Administrative Office.

1. Construction

The purpose of the transition period for e-filing ~~pilot program~~ is to continue successful e-filing efforts in the 16th Circuit and to coordinate with state efforts, through a vendor or otherwise, to build and operate a statewide system of e-filing ~~study the effectiveness of electronically filing court documents in connection with the just, speedy, and economical determination of the actions involved in the pilot program~~. The 16th Circuit Court may exercise its discretion to grant necessary relief to avoid the consequences of error so as not to affect the substantial rights of the parties. Except for matters related to electronically filing or service of documents during the transition period~~pilot program~~, the Michigan Rules of Court govern all other aspects of the cases involved in the project~~pilot~~.

2. Definitions

a. "Clerk" means the Macomb County Clerk.

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

c. LAO" means all local administrative orders governing the 16th Judicial Circuit Court.

d. "MCR" means the Michigan Rules of Court.

e. "Transition e-filing ~~Pilot~~ program" or project" means the initiative by the Sixteenth Judicial Circuit Court, the Macomb County Clerk/Register of Deeds, and the Macomb County Information Technology Department in conjunction with the court's vendor~~ImageSoft, Inc.~~, and under the supervision of the State Court Administrative Office. This e-filing application facilitates the electronic filing of pleadings, motions, briefs, responses, lists, orders, judgments, notices, and other documents during the period after enactment of statutory authority to fund and operate a statewide electronic filing system. All state courts in Michigan are envisioned as eventually permitting e-filing (with appropriate modifications and improvements). The Macomb County ~~pilot~~ program will begin testing with two circuit judges with "C" and "N" type civil cases. The 16th Judicial Circuit Court will expand testing into the remaining Civil Division case types, and the Family Division case types for Divorces without Children, Personal Protection Proceedings, and Juvenile Proceedings. The court plans to expand the ~~pilot~~ program to all circuit judges.

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

g. "TrueCertify" means an electronic document certification tool that allows the Macomb County Clerk's office to create and deliver electronically certified docu-

ments, eliminating the need for raised seals. TrueCertify includes an ImageSoft hosted confirmation website (truecertify.com) that stores an encrypted copy of each certified document so that it can be visually verified by the recipient.

h. "TrueFiling" means a web-based efile and service solution provided by ImageSoft where electronic filings may be submitted and delivered to the Courts' OnBase workflow.

3. Participation in the ~~Pilot~~ Program

a. Participation in the ~~pilot~~ program shall be mandatory in all pending "C" or "N" case types assigned to participating circuit judges as part of Phase 1 and additionally in other case types as follows:

i. Phase 1: The Macomb County ~~pilot~~ program will begin with two Civil/Criminal Division judges and will encompass case-type codes that begin with "C" or "N".

ii. Phase 2: The program will expand to case-type codes AA, AE, AP, AR, AV, AH, AL, AS, AW, PC, PD, PR, PS, and PZ for the above two judges within six months after Phase 1 has begun.

iii. Phase 3: The program will expand to the remaining Civil/Criminal Division judges for all civil case-type codes within three months after Phase 2 has begun.

iv. Phase 4: The program will expand to case-type code DO with all Family Division judges within three months after Phase 3 has begun.

v. Phase 5: The program will expand to case-type codes PH, PJ, PP, and VP, for all judges within six months after Phase 4 has begun. Case initiation documents will be supported in this Phase for case-type codes PH, PJ, PP, and VP.

vi. Phase 6: The program will expand to case-type codes DJ, DL, EM, JG, NA, PW, TL, and VF for all Family Division judges within six months after Phase 5 has begun.

Until the 16th Circuit Court begins electronic case initiation for specific case-type codes, participation shall be assigned following the filing and service of the initial complaint or other initial filing and assignment of the case to a participating judge. At the discretion of the judge, participation may also include post-disposition proceedings in qualifying case types assigned to participating judges.

b. This is a mandatory e-filing project. It is presumed that all documents will be filed electronically. However, the Court recognizes that circumstances may arise that will prevent a party from e-filing. To ensure that all parties retain access to the courts, parties that demonstrate good cause will be permitted to file their documents with the Clerk, who will then file the documents electronically. Among the factors that the 16th Circuit Court will consider in determining whether good cause exists to excuse a party from mandatory e-filing are a party's access to the Internet and indigency. A self-represented party is not excused from the project merely because the individual does not have counsel. However, upon submission of proof of incarceration, a self-represented party shall be exempted from e-filing during the period of the individual's incarceration. Application for a waiver from e-filing at the time of case initiation shall be made to the Chief Judge or the Chief Judge's designee.

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

a. In an effort to facilitate uniform service within the scope of this project, the 16th Circuit Court strongly

recommends electronic service. However, service of process for initiating documents shall be made pursuant to MCR 2.105.

b. After the initial process has been served and the defendant has registered as a user with the TrueFiling e-filing system, amendments to the initiating documents may be served electronically subject to the limitations or restrictions otherwise imposed in this order.

c. Program participants must submit e-filings pursuant to these rules and the ~~pilot~~ program's technical requirements. The Clerk may, in accordance with MCR 8.119(C), reject documents submitted for filing that do not comply with MCR 2.113(C)(1), are not accompanied by the proper fees, clearly violate Administrative Order No. 2006-2, do not conform to the technical requirements of this ~~pilot~~ project, or are otherwise submitted in violation of a statute, an MCR, an LAO, or the program rules.

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. The clerk shall process electronic submission 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. E-filings shall be treated as if they were hand-delivered to the court for all purposes under statute, the MCR, and the LAO.

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

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

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

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

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

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

i. By electronically filing the document, the electronic filer indicates compliance with these rules.

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

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

b. Where a praecipe is required, it must be e-filed along with the documents that require the praecipe, unless another court-approved mechanism is approved and used by the filer.

c. The electronic submission of a motion and brief through this ~~pilot~~ program satisfies the requirements of filing a judge's copy under MCR 2.119(A)(2). A judge may require that one "courtesy copy" or "chambers copy" of any dispositive motion and all accompanying exhibits, as well as responses and replies, or any motion and brief in which the motion, brief, and attachments equal 40 pages or more be submitted directly to the judge's chamber in paper format. Any exhibits must be appropriately tabbed. Good practice requires that in appropriate cases, relevant portions of lengthy documents be highlighted. A printed copy of the e-filing transmission receipt must be attached to the front of the pleading. The requirement to provide a "courtesy copy" or "chambers copy" at a judge's request shall expire on May 22, 2018.

d. Applicable fees, including e-filing fees and service fees, shall be paid electronically through procedures established by the Macomb County Clerk's Office at the same time and in the same amount as required by statute, court rule, or administrative order.

~~i. Each e-filing is subject to the following e-filing fees:~~

~~(1) EFO (e-filing only) $5.00~~

~~(2) EFS (e-filing with service) $8.00~~

~~(3) SO (service only) $5.00~~

~~ii. Users who use credit cards for payment may also be responsible for a user fee not to exceed 3 percent.~~

6. Service

a. All parties shall register with the court and opposing parties one e-mail address with the functionality required for the ~~pilot~~ program. All service shall originate from this registered e-mail address. All parties shall also register this e-mail address with the TrueFiling e-filing system. Additional e-mail addresses for other attorneys or staff persons associated with counsel for the party may be added as registered users. Service shall be perfected upon a self-represented party or counsel and any additional registered users associated with counsel at the e-mail addresses registered with the TrueFiling e-filing system. Each individual bears the responsibility for the accuracy of the registered e-mail address.

b. Unless otherwise agreed to by the court and the parties, all e-filings must be served electronically to the e-mail addresses of all parties. The subject matter line for the transmittal of document served by e-mail shall state: "Service of e-filing in case [insert caption of case]."

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

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

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

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

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

d. Proof of Service shall be submitted to the 16th Circuit Court according to MCR 2.107(D) and these rules.

7. Format and Form of E-filing and Service

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

b. All e-filings shall comply with MCR 1.109 and the technical requirements of the court's vendor, and, after implementation, the vendor implementing the statewide e-filing system.

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

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

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

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

a. initiating documents for case-type codes other than PH, PJ, PP, and VP3[1]

b. documents to be filed under seal (pursuant to court order).

9. Official Court Record; Certified Copies

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[1] E-file case initiation for case-type codes PH, PJ, PP, and VP will be supported in Phase 5 of the ~~pilot~~ program and these cases may be initiated through the TrueFiling web application. It is anticipated program participants will be able to access TrueFiling through their own Internet connected device from a remote location, through the Turning Point office located in the court building, or through additional on-site court computer kiosks.

a. For purposes of this ~~pilot~~ program, the official court record is the electronic version of all documents filed with the court. An appellate record shall be certified in accordance with MCR 7.210(A)(1).

b. Certified or true copies of e-filed documents shall be issued in the conventional manner or through TrueCertify by the Macomb County Clerk's Office in compliance with the Michigan Trial Court Case File Management Standards.

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

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

10. Court Notices, Orders, and Judgments

At the court's discretion, the court may issue, file, and serve orders, judgments, and notices as e-filings. Pursuant to a stipulation and order, the parties may agree to accept service from the court via facsimile pursuant to the procedures set forth in Rule 6(c).

11. Technical Malfunctions

a. A party experiencing a technical malfunction with the party's equipment (such as Portable Document Format [PDF] conversion problems or inability to access the ~~pilot~~project sites), another party's equipment (such as an inoperable e-mail address), or an apparent technical malfunction of the court's ~~pilot~~ equipment, software, or server shall use reasonable efforts to

timely file or receive service by traditional methods and shall provide prompt notice to the court and the parties of any such malfunction.

b. If a technical malfunction has prevented a party from timely filing, responding to, or otherwise perfecting or receiving service of an e-filing, the affected party may petition the 16th Circuit Court for relief. Such petition shall contain an adequate proof of the technical malfunction and set forth good cause for failure to use non-electronic means to timely file or serve a document. The court shall liberally consider proof of the technical malfunction and use its discretion in determining whether such relief is warranted.

12. Privacy Considerations (Personal Identifiers)

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

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

ii. Names of Minor Children: Unless named as a party or otherwise required by statute, court rule, or administrative order, the identity of minor children shall not be included in e-filings. If a non-party minor child must be mentioned, only the initials of that child's name may be used.

iii. Dates of Birth: Except as required by statute, court rule, or administrative order, an individual's full birth date shall not be included in e-filings. Subject to the above limitation, if an individual's date of birth is

otherwise referenced in an e-filing, only the year may be used and the date specified in substantially the following format: XX/XX/1998.

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

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

vi. Home Addresses: With the exception of a self-represented party, full home addresses shall not be included in e-filings. If an individual's home address must be referenced in an e-filing, only the city and state should be used. For a party whose address has been made confidential by court order pursuant to MCR 3.203(F), the alternate address shall be treated as specified above.

b. Parties wishing to file a pleading containing a complete personal data identifier as listed above may:

i. Pursuant to and in accordance with the MCR and the LAO, file a motion to file a traditional paper version of the document under seal. The court, in granting the motion to file the document under seal,

may still require that an e-filing that does not reveal the complete personal data identifier be filed for the public files; or,

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

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

i. Medical records, treatment and diagnosis;

ii. Employment history;

iii. Individual financial information;

iv. Insurance information;

v. Proprietary or trade secret information;

vi. Information regarding an individual's cooperation with the government; and,

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

These rules are designed to protect the private personal identifiers and information of individuals involved or referenced in actions before the court. Nothing in these rules should be interpreted as authority for counsel or a self-represented litigant to deny discovery to the opposing party.

13. Records and Reports: Further, the 16th Circuit Court shall file an annual report with the Michigan Supreme Court covering the project to date by January 1 of each year (or more frequently or on another date as specified by the Court) that outlines the following:

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

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

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

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

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

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

14. Amendment

Procedural aspects of these rules may be amended upon the recommendation of the participating judges,

the approval of the Chief Judge, and authorization by the State Court Administrator. Proposed substantive changes, including, for example, a proposed expansion of the program to permit additional case-type codes or a proposed change in fees, must be submitted to the Michigan Supreme Court for approval.

15. Expiration

~~Unless otherwise directed by the Michigan Supreme Court, this pilot~~ This program, requiring parties to electronically file documents in cases assigned to participating judges, shall continue until ~~December 31, 2015~~further order of the Court.

AMENDED ADMINISTRATIVE ORDER 2011-1

E-FILING RULES FOR THE 3RD CIRCUIT COURT (WAYNE COUNTY) AS MICHIGAN COURTS TRANSITION TO A STATEWIDE E-FILING SYSTEM

Entered December 23, 2015, effective January 1, 2016 (File No. 2002-37)—REPORTER.

On order of the Court, Administrative Order No. 2011-1 is amended as follows, effective January 1, 2016.

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

E-filing ~~Pilot Project~~ in the 3rd Circuit Court (Wayne County)

On order of the Court, the 3rd Circuit Court is authorized to continue its e-filing project during a transition period while the State Court Administrative Office prepares and implements a statewide e-filing system.~~implement an Electronic Document Filing Pilot Project. The pilot project is established to study the effectiveness of electronically filing court documents in lieu of traditional paper filings. The pilot project shall begin January 1, 2011, or as soon thereafter as is possible, and shall remain in effect until July 1, 2015, or further order of this Court.~~ The 3rd Circuit Court is

aware that rules regarding electronic filing have been published for comment by this Court. If this Court adopts electronic-filing rules during the pendency of the 3rd Circuit Court Electronic Document Filing ~~Pilot~~ Project, the 3rd Circuit Court will, within 60 days of the effective date of the rules, comply with the requirements of those rules. In addition, it is anticipated that the 3rd Circuit Court, along with other courts that participated as e-filing pilot project locations, will be among the first group of courts that will connect with any statewide system for purposes of testing and early integration.

The 3rd Circuit Court will ~~track the participation and effectiveness of this pilot program and shall~~ report to and provide information as requested by the State Court Administrative Office.

1. Construction

The purpose of the transition period for e-filing ~~pilot program~~ is to continue successful e-filing efforts in the 3rd Circuit and to coordinate with state efforts, through a vendor or otherwise, to build and operate a statewide system of e-filing ~~study the effectiveness of electronically filing court documents in connection with the just, speedy, and economical determination of the actions involved in the pilot program~~. The 3rd Circuit Court may exercise its discretion to grant necessary relief to avoid the consequences of error so as not to affect the substantial rights of the parties. Except for matters related to electronically filing or service of documents during the transition period~~pilot program~~, the Michigan Rules of Court govern all other aspects of the cases involved in the project~~pilot~~.

2. Definitions

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

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

(c) "LAO" means all local administrative orders governing the 3rd Judicial Circuit Court.

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

(e) "Transition e-filing~~Pilot~~ Program" or "project" means the initiative by the 3rd Judicial Circuit Court, and the Wayne County Clerk in conjunction with ~~Tyler Technologies, Inc.~~the court's vendor, and under the supervision of the State Court Administrative Office to facilitate the electronic filing of pleadings, motions, briefs, responses, lists, orders, judgments, notices, and other documents during the period after enactment of statutory authority to fund and operate a statewide electronic filing system.

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

3. Participation in the ~~Pilot~~ Program

(a) Participation in the ~~pilot~~ project shall be mandatory in all pending "C" type cases (i.e., CB, CC, CD, CE, CF, CH, CK, CL,CP, CR, CZ); as well as all pending ND, NF, NI, and PZ case types. All judges in the 3rd Circuit Court's Civil Division shall participate. Expansion into the other Civil Division case types will occur as follows: upon the effective date of this order, the court may (except for good cause as stated in the paragraph below) include the following case-type codes in the e-filing project: all cases types for appeals (case types AA, AE, AP, and AV) except for the AR case type, all cases for administrative review, superintending

control and extraordinary writs (case types AH, AL, AS, and AW), all remaining civil damage suits (NH, NI, NM, NO, NP, NS, and NZ); all remaining case types regarding other civil matters (PC, PD, PR, and PS).

(b) This is a mandatory e-filing project. It is presumed that all documents will be filed electronically. However, the Court recognizes that circumstances may arise that will prevent one from e-filing. To ensure that all parties retain access to the courts, parties that demonstrate good cause will be permitted to file their documents with the clerk, who will then file the documents electronically. Among the factors that the 3rd Circuit Court will consider in determining whether good cause exists to excuse a party from mandatory e-filing is a party's access to the Internet and indigency. A self-represented party is not excused from the project merely because the individual does not have counsel.

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

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

(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). The clerk shall process e-filings on a first-in, first-out basis.

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

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

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

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

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

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

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

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

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

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

(b) The electronic submission of a motion and brief through this ~~pilot~~ project satisfies the requirements of filing a judge's copy under MCR 2.119(A)(2). A judge may require that one "courtesy copy" or "chambers copy" of any dispositive motion and all accompanying exhibits, as well as responses and replies, or any motion and brief in which the motion, brief, and attachments equal 40 pages or more be submitted directly to the judge's chamber in paper format. Any exhibits must be appropriately tabbed. Good practice requires that in appropriate cases, relevant portions of lengthy documents be highlighted. A printed copy of the e-filing transmission receipt must be attached to the front of the pleading. The requirement to provide a "courtesy copy" or "chambers copy" at a judge's request shall expire on May 22, 2018.

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

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

~~Type of Filing Fee~~

~~EFO (e-filing only) $5.00 EFS (e-filing with service) $8.00 SO (service only) $5.00~~

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

6. Service

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

(b) Unless otherwise agreed to by the court and the parties, all e-filings must be served electronically to the e-mail addresses of all parties. The subject matter line for the transmittal of document served by e-mail shall state: "Service of e-filing in case [insert caption of case]."

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

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

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

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

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

(d) Proof of service shall be submitted to the 3rd Circuit Court according to MCR 2.107(D) and this administrative order.

(e) Service of the complaint or third party complaint must be performed in accordance with the MCR and statutes.

7. Format and Form of E-filing and Service

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

(b) All e-filings shall comply with MCR 1.109 and the technical requirements of the court's vendor and, after implementation, the vendor implementing the statewide e-filing system.

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

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

(e) All documents filed electronically shall be in electronically generated text format (such as native portable digital format (PDF)) so that the text of the submission is searchable and taggable. Any attachments and exhibits that are not available as electronically generated text may be scanned.

(f) When a filing includes grouped documents (i.e., a motion and accompanying exhibits or attachments) each such document shall be separately bookmarked by an identifying tab.

8. Pleadings, Motions, and Documents not to be E-filed. The following documents shall not be e-filed during the ~~pilot~~ project and must be filed by the traditional methods provided in the MCR and the LAO:

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

(b) documents for case evaluation proceedings.

9. Official Court Record; Certified Copies

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

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

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

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

10. Court Notices, Orders, and Judgments. At the court's discretion, the court may issue, file, and serve orders, judgments, and notices as e-filings. Pursuant to a stipulation and order, the parties may agree to accept service from the court via facsimile pursuant to the procedures set forth in Section 6(c) above.

11. Technical Malfunctions

(a) A party experiencing a technical malfunction with the party's equipment (such as format or conversion problems or inability to access the projectpilot sites), another party's equipment (such as an inoperable e-mail address), or an apparent technical malfunction of the court's ~~pilot~~ equipment, software, or server shall use reasonable efforts to timely file or receive

service by traditional methods and shall provide prompt notice to the court and the parties of any such malfunction.

(b) If a technical malfunction has prevented a party from timely filing, responding to, or otherwise perfecting or receiving service of an e-filing, the affected party may petition the 3rd Circuit Court for relief. Such petition shall contain an adequate proof of the technical malfunction and set forth good cause for failure to use nonelectronic means to timely file or serve a document. The court shall liberally consider proof of the technical malfunction and use its discretion in determining whether such relief is warranted.

12. Privacy Considerations

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

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

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

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

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

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

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

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

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

(ii) Pursuant to and in accordance with the applicable MCR and LAO, obtain a court order to file a traditional paper reference list under seal. The reference list shall contain the complete personal data

identifiers and the redacted identifiers used in the e-filing. All references in the case to the redacted identifiers included in the reference list shall be construed to refer to the corresponding complete personal data identifiers. The reference list must be filed under seal, and may be amended as of right.

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

(i) Medical records, treatment and diagnosis;

(ii) Employment history;

(iii) Individual financial information;

(iv) Insurance information;

(v) Proprietary or trade secret information;

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

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

13. Records and Reports. The 3rd Circuit Court shall file an annual report with the Supreme Court covering the project to date by January 1 of each year (or more frequently or on another date as specified by the Court) that outlines the following:

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

(b) Detailed financial information regarding the distribution or retention of collected fees, including the amount paid to Tyler per document and in total for the subject period, the amount retained by the court per

document and in total for the period, and whether the monies retained by the court are in a separate account or commingled with other monies.

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

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

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

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

14. Amendment. Procedural aspects of these rules may be amended upon the recommendation of the participating judges, the approval of the chief judge, and authorization by the State Court Administrator. Proposed substantive changes, including, for example, a proposed expansion of the program to permit additional case types and a proposed change in fees, must be submitted to the Supreme Court for approval.

15. Expiration. ~~Unless otherwise directed by the Michigan Supreme Court, this pilot~~ This project, requiring parties to electronically file documents in cases assigned to participating judges, shall continue ~~until December 31, 2015~~ until further order of the Court.

AMENDED ADMINISTRATIVE ORDER 2011-4

E-FILING RULES FOR THE 20TH CIRCUIT COURT, THE OTTAWA COUNTY PROBATE COURT, AND THE 58TH DISTRICT COURT (OTTAWA COUNTY) AS MICHIGAN COURTS TRANSITION TO A STATEWIDE E-FILING SYSTEM

Entered December 23, 2015, effective January 1, 2016 (File No. 2002-37)—REPORTER.

On order of the Court, Administrative Order No. 2011-4 is amended as follows, effective January 1, 2016.

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

E-filing ~~Pilot~~ Project in the 20th Circuit Court, the Ottawa County Probate Court, and the 58th District Court (Ottawa County)

On order of the Court, the 20th Circuit Court, the Ottawa County Probate Court, and the 58th District Court (hereafter Ottawa County or participating courts) are authorized to continue their e-filing project during a transition period while the State Court Administrative Office prepares and implements a statewide e-filing system. ~~implement an Electronic Document Filing Pilot Project. The pilot project is~~

~~established to study the effectiveness of electronically filing court documents in lieu of traditional paper filings. The pilot project shall begin October 1, 2011, or as soon thereafter as is possible, and shall remain in effect until December 31, 2016, or further order of this Court.~~ The participating courts are aware that rules regarding electronic filing have been published for comment by this Court. If this Court adopts electronic filing rules during the pendency of Ottawa County's Electronic Document Filing ~~Pilot~~ Project, the participating courts will, within 60 days of the effective date of the rules, comply with the requirements of those rules. In addition, it is anticipated that the Ottawa County courts, along with other court locations that participated as e-filing pilot courts, will be among the first group of courts that will connect with any statewide system for the purposes of testing and early integration.

The participating courts will ~~track the participation and effectiveness of this pilot program and shall~~ report to and provide relevant information as requested by the State Court Administrative Office.

1. Construction

The purpose of the transition period for e-filing ~~pilot program~~ is to continue successful e-filing efforts in the participating courts and to coordinate with state efforts, through a vendor or otherwise, to build and operate a statewide system of e-filing. ~~study the effectiveness of electronically filing court documents in connection with the just, speedy, and economical determination of the actions involved in the pilot program.~~ The participating courts may exercise discretion to grant necessary relief to avoid the consequences of error so as not to affect the substantial rights of the parties. Except for matters related to electronically

filing or service of documents during the transition period~~pilot program~~, the Michigan Rules of Court govern all other aspects of the cases involved in the ~~pilot~~ project.

2. Definitions

a. "Clerk" means the Ottawa County Clerk and clerks of the participating courts.

b. "E-Filing" means any court pleading, motion, brief, response, list, order, judgment, notice, or other document filed electronically pursuant to the ~~pilot~~ program.

c. "LAO" means all local administrative orders governing the participating courts.

d. "MCR" means the Michigan Court Rules.

e. "Transition e-filing ~~Pilot~~ program" or "project" means the e-filing initiative of the participating courts, the County Clerk, and the Ottawa County Information Technology Department in conjunction with ImageSoft, Inc., and under the supervision of the State Court Administrative Office. This e-filing application facilitates the electronic filing of pleadings, motions, briefs, responses, lists, orders, judgments, notices, and other documents during the period after enactment of statutory authority to fund and operate a statewide electronic filing system in the following case types:

i. The 20th Circuit ~~pilot~~ program will begin testing with adoption case types AB, AC, AD, AF, AG, AM, AN, AO, AY, civil case types ND, NF, NH, NI, NM, NO, NP, NS, NZ, CB, CC, CD, CE, CF, CH, CK, CL, CP, CR, CZ, PC, PD, PR, PS, PZ, criminal case types FC and FH, domestic relations case types DC, DM, DO, DP, DS, DZ, UD, UE, UF, UI, UM, UN, UT, UW, and neglect/abuse case type NA.

ii. The Ottawa County Probate Court will begin testing with civil case type CZ.

iii. The 58th District Court will begin testing with general civil case type GC as part of Phase 1 and additionally in other case types as follows:

1. Phase II: Summary proceedings case types, including LT and SP, beginning with the effective date of this order.

2. Phase III: Post disposition collection proceedings in small claims proceedings ("SC") beginning with the effective date of this order.

3. Phase IV: Criminal proceedings case types, including EX, FY, OM, SM, FD, FT, OD, OI, OT, SD, SI, ST, OK, ON, SK, and SN, beginning not less than six months after implementation of Phase II and III.

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

g. "Web-based portal" means a website provided by ImageSoft where electronic filings may be submitted and delivered to the participating courts' OnBase workflow.

3. Participation in the ~~Pilot~~ Program

a. Participation in Ottawa County's ~~pilot~~ program is elective for all case types identified in Section 2.e., above. Participation may be initiated with new case filings or existing case files. At the discretion of the judge, participation may also include postdisposition proceedings in qualifying case types.

b. This is a voluntary e-filing project; however, once a case is designated as part of the e-filing project, it is presumed that all further documents will be filed electronically. Ottawa County recognizes that circum-

stances may arise preventing one from e-filing. To ensure all parties retain access to the participating courts, parties that demonstrate good cause will be permitted to file documents with the clerk, who will then file the documents electronically. Among the factors the participating courts will consider in determining whether good cause exists to excuse a party from e-filing is a party's access to the Internet.

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

a. In an effort to facilitate uniform service within the scope of this project, the participating courts strongly recommend electronic service.

b. Program participants must submit e-filings pursuant to these rules and the ~~pilot~~ program's technical requirements. The clerk may, in accordance with MCR 8.119(C) reject documents submitted for filing that do not comply with MCR 2.113(C)(1), are not accompanied by the proper fees, clearly violate Administrative Order No. 2006-2 (Privacy Policy), do not conform to the requirements of this ~~pilot~~ project, or are otherwise submitted in violation of a statute, MCR, LAO, or program rules.

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 a.m. to 5 p.m. E-filings submitted after business hours shall be deemed filed on the business day the e-filing is accepted (usually the next business day). The clerk shall process electronic submissions on a first-in, first-out basis.

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

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

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

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

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

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

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

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

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

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

b. The electronic submission of a motion and brief through this ~~pilot~~ program satisfies the requirements of filing a judge's copy under MCR 2.119(A)(2). A judge may require that one "courtesy copy" or "chambers copy" of any dispositive motion and all accompanying exhibits, as well as responses and replies, or any motion and brief in which the motion, brief, and attachments equal 40 pages or more be submitted directly to the judge's chamber in paper format. Any exhibits must be appropriately tabbed. Good practice requires that in appropriate cases, relevant portions of lengthy documents be highlighted. A printed copy of the e-filing transmission receipt must be attached to the front of the pleading. The requirement to provide a "courtesy copy" or "chambers copy" at a judge's request shall expire on May 22, 2018.

c. Applicable fees, including e-filing fees and service fees, shall be paid electronically through procedures established by the clerk's office at the same time and in the same amount as required by statute, MCR, or LAO.

~~i. Each e-filing is subject to the following e-filing fees:~~

~~1. EFO (e-filing only) $4.00~~

~~2. EFS (e-filing with service) $7.00~~

~~3. SO (service only) $4.00~~

~~d. Users who use credit cards for payment are also responsible for a 3% user fee to reimburse the participating courts for credit card transaction costs.~~

6. Service

a. All parties shall provide the participating courts and opposing parties with one e-mail address with the functionality required for the ~~pilot~~ program. All service shall originate from and be perfected upon this e-mail address.

b. Alternatively, all parties shall register their e-mail addresses within the web-based portal and all documents filed within the web-based portal relating to the case will be served to the registered e-mail address or, after implementation, in compliance with the any statewide e-filing system requirements.

c. Unless otherwise agreed to by the participating courts and the parties, all e-filings must be served electronically to the e-mail addresses of all parties. The subject matter line for the transmittal of the document served by e-mail shall state: "Service of e-filing in case [insert caption of case]."

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

i. the parties shall provide the participating courts and the opposing parties with one facsimile number with appropriate functionality,

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

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

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

e. Proof of service shall be submitted to the participating courts according to MCR 2.107(D) and this order.

7. Format and Form of E-filing Service

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

b. All e-filings shall comply with MCR 1.109 and the technical requirements of the participating courts' vendor and, after implementation, the vendor implementing the statewide e-filing system.

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

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

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

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

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

b. documents for case evaluation proceedings.

9. Official Court Record; Certified Copies

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

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

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

d. At the conclusion of the ~~pilot~~ program, ~~if the program continues as a pilot project or in another format,~~ the clerk shall provide for record retention and public access in a manner consistent with the instructions of the participating courts and the MCR.

10. Court Notices, Orders, and Judgments

At the participating court's discretion, the participating court may issue, file, and serve orders, judgments, and notices as e-filings. Pursuant to a stipulation and order, the parties may agree to accept service from the participating courts via facsimile pursuant to the procedures set forth in Rule 6(d) of this order.

11. Technical Malfunction

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

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

12. Privacy Considerations

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

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

ii. Names of Minor Children. Unless named as a party or otherwise required by statute, court rule, or administrative order, the identity of minor children shall not be included in e-filings. If a non-party minor child must be mentioned, only the initials of that child's name may be used.

iii. Dates of Birth. Except as required by statute, court rule, or administrative order, an individual's full birthdate shall not be included in e-filings. Subject to the above limitation, if an individual's date of birth is otherwise referenced in an e-filing, only the year may be used and the date specified in substantially the following format: XX/XX/1998.

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

v. Driver's License Numbers and State-Issued Personal Identification Card Numbers. A person's full driver's license number and state-issued personal identification number shall not be included in e-filings.

If an individual's driver's license number or state-issued personal identification card number must be reference in e-filing, only the last four digits of that number should be used and the number specified in substantially the following format X-XXX-XXX-XX1-234.

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

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

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

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

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

i. Medical records, treatment and diagnosis;

ii. Employment history;

iii. Individual financial information;

iv. Insurance information;

v. Proprietary or trade secret information;

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

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

13. Records and Reports

Further, the participating courts will file a joint annual report ~~covering the annual project progress~~ by January 1 of each year (or more frequently or on another date as specified by the Court), that outlines the following:

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

b. Detailed financial information regarding the distribution or retention of collected fees, including the amount paid to each vendor per document and in total for the subject period and the amount retained by the participating courts or funding unit per document and in total for the period.

c. Detailed information regarding whether the monies retained by the participating courts are in a separate account or commingled with other monies.

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

e. A detailed itemization of all cost savings to the participating courts whether by reduced personnel or otherwise and a statement of whether any cost savings

to the participating courts are reflected in the fee structure charged to the parties.

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

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

14. Amendments

Procedural aspects of these rules may be amended upon the recommendation of the participating judges, the approval of the chief judge, and authorization by the State Court Administrator. Proposed substantive changes, including, for example, a proposed expansion of the program to permit additional case types and a proposed change in fees, must be submitted to the Supreme Court for approval.

15. Expiration

~~Unless otherwise directed by the Michigan Supreme Court, this~~ This ~~pilot~~ program, allowing parties to electronically file documents in cases assigned to participating judges, shall continue until further order of the Court~~December 31, 2016~~.

AMENDED ADMINISTRATIVE ORDER 2011-6

E-FILING RULES FOR THE OAKLAND COUNTY PROBATE COURT (6TH CIRCUIT) AS MICHIGAN COURTS TRANSITION TO A STATEWIDE E-FILING SYSTEM

Entered December 23, 2015, effective January 1, 2016 (File No. 2002-37)—REPORTER.

On order of the Court, Administrative Order No. 2011-6 is amended as follows, effective January 1, 2016.

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

E-Filing in Oakland County Probate Court

On order of the Court, the Oakland County Probate Court is authorized to continue its e-filing project during a transition period while the State Court Administrative Office prepares and implements a statewide e-filing system. ~~implement an Electronic Document Filing Pilot Project. The pilot project is established to study the effectiveness of electronically filing court documents in lieu of traditional paper filings in certain instances. The pilot project shall begin September 1, 2011, or as soon thereafter as is possible, and shall remain in effect until July 31, 2018, or further order of this Court.~~ The Oakland County

Probate Court is aware that rules regarding electronic filing have been published for comment by this Court. If this Court adopts electronic-filing rules during the pendency of the Oakland County Probate Court Electronic Document Filing ~~Pilot~~ Project, the Oakland County Probate Court will, within 60 days of the effective date of the rules, comply with the requirements of those rules. In addition, it is anticipated that the Oakland County Probate Court, along with other court locations that participated as e-filing pilot courts, will be among the first group of courts that will connect with any statewide system for purposes of testing and early integration.

The Oakland County Probate Court will ~~track the participation and effectiveness of this pilot program and shall~~ report to and provide information as requested by the State Court Administrative Office.

1. Construction

The purpose of the transition period for e-filing ~~pilot program~~ is to review and potentially recommence e-filing efforts in the Oakland County Probate Court and to coordinate with state efforts, through a vendor or otherwise, to build and operate a statewide system of e-filing ~~study the effectiveness of electronically filing court documents in connection with the just, speedy, and economical determination of the actions involved in the pilot program~~. The Oakland County Probate Court may exercise its discretion to grant necessary relief to avoid the consequences of error so as not to affect the substantial rights of the parties. Except for matters related to electronically filing or service of documents during the transition period~~pilot program~~, the Michigan Rules of Court govern all other aspects of the cases involved in the program~~pilot~~.

2. Definitions

(a) "Register" means the Oakland County Probate Register.

(b) "E-filing" means any court pleading, motion, brief, response, list, order, judgment, notice, claims, inventories, accounts, reports, or other documents filed electronically pursuant to the ~~pilot~~ program.

(c) "LAO" means all local administrative orders governing the Oakland County Probate Court.

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

(e) "Transition e-filing program~~Pilot program~~" or "project" means the initiative by the Oakland County Probate Court in conjunction with the Oakland County Department of Information Technology, and in part with Tyler, Inc. (Wiznet), and under the supervision of the State Court Administrative Office. This e-filing application facilitates the electronic filing of pleadings, motions, briefs, responses, lists, orders, judgments, notices, claims, inventories, accounts, reports, and other documents during the period after enactment of statutory authority to fund and operate a statewide electronic filing system. The Oakland County ~~pilot~~ program will begin testing with one probate judge with "DE", "DA," "TV," and "CZ" case types. The court plans to expand the ~~pilot~~ program to all probate judges as soon as practicable.

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

(g) "Wiznet envelope" means an electronic submission that contains one or more Wiznet transactions.

(h) "Wiznet transaction" means the submission of one or more related documents which results in a single register of actions entry.

3. Participation in the ~~Pilot~~ Program

(a) If the court recommences its efiling program, participation ~~Participation~~ in the ~~pilot~~ program shall be mandatory in all newly filed DE, DA, TV or CZ case types assigned to the participating probate judges. Participation shall begin following the filing of the initial petition, complaint or other initiating document, and assignment of the case to a participating judge pursuant to the court's LAO. At the discretion of the judge, participation may also include post-disposition proceedings in qualifying case types assigned to participating judges.

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

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

(a) Program participants must submit e-filings pursuant to these rules and the ~~pilot~~ program's technical requirements. The register may, in accordance with MCR 8.119(C), reject documents submitted for filing that do not comply with MCR 5.113 or MCR 2.113(C)(2), are not accompanied by the proper fees, clearly violate Administrative Order No. 2006-2, do not

conform to the technical requirements of this ~~pilot~~ project, or are otherwise submitted in violation of a statute, an MCR, an LAO, or the program rules.

(b) E-filings may be submitted to the court at any time, but shall only be reviewed and accepted for filing by the Oakland County Probate Court during the normal business hours of the register's office. E-filings submitted after business hours shall be deemed filed on the business day the e-filing is accepted for filing. The register's office shall process electronic submissions on a first-in, first-out basis.

(c) E-filings shall be treated as if they were hand delivered to the court for all purposes under statute, court rule, and administrative order.

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

(i) Signatures submitted electronically shall be scanned copies of the actual signed document, or shall use the following form for the signature: /s/John L. Smith.

(ii) A document that requires a signature under the penalty of perjury, or is required to be signed by the fiduciary or trustee under MCR 5.114(A)(3), is deemed signed by the declarant or fiduciary if, before filing, the declarant or fiduciary has signed a printed form of the document.

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

(e) The original of a sworn or verified document that is an e-filing (e.g., a verified pleading) or part of an

e-filing (e.g. an affidavit, notarization, or bill of costs) must be maintained by the filing attorney or self-represented litigant and made available upon reasonable request of the court, the signatory, or opposing party.

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

(g) By electronically filing the document, the electronic filer indicates compliance with these rules.

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

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

(b) The electronic submission of a motion and brief through this ~~pilot~~ program satisfies the requirements of filing a judge's copy where applicable under the MCR. A judge may require that one "courtesy copy" or "chambers copy" of any dispositive motion and all accompanying exhibits, as well as responses and replies, or any motion and brief in which the motion, brief, and attachments equal 40 pages or more be submitted directly to the judge's chamber in paper format. Any exhibits must be appropriately tabbed. Good practice requires that in appropriate cases, relevant portions of lengthy documents be highlighted. A printed copy of the e-filing transmission receipt must be attached to the front of the pleading. The requirement to provide a "courtesy copy" or "chambers copy" at a judge's request shall expire on May 22, 2018.

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

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

~~Type of Filing Fee~~

~~EFO (e-filing)~~

~~$5.00~~

~~EFS (e-filing with service)~~

~~$8.00~~

~~SO (service only)~~

~~$5.00~~

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

6. Service

(a) All parties shall register as a service contact with the Tyler (Wiznet) application which will provide the court and opposing parties with one e-mail address with the functionality required for the ~~pilot~~ program. All service shall originate from and be perfected upon this e-mail address.

(b) Unless otherwise agreed to by the court and the parties, all e-filings must be served electronically to the e-mail address of all interested parties. The subject matter line for the transmittal of document served by e-mail shall state: "Service of e-filing in case [insert caption of case]."

(c) The parties and the court may agree that, instead of e-mail service, e-filings may be served to the parties

(but not the court) by other appropriate means under the MCR. For those choosing to accept facsimile service:

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

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

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

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

(d) The court reserves the right to serve parties by traditional means, including facsimile, when necessary to ensure appropriate service of notices, opinions and orders, and other official court documents.

(e) Proof of Service shall be submitted to the Oakland County Probate Court according to the MCR and these rules.

7. Format and Form of E-filing and Service

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

(b) All e-filings shall comply with MCR 1.109 and the technical requirements of the court's vendor and, after implementation, the vendor implementing the statewide e-filing system.

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

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

8. Pleadings, Motions, and Documents Not to Be E-Filed

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

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

(b) initiating documents,

(c) original documents which are required by statute to be filed with the court, such as wills submitted for probate. In such case, the document shall be e-filed using a copy of the document and the original shall be delivered to the court for filing within 14 days of the e-filing date,

(d) inventories that are being presented pursuant to MCL 700.3706,

(e) documents for case evaluation proceedings.

9. Official Court Record; Certified Copies

(a) For purposes of this ~~pilot~~ program, the electronic version of all documents filed with the Court, with the exception of documents filed under seal, is the official court record. An appellate record for the Court of Appeals shall be certified in accordance with MCR 7.210(A)(1).

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

(c) At the conclusion of the ~~pilot~~ program, if the program does not continue ~~as a pilot project or~~ in some other format, the register shall convert all e-filings to paper form in accordance with MCR 8.119(D)(1)(d).

Participating attorneys shall provide reasonable assistance in constructing the paper record.

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

10. Court Notices, Orders, and Judgments

At the court's discretion, the court and register may issue, file and serve orders, judgments, and notices as e-filings.

11. Technical Malfunctions

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

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

12. Privacy Considerations

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

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

1. Medical records, treatment and diagnosis;

2. Employment history;

3. Individual financial information;

4. Insurance information;

5. Proprietary or trade secret information;

6. Information regarding an individual's cooperation with the government; and

7. Personal information regarding the victim of any criminal activity.

13. If the e-filing program is recommenced, the ~~The~~ Oakland Probate Court shall file an annual report with the Supreme Court covering the project to date by January 1 of each year (or more frequently or on another date as specified by the Court) that outlines the following:

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

(b) Detailed financial information regarding the distribution or retention of collected fees, including the

amount paid to Tyler per document and in total for the subject period, the amount retained by the court per document and in total for the period, and whether the monies retained by the court are in a separate account or commingled with other monies.

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

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

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

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

14. Amendment

Procedural aspects of these rules may be amended upon the recommendation of the participating judges, the approval of the chief judge, and authorization by the State Court Administrator. Proposed substantive changes, including, for example, a proposed expansion of the program to permit additional case types and a proposed change in fees, must be submitted to the Supreme Court for approval.

15. Expiration

~~Unless otherwise directed by the Michigan Supreme Court, this~~ This ~~pilot~~ program, requiring parties to electronically file documents in cases assigned to participating judges, shall continue until further order of the Court~~July 31, 2018~~.

AMENDED ADMINISTRATIVE ORDER No. 2014-12

AMENDMENT OF ADMINISTRATIVE ORDER NO. 2014-12

Entered September 16, 2015, effective immediately (File No. 2014-33)—REPORTER.

On order of the Court, effective immediately, Administrative Order No. 2014-12, the order that established the Michigan Tribal State Federal Judicial Forum, is amended to add a new federal member with the following term:

• Assistant U.S. Attorney Hannah N. Bobee (Western District of Michigan) (for a term ending July 1, 2017)

AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Adopted September 23, 2015, effective immediately (File No. 2014-31)—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 new MCR 3.617 is adopted, effective immediately.

[The following rule is new.]

RULE 3.617. DELAYED REGISTRATION OF FOREIGN BIRTH.

The entire record for delayed registration of foreign birth pursuant to MCL 333.2830 is confidential.

Staff Comment: This new rule, MCR 3.617, requires adoption files of foreign-born children who are adopted by a parent who is a resident of this state to be retained as confidential records (as are the adoption records that are governed by MCL 710.67 and MCL 710.68).

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.

Entered September 23, 2015, effective immediately (File No. 2014-49)—REPORTER.

By order dated March 25, 2015, the Court adopted an order amending MCR 3.903, 3.920, 3.961, and 3.965, effective March 25, 2015. Notice and an oppor-

tunity for public comment having been provided, the amendments of these rules are retained.

On further order of the Court, effective immediately, the Court adopts an additional amendment of MCR 3.961(C)(3), as indicated in underlining below.

RULE 3.961. INITIATING CHILD PROTECTIVE PROCEEDINGS.

(A)-(B) [Unchanged.]

(C) Amended and Supplemental Petitions.

(1)-(2) [Unchanged.]

(3) If either an amended or supplemental petition is not accompanied by a request for placement of the child or the child is not in protective or temporary custody, the court shall conduct a preliminary inquiry to determine the appropriate action to be taken on a petition. If either the amended or supplemental petition contains a request for removal, the court shall conduct a preliminary hearing to determine the appropriate action to be taken on the petition consistent with MCR 3.965(B). If either the amended or supplemental petition is authorized, the court shall proceed against each respondent parent in accordance with MCR 3.971 or MCR 3.972.

Staff Comment: The Court retained the amendments of MCR 3.903, 3.920, 3.961, and 3.965 that became effective on March 25, 2015, and were prompted by the Michigan Supreme Court's decision in *In re Sanders*, 495 Mich 394 (2014), to provide clarification and procedural provisions with regard to a nonrespondent parent and adjudication that is consistent with the Court's holding. The Court further amended MCR 3.961(C)(3), effective immediately, to require the court to proceed against each respondent parent in accordance with MCR 3.971 or MCR 3.972 if *either* the amended *or supplemental* petition is authorized.

Adopted September 23, 2015, effective immediately (File No. 2013-02)—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 revisions of MCR 5.402 are adopted, effective immediately.

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

RULE 5.402. COMMON PROVISIONS.

(A)-(D) [Unchanged.]

(E) Indian Child; Definitions, Jurisdiction, Notice, Transfer, Intervention.

(1)-(4) [Unchanged.]

(5) If the court discovers a child may be an Indian child after a guardianship is ordered, the court shall do all of the following:

(a) schedule a hearing to be conducted in accordance with MCR 5.404(C) and MCR 5.404(F).

(b) enter an order for an investigation in accordance with MCR 5.404(A)(2). The order shall be on a form approved by the State Court Administrative Office and shall require the guardian to cooperate in the investigation. The court shall mail a copy of the order to the persons prescribed in MCR 5.125(A)(8), (C)(19), and (C)(25) by first-class mail.

(c) provide notice of the guardianship and the hearing scheduled in subrule (5)(a) and the potential applicability of the Indian Child Welfare Act and the Michigan Indian Family Preservation Act on a form approved by the State Court Administrative Office to the persons prescribed in MCR 5.125(A)(8), (C)(19),

and (C)(25) in accordance with MCR 5.109(1). A copy of the notice shall be mailed to the guardian by first-class mail.

Staff Comment: The amendment of MCR 5.402(E)(5)(a) requires a court that discovers a child of an ordered guardianship may be an Indian child to schedule a hearing in accordance with MCR 5.404(C) and MCR 5.404(F), the amendment of MCR 5.402(E)(5)(b) requires the court to enter an order for investigation in accordance with MCR 5.404(A)(2), and the amendment of MCR 5.402(E)(5)(c) requires notice of the hearing scheduled in subrule (5)(a) to be provided to the persons prescribed.

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 23, 2015, effective January 1, 2016 (File No. 2014-02)—REPORTER.

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

RULE 6.106. PRETRIAL RELEASE.

(A) In General. At the defendant's ~~first appearance before a court~~ arraignment on the complaint and/or warrant, unless an order in accordance with this rule was issued beforehand, the court must order that, pending trial, the defendant be

(1) held in custody as provided in subrule (B);

(2) released on personal recognizance or an unsecured appearance bond; or

(3) released conditionally, with or without money bail (ten percent, cash or surety).

(B)-(I) [Unchanged.]

Staff Comment: The amendment of MCR 6.106 clarifies that a court would determine issues concerning defendant's pretrial release, if any, at the time of defendant's arraignment on the complaint and/or warrant.

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 23, 2015, effective January 1, 2016 (File No. 2014-11)—REPORTER.

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

RULE 3.613. CHANGE OF NAME.

(A) [Unchanged.]

(B) Minor's Signature. A petition for a change of name by a minor need not be signed in the presence of a judge. However, the separate written consent that must be signed by a minor 14 years of age or older shall be signed in the presence of the judge.

(C)-(E) [Unchanged.]

Staff Comment: The amendments of MCR 3.613 provide clarification that distinguish a written consent from a petition for a name change, and reflect the statutory requirement that the written consent be signed by the minor in the presence of the judge.

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 the Court.

Adopted September 23, 2015, effective January 1, 2016 (File No. 2014-15)—REPORTER.

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

RULE 6.106. PRETRIAL RELEASE.

(A) [Unchanged.]

(B) Pretrial Release/Custody Order Under Const 1963, Art 1, § 15.

(1)-(4) [Unchanged.]

(5) The court may, in its custody order, place conditions on the defendant, including but not limited to restricting or prohibiting defendant's contact with any other named person or persons, if the court determines the conditions are reasonably necessary to maintain the integrity of the judicial proceedings or are reasonably necessary for the protection of one or more named persons. If an order under this paragraph is in conflict with another court order, the most restrictive provisions of the orders shall take precedence until the conflict is resolved.

(6) Nothing in this rule limits the ability of a jail to impose restrictions on detainee contact as an appropriate means of furthering penological goals.

(C) [Unchanged.]

(D) Conditional Release. If the court determines that the release described in subrule (C) will not reasonably ensure the appearance of the defendant as required, or will not reasonably ensure the safety of the public, the court may order the pretrial release of the defendant on the condition or combination of conditions that the court determines are appropriate including

(1) [Unchanged.]

(2) subject to any condition or conditions the court determines are reasonably necessary to ensure the appearance of the defendant as required and the safety of the public, which may include requiring the defendant to

(a)-(l) [Unchanged.]

(m) comply with any condition limiting or prohibiting contact with any other named person or persons.

If an order under this paragraph limiting or prohibiting contact with any other named person or persons is in conflict with another court order, the most restrictive provision of ~~each order~~the orders shall take precedence ~~over the other court order~~ until the conflict is resolved. The court may make this condition effective immediately on entry of a pretrial release order and while defendant remains in custody if the court determines it is reasonably necessary to maintain the integrity of the judicial proceedings or it is reasonably necessary for the protection of one or more named persons.

(n)-(o) [Unchanged.]

(E)-(I) [Unchanged.]

Staff Comment: The amendments of MCR 6.106(B) and (D) clarify that courts are permitted to exercise their inherent power to order conditions, including but not limited to those conditions that restrict or prohibit a pretrial defendant's contact with any named person to be effective immediately, even while defendant remains in custody. These conditions are allowed in a custody order when the protective restriction or prohibition is reasonably necessary to maintain the integrity of the judicial proceedings or is reasonably necessary for the protection of one or more named persons.

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 23, 2015, effective January 1, 2016 (File No. 2014-40)—REPORTER.

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

RULE 2.506. SUBPOENA; ORDER TO ATTEND.

(A)-(F) [Unchanged.]

(G) Service of Subpoena and Order to Attend; Fees.

(1)-(2) [Unchanged.]

(3) A subpoena or order to attend directed to the Michigan Department of Corrections, Michigan Department of Health and Human Services, Michigan State Police Forensic Laboratory, other accredited forensic laboratory, law enforcement, or other governmental agency may be served by electronic transmission, including by facsimile or over a computer network, provided there is a memorandum of understanding between the parties indicating the contact person, the method of transmission, and the e-mail or facsimile number where the subpoena or order to attend should be sent. A confirmation correspondence must be received from the recipient within 2 business days after email or facsimile service is complete, and the confirmation correspondence shall be filed with the court. If no confirmation correspondence is provided within 2 business days after email or facsimile transmission, the subpoena must be served in the manner provided in subrule (G)(1).

(4) [Former subrule "(3)" renumbered as "(4)," but otherwise unchanged.]

(H)-(I) [Unchanged.]

Staff Comment: The amendment of MCR 2.506(G)(3) allows electronic or facsimile transmission of subpoenas to attend when the subpoenas are directed to specific identified departments or agencies and when there is a memorandum of understanding between the parties as described by the amendment; the revision also would require a confirmation to be received within 2 business days after email or facsimile transmission of the subpoena. If no confirmation is provided, the subpoena must be served in the traditional manner.

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 23, 2015, effective October 1, 2015 (File No. 2015-07)—REPORTER.

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

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) Unless otherwise ordered by the court, a writ of periodic garnishment served on a garnishee who is obligated to make periodic payments to the defendant is effective until the first to occur of the following events:

(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; or

(ii) ~~the expiration of 182 days after the date the writ was issued;~~

~~(iii)~~ the plaintiff files and serves on the defendant and the garnishee a notice that the amount withheld exceeds the remaining unpaid judgment, interest, and costs, or that the judgment has otherwise been satisfied.

(b) The plaintiff may not obtain the issuance of a second writ of garnishment on a garnishee who is obligated to make periodic payments to the defendant while a prior writ served on that garnishee remains in

effect relating to the same judgment. ~~The plaintiff may seek a second writ after the first writ expires under subrule (B)(1)(a).~~

(c) [Unchanged.]

(2) [Unchanged.]

(C)-(D) [Unchanged.]

(E) Writ of Garnishment.

(1)-(4) [Unchanged.]

(5) The writ shall inform the defendant that unless the defendant files objections within 14 days after the service of the writ on the defendant or as otherwise provided under MCL 600.4012,

(a) without further notice the property or debt held pursuant to the garnishment may be applied to the satisfaction of the plaintiff's judgment, and

(b) periodic payments due to the defendant may be withheld until the ~~expiration of the writ~~ judgment is satisfied and in the discretion of the court paid directly to the plaintiff.

(6) [Unchanged.]

(F)-(M) [Unchanged.]

(N) Orders for Installment Payments.

(1) [Unchanged.]

(2) If an order terminating the installment payment order is entered and served on the garnishee, the writ again becomes effective and retains its priority and remains in force ~~until it would have expired~~ as if the installment payment order had never been entered.

(O)-(R) [Unchanged.]

(S) Failure to Disclose or to Do Other Acts; Default; Contempt.

(1) For garnishments filed under MCR 3.101(B)(2) (nonperiodic):

~~(1)~~(a)If the garnishee fails to disclose or do a required act within the time limit imposed, a default may be taken as in other civil actions. A default judgment against a garnishee may not exceed the amount of the garnishee's liability as provided in subrule (G)(2).

~~(2)~~ (b) If the garnishee fails to comply with the court order, the garnishee may be adjudged in contempt of court.

(2) For garnishments filed under MCR 3.101(B)(1) (periodic):

MCL 600.4012(6)-(10) governs default, default judgments, and motions to set aside default judgments for periodic garnishments.

(3) ~~In addition to other actions permitted by law or these rules, t~~The court may impose costs on a garnishee whose default or contempt results in expense to other parties. Costs imposed shall include reasonable attorney fees and shall not be less than $100.

(4) This rule shall not apply to nonperiodic garnishments filed for an income tax refund or credit.

(T) [Unchanged.]

Staff Comment: The amendments of MCR 3.101 eliminate subrule (B)(1)(a)(ii) and make other coordinating changes to reflect statutory revisions in 2015 PA 14 and 15.

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 23, 2015, effective January 1, 2016 (File No. 2015-09)—REPORTER.

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

RULE 2.403. CASE EVALUATION.

(A)-(N) [Unchanged.]

(O) Rejecting Party's Liability for Costs.

(1)-(5) [Unchanged.]

(6) For purposes of this rule, actual costs are

(a) those costs taxable in any civil action, and

(b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation, which may include legal services provided by attorneys representing themselves or the entity for whom they work, including the time and labor of any legal assistant as defined by MCR 2.626.

For the purpose of determining taxable costs under this subrule and under MCR 2.625, the party entitled to recover actual costs under this rule shall be considered the prevailing party.

(7)-(11) [Unchanged.]

Staff Comment: The amendments of MCR 2.403(O) allow a reasonable attorney fee to be included in a request for costs by attorneys who represent themselves or who are employed by a party to the case for services provided after case evaluation is rejected.

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 21, 2015, effective January 1, 2016 (File No. 2013-26) —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 amendments of Rules 2.614 and 7.209 of the Michigan Court Rules are adopted, effective January 1, 2016.

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

RULE 2.614. STAY OF PROCEEDINGS TO ENFORCE JUDGMENT.

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

(1) Except as provided in this rule, execution may not issue on a judgment and proceedings may not be taken for its enforcement until ~~the expiration of~~ 21 days after a final judgment (as defined in MCR 7.202[6]) is entered in the case~~its entry~~. 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 7.209. BOND; STAY OF PROCEEDING.

(A) Effect of Appeal; Prerequisites.

(1) Except for an automatic stay pursuant to MCR 2.614, or except as otherwise provided under this rule, an appeal does not stay the effect or enforceability of a judgment or order of a trial court unless the trial court or the Court of Appeals otherwise orders. An automatic stay under MCR 2.614(D) operates to stay any and all proceedings in a cause in which a party has appealed a trial court's denial of the party's claim of governmental immunity.

(2)-(3) [Unchanged.]

(B) Responsibility for Setting Amount of Bond in Trial Court.

(1) Civil Actions. Unless determined by law, or except as otherwise provided by this rule, the dollar amount of a stay or appeal bond in a civil action must be set by the trial court in an amount adequate to protect the opposite party.

(2) [Unchanged.]

(C)-(D) [Unchanged.]

(E) Stay of Proceedings by Trial Court.

(1) ~~Except as otherwise provided by law or rule, the trial court may order a stay of proceedings, with or without a bond as justice requires.~~ Unless otherwise provided by rule, statute, or court order, an execution may not issue and proceedings may not be taken to enforce an order or judgment until expiration of the time for taking an appeal of right.

(2) An appeal does not stay execution unless:

(a) ~~When the stay is sought before an appeal is filed and a bond is required,~~ With respect to a money

judgment, the party seeking the stay ~~shall~~ 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) ~~If a stay is sought after an appeal is filed, any bond must meet the requirements set forth in subrule 7.209(F).~~ With respect to all other judgments, including those obtained in a domestic relations matter, 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) When the bond or other security in subsections (E)(2)(a)-(c) is filed, the judgment or order shall automatically be stayed pending entry of a final order under subsection (G).

~~(2)~~-~~(4)~~ [Renumbered as (4)-(6), but otherwise unchanged.]

(F) Conditions of ~~Appeal~~Stay Bond.

(1)-(2) [Unchanged.]

(G) Sureties and Filing of Bond~~:~~; Service of Bond; Objections; Stay Orders. Except as otherwise specifically provided in this rule, MCR 3.604 applies. A bond must be filed with the clerk of the court ~~which~~ that entered the order or judgment to be stayed.

(1) Civil Actions. ~~A bond in a civil action need not be approved by a court or clerk before filing but is subject to the objection procedure provided in MCR 3.604.~~

(a) A copy of a bond and any accompanying power of attorney or affidavit must be promptly served on all parties in the manner prescribed in MCR 2.107. At the same time, the party seeking the stay shall file a proposed stay order pursuant to MCR 2.602(B)(3). Proof of service must be filed promptly with the trial court in which the bond has been filed.

(b) Objections shall be filed and served within 7 days after service of the bond. Objections to the amount of the bond are governed by MCR 2.602(B)(3). Objections to the surety are governed by MCR 3.604(E).

(c) If no timely objections to the bond, surety, or stay order are filed, the trial court shall promptly enter the order staying enforcement of the judgment or order pending all appeals. The stay shall continue until otherwise ordered by the trial court or an appellate court.

(d)Any stay order must be promptly served on all parties in the manner prescribed in MCR 2.107. Proof of service must be filed promptly with the trial court.

(e) All hearings under this rule may be held by telephone conference as provided in MCR 2.402.

(f) For good cause shown, the trial court may set the amount of the bond in a greater or lesser amount adequate to protect the interests of the parties.

(g) A bond may be secured under MCL 600.2631.

(2) [Unchanged.]

(H)-(I) [Unchanged.]

Staff Comment: These amendments relate to stay bonds. The amendments of MCR 7.209 are modeled on the recent revisions of MCR 7.108, the circuit court appeals rule, and provide that filing a bond automatically stays enforcement of a money judgment or order. The amendments further clarify that the automatic stay provision does not apply to domestic relations matters, in which a stay must be ordered by the trial court. The amendment of MCR 2.614 coordinates with the amendment of MCR 7.209 and clarifies that execution may not issue until 21 days after a *final* judgment enters in a case.

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.

Entered January 6, 2016 (File No. 2014-12)—REPORTER.

On order of the Court, the proposed amendment of Rule 3.211 of the Michigan Court Rules having been published for comment at 497 Mich 1218-1219 (2014), and an opportunity having been provided for comment in writing and at a public hearing, the Court declines to adopt the proposed amendment. This administrative file is closed without further action.

AMENDMENTS OF MICHIGAN RULES OF PROFESSIONAL CONDUCT

Retained September 23, 2015, effective immediately (File No. 2015-03)—REPORTER.

RULE 1.15.

By order dated February 4, 2015, the Court adopted an amendment of MRPC 1.15, effective immediately, but pending a public comment period and a public hearing. Notice and an opportunity for comment at a public hearing having been provided, the amendment of MRPC 1.15 is retained.

SUPREME COURT CASES

GARDNER v DEPARTMENT OF TREASURY

NGO v DEPARTMENT OF TREASURY

MASELLI v DEPARTMENT OF TREASURY

Docket Nos. 150293, 150294, and 150295. Decided July 9, 2015.

After selling their principal residences, James and Susan Gardner, Liem and Alecia Ngo, and John and Jennifer Maselli sought refunds from the Department of Treasury of the transfer tax they had paid on the sales. The department denied the refund requests. Petitioners appealed in the Tax Tribunal, which reversed the department's decision in all three cases, holding that petitioners were entitled to refunds. The department appealed, and the appeals were consolidated by the Court of Appeals. The Court of Appeals, CAVANAGH, P.J., and STEPHENS, J. (OWENS, J., dissenting), reversed. 306 Mich App 546 (2014). Petitioners sought leave to appeal.

In a unanimous opinion per curiam, the Supreme Court, in lieu of granting leave to appeal and without hearing oral argument, *held*:

The State Real Estate Transfer Tax Act, MCL 207.521 *et seq*., generally imposes a tax on written instruments when the instrument is recorded. However, a written instrument is exempt from the tax, under MCL 207.526(u), when (1) the seller or transferor claimed a principal residence exemption for the property under MCL 211.7cc, and (2) at the time the property was conveyed, the state equalized value (SEV) was less than or equal to the SEV on the date the property was acquired. MCL 207.526(u) also contains a penalty clause, which states that after an exemption is claimed under Subsection (u), if the sale or transfer of property is found by the Treasurer to have been at a value other than true cash value, then a penalty equal to 20% of the tax shall be assessed in addition to the tax due under the act to the seller or transferor. "True cash value" as used in MCL 207.526(u) refers to the property's fair market value, namely the price that a willing buyer and a willing seller would arrive at through arm's-length negotiation. Therefore, the only instance in which the penalty clause would apply to preclude entitlement to the exemption is when a seller or transferor sold the property for

an amount other than an amount at which a willing buyer and a willing seller would have arrived through arm's-length negotiation. Accordingly, to be entitled to the transfer tax exemption available under MCL 207.526(u), the petitioning taxpayer need only demonstrate that the property at issue is the principal residence of the seller or transferor, that it has an SEV at the time of conveyance that is less than or equal to the SEV at the time of acquisition, and that it was sold or transferred for a price at which a willing buyer and a willing seller would arrive through an arm's-length negotiation. Because these elements were met in each of these consolidated cases, the Tax Tribunal properly determined that petitioners were entitled to a refund of the real estate transfer tax that they had paid. The Court of Appeals erred when it held that to be entitled to the exemption, petitioners must have sold their properties for exactly double the SEV at the time of sale.

Reversed; cases remanded to the Tax Tribunal for further proceedings.

TAXATION — PROPERTY — TRANSFER TAXES — EXEMPTION.

The State Real Estate Transfer Tax Act, MCL 207.521 *et seq*., generally imposes a tax on written instruments when the instrument is recorded; to be entitled to the transfer tax exemption available under MCL 207.526(u), the petitioning taxpayer need only demonstrate that the property at issue is the principal residence of the seller or transferor, that it has a state equalized value (SEV) at the time of conveyance that is less than or equal to the SEV at the time of acquisition, and that it was sold or transferred for a price at which a willing buyer and a willing seller would arrive through an arm's-length negotiation.

Warner Norcross & Judd LLP (by *Gaëtan Gerville-Réache* and *Jason L. Byrne*) for petitioners.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Matthew B. Hodges*, Assistant Attorney General, for respondent.

Amicus Curiae:

McClelland & Anderson, LLP (by *Gregory L. McClelland* and *Melissa A. Hagen*), for the Michigan Realtors.

PER CURIAM. In these consolidated appeals, we consider whether petitioners, who sold their principal residences in arm's-length transactions, are entitled to refunds of the real estate transfer tax under the real estate transfer tax exemption set forth in MCL 207.526(u) when the state equalized value of the properties at the time of sale was less than it was at the time of their original purchases. We hold that petitioners are entitled to refunds under the real estate transfer tax exemption in these circumstances. We therefore reverse the judgment of the Court of Appeals and remand these cases to the Tax Tribunal for further proceedings consistent with this opinion, including reinstatement of its judgments in favor of petitioners.

I. BASIC FACTS AND PROCEDURAL HISTORY

Petitioners in these consolidated cases are all homeowners who sold their principal residences at a time when the state equalized value (SEV) of their respective properties was less than the SEV at the time of their purchase.[1] Upon the sale of their homes, the petitioners paid a transfer tax under MCL 207.523 of the State Real Estate Transfer Tax Act (SRETTA), MCL 207.521 *et seq.*, and then requested a refund from respondent, the Department of Treasury, under MCL 207.526(u). That statute exempts from this tax a sale

[1] Petitioners James and Susan Gardner acquired their principal residence in 2008 when the property's SEV was $464,300; they sold the property in 2010 for $875,000, when the SEV was $374,800.

Petitioners Liem and Alecia Ngo acquired their principal residence in 2007, when the property's SEV was $321,180; they sold the property in 2011 for $464,000, when the SEV was $219,860.

Petitioners John and Jennifer Maselli acquired their principal residence in 2004 when the property's SEV was $303,370; they sold the property in 2011, when the SEV was $198,530.

or transfer of a principal residence when, at the time of the conveyance, the property has an SEV that is "equal to or lesser than the [SEV] on the date of purchase or on the date of acquisition by the seller or transferor for that same interest in property." Significantly, this subsection includes a penalty clause under which a 20% penalty is assessed against the seller or transferor of property in the event that the treasurer finds that the sale or transfer was for "a value other than" the property's "true cash value."

Respondent separately denied petitioners' requests for a refund of the transfer tax, concluding that they were not entitled to the claimed exemption because each property sold for more than its "true cash value," which respondent interpreted to mean two times the property's SEV or less in the year of sale. Each petitioner thereafter appealed in the Michigan Tax Tribunal, which awarded refunds to petitioners on the ground that the conveyances were exempt under MCL 207.526(u). In reaching this conclusion, the Tax Tribunal observed that the first portion of the statute unambiguously indicates that the exemption applies if, at the time of sale, the property's SEV is less than or equal to the SEV at the date of acquisition. However, the Tax Tribunal determined that the penalty clause renders the statute ambiguous because its literal reading would mean that the exemption applies only when the sale price of the property is exactly twice the property's SEV. The Tax Tribunal, reasoning that statutes must be construed to avoid absurd results, concluded that the Legislature intended for petitioners to be granted the exemption. Finally, when petitioners had presented market evidence that the sale of each property was for its "true cash value" and respondent had failed to provide any market evidence to the contrary, the Tax

Tribunal found that the penalty clause did not apply.[2]

The Court of Appeals consolidated these cases and reversed the Tax Tribunal's refund award in a split published opinion.[3] Contrary to the Tax Tribunal's determination, the majority concluded that MCL 207.526(u) is unambiguous in its entirety and that the exemption only applies if the property's SEV at the time of its sale is precisely twice the property's SEV at the time of its purchase. Relying on the definition of "true cash value" provided under the General Property Tax Act (GPTA), MCL 211.1 *et seq.*, the majority defined the term as used in MCL 207.526(u) to "require[] consideration of how much claimants of the transfer tax exemption were paid for their respective properties compared to how much their properties were worth for taxation purposes."[4] Because petitioners sold their properties for a value that was not equal to twice the property's SEV at the time of purchase, the majority held that the transfer tax was properly paid. The issue before this Court, then, is whether the Court of Appeals' construction of MCL 207.526(u) is both supported by the statutory language and reflective of the Legislature's intent.

II. STANDARD OF REVIEW

We review questions of statutory interpretation de novo.[5] When interpreting a statute, we follow the established rules of statutory construction, the fore-

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[2] Because the Court of Appeals properly affirmed the Tax Tribunal's finding in this regard, there is no dispute that these petitioners are not subject to the 20% penalty. However, the general applicability of the penalty is still before this Court.

[3] *Gardner v Treasury Dep't*, 306 Mich App 546; 858 NW2d 76 (2014).

[4] *Id.* at 555.

[5] *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013).

most of which is to ascertain and give effect to the intent of the Legislature.[6] We begin this analysis by examining the language of the statute itself, as this is the most reliable evidence of that intent.[7] If the language of a statute is clear and unambiguous, we presume that the Legislature intended the meaning clearly expressed. Accordingly, the statute must be enforced as written and no further judicial construction is permitted.[8] To the extent possible, effect should be given to every phrase, clause, and word in the statute, and no word should be treated as surplusage or rendered nugatory.[9]

III. ANALYSIS

MCL 207.525(1) imposes a real estate transfer tax at the rate of $3.75 per $500.00 of the total value of the property being transferred. However, MCL 207.526 exempts from this tax certain written instruments and transfers of property. Relevant to this case is Subsection (u), which provides an exemption for a transfer effectuated by

> [a] written instrument conveying an interest in property for which an exemption is claimed under section 7cc of the general property tax act, 1893 PA 206, MCL 211.7cc, if the state equalized valuation of that property is equal to or lesser than the state equalized valuation on the date of purchase or on the date of acquisition by the seller or transferor for that same interest in property. If after an exemption is claimed under this subsection, the sale or transfer of property is found by the treasurer to be at a

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[6] *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[7] *Id*.

[8] *Id*.

[9] *Id*. at 237.

> value other than the true cash value, then a penalty equal to 20% of the tax shall be assessed in addition to the tax due under this act to the seller or transferor. [MCL 207.526(u).]

Reduced to its elements, a seller or transferor of property is entitled to this exemption if (1) the seller or transferor claimed a principal residence exemption for the property under MCL 211.7cc, and (2) the SEV at the time the property was conveyed was equal to or lesser than the SEV on the date the property was acquired. In these cases, no one disputes that all three petitioners sold their principal residences and that the SEV of their respective properties had declined since the date of purchase. What is in dispute is the meaning of "true cash value" as used in the second sentence of MCL 207.526(u)—the penalty clause—and the extent to which that meaning controls the concept of SEV as contemplated in the first sentence of this subsection.

Petitioners contend that the proper understanding of "true cash value" for purposes of MCL 207.526(u) is the property's fair market value at the time it is sold. Under this theory, the exemption would apply if the SEV at the time the property is conveyed is equal to or lesser than the SEV on the date the property was acquired, unless it is determined by the Treasurer that the sale or the transfer of the property was at a value other than the property's fair market value. Respondent argues that "true cash value" is a term of art that means the value assigned by the assessor in that tax year, which will always equal the property's SEV multiplied by two because property is assessed at 50% of its true cash value,[10]

[10] See MCL 211.27a(1); see also MCL 205.737(2) (directing the Tax Tribunal that, when determining the SEV in an assessment dispute"[t]he property's state equalized valuation shall not exceed 50% of the true cash value of the property on the assessment date").

subject to county equalization.[11]

While SRETTA does not define "true cash value," it defines the word "value" as "the current or fair market worth in terms of legal monetary exchange at the time of the transfer."[12] The GPTA, however, does offer a definition of "true cash value":

> As used in this act, "true cash value" means the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale . . . .[13]

Nevertheless, caselaw treats the concept of true cash value as being synonymous with "fair market value." For instance, in *CAF Investment Co v State Tax Comm*,[14] this Court, after examining various provisions of the GPTA and corresponding caselaw, defined the term as "the usual selling price that could be obtained at the time of assessment, but not the price that could be obtained at a forced or auction sale." Similarly, in *Detroit Lions, Inc v Dearborn*, the Court of Appeals noted that "true cash value" refers to " 'the probable price that a willing buyer and a willing seller

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[11] MCL 211.34(2) (providing the method by which a property's SEV is to be assessed).

[12] MCL 207.522(g).

[13] MCL 211.27(1). This subsection likewise enumerates a list of factors, such as zoning, quality of soil, advantages and disadvantages of location, and current economic income of structures, to be used as guidelines in an attempt to determine the fair market value of a property. However, "[a]ny method for determining true cash value which is recognized as acceptable and reasonably related to fair market valuation . . . is an acceptable indicator of true cash value" of real property. *CAF Investment Co v State Tax Comm*, 392 Mich 442, 450 n 2; 221 NW2d 588 (1974).

[14] *Id*. at 450, quoting *Moran v Grosse Pointe Twp*, 317 Mich 248, 254; 26 NW2d 763 (1947).

would arrive at through arm's length negotiation.' "[15]

The Court of Appeals erred when it held that, to be entitled to the exemption, petitioners must have sold their properties for exactly double the SEV at the time of the sale. To illustrate this logic, we turn to the specific dollar values involved in the Gardner case. As previously indicated, the Gardners paid $950,000 to acquire their principal residence in 2008 when the property's SEV was $464,300. Two years later, they sold the property for $875,000, when the SEV was $374,800.[16] Under the majority's interpretation, the property's true cash value at the time of sale was $374,800 multiplied by two, or $749,600. Consequently, the Gardners were not entitled to the claimed exemption because they sold their property for $875,000, which was an amount "other than" $749,600.[17] Yet contrary to the Court of Appeals majority's understanding, nothing in the statute states or even suggests that application of the exemption be limited to such exacting circumstances. Instead, all that need be shown in this regard is that the SEV be the same or lower at the time of sale than when the property was first acquired. Nor is there support for the majority's sweeping and unprecedented interpretation of the penalty clause, which, according to the

[15] *Detroit Lions, Inc v Dearborn*, 302 Mich App 676, 696; 840 NW2d 168 (2013), quoting *Huron Ridge LP v Ypsilanti Twp*, 275 Mich App 23, 28; 737 NW2d 187 (2007).

[16] The SEV for the Gardners' property in 2008 and 2010 was according to assessment information provided in a BS&A Software report.

[17] That the Gardners sold their property for a value greater than $749,600 is irrelevant to this analysis; under the Court of Appeals majority's interpretation, if they had sold the property for $749,599, they would not have been entitled to the exemption and, indeed, would have been assessed the 20% penalty in the absence of undisputed market evidence that the sale was for the property's "true cash value."

majority, applies whenever property is sold for an amount "different" from twice the property's SEV at the time it is sold.[18]

It is very unlikely—particularly in the absence of any textual indicia—that the Legislature impliedly intended the property's "true cash value" to mean precisely twice its SEV. Rather, the interpretation that best effectuates the legislative intent of MCL 207.562(u) is the one properly recognized by the Court of Appeals dissent; namely, that the exemption requires an arm's-length transaction, which, by definition, gives the property its true cash value. As previously indicated, a property's "true cash value" has been defined in our caselaw to mean the property's "fair market value," thereby referring to "the probable price that a willing buyer and a willing seller would arrive at through arm's length negotiation."[19] By this definition, then, the only instance in which the penalty clause would apply to preclude an exemption is when a seller or transferor sold the property for an amount other than an amount at which a willing buyer and a willing seller would have arrived through arm's-length negotiation.

Additional support compels this construction of the statute. Because the first sentence in MCL 207.526(u) exempts from the real estate transfer tax those sales or transfers that produce an SEV "equal to or lesser than"

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[18] *Gardner*, 306 Mich App at 557. Even respondent disagrees with the Court of Appeals majority's construction of the phrase "other than." Rather, as contemplated under the penalty clause, respondent has long been interpreting the phrase "other than" to mean that the 20% penalty may be imposed when the property is sold for an amount "greater than" twice the property's SEV at the time of sale. This construction, according to respondent, is consistent with the statute's purpose of allowing for a transfer tax exemption in a declining market.

[19] *Detroit Lions*, 302 Mich App at 696.

the property's SEV at the time of acquisition, the exemption itself was clearly designed to protect sellers and transferors conducting sales in declining or depressed real estate markets so long as those sales are conducted in a legitimate manner. However, because the penalty clause permits the Treasurer to reject a requested exemption and impose a penalty when the sale or transfer of property is for something "other than" the property's "true cash value," the second portion of the statute plainly serves as a deterrent against the underhanded sale of property as a means to avoid the real estate transfer tax. By penalizing only those sellers and transferors who seek this exemption under such circumstances, the Legislature clearly sought to punish and discourage only those transactions that are not arm's-length market-value sales. In short, there is no basis, textually or logically, for the Court of Appeals' interpretation of MCL 207.526(u) as requiring that, to be entitled to the exemption and to avoid the 20% penalty, a seller or transferor must demonstrate that the sale price of the property at the time it was sold equaled exactly twice its SEV.

IV. CONCLUSION

To be entitled to the transfer tax exemption under MCL 207.526(u), the petitioning taxpayer need only demonstrate that the property at issue is the principal residence of the seller or transferor, that it has an SEV at the time of conveyance that is less than or equal to the SEV at the time of acquisition, and that it was sold or transferred for a price at which a willing buyer and a willing seller would arrive through arm's-length negotiation. Because each of these elements was met in these consolidated cases, the Tax Tribunal properly determined that petitioners were entitled to a refund

of the real estate transfer tax they paid.[20] In lieu of granting petitioners' joint application for leave to appeal, we reverse the judgment of the Court of Appeals and remand these cases to the Tax Tribunal for further proceedings consistent with this opinion, including reinstatement of its judgments in favor of petitioners.

YOUNG, C.J., and MARKMAN, KELLY, ZAHRA, MCCORMACK, VIVIANO, and BERNSTEIN, JJ., concurred.

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[20] We note that the Gardners requested a transfer tax refund in the amount of $7,125, which is based on the $950,000 purchase price of their home rather than its $875,000 sale price. This is inconsistent with the requirement in MCL 207.525(1) that the transfer tax be calculated based on the total value of the property "being transferred." Although the Gardners' refund might have been erroneously calculated, on remand, we direct the Tax Tribunal to revisit this calculation to ensure that the Gardners receive a refund equal to the amount that they initially paid.

PEOPLE v MILLER

Docket No. 149502. Argued April 7, 2015 (Calendar No. 4). Decided July 20, 2015.

Joseph Miller was convicted by a jury in the Leelanau Circuit Court of operating while intoxicated (OWI), MCL 257.625(1), and operating while intoxicated causing serious impairment of another person's body function (OWI-injury), MCL 257.625(5), for an accident that resulted when he grabbed the steering wheel of the car that his girlfriend was driving. The court, Thomas G. Power, J., sentenced defendant to two concurrent terms of five years' probation, with the first nine months to be served in jail. Defendant appealed. The Court of Appeals, DONOFRIO, P.J., and SAAD and METER, JJ., in an unpublished opinion per curiam issued March 11, 2014 (Docket No. 314375), affirmed defendant's conviction for OWI-injury but vacated defendant's OWI conviction on the ground that it violated defendant's constitutional protection against double jeopardy. The Court of Appeals denied the prosecution's motion for reconsideration. The Supreme Court granted the prosecution's application for leave to appeal. 497 Mich 881 (2014).

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

The trial court violated the constitutional protection against double jeopardy by convicting defendant of both OWI and OWI-injury. When read as a whole, MCL 257.625 expresses a clear legislative intent not to allow conviction of and punishment for multiple offenses arising from the same incident except where explicitly authorized by the statute, and MCL 257.625(1) and MCL 257.625(5) do not specifically authorize multiple punishments. Accordingly, the Court of Appeals correctly vacated defendant's conviction, but for the wrong reason.

1. The constitutional prohibition against double jeopardy protects against successive prosecutions for the same offense and against the imposition of multiple punishments for the same offense. The protection against multiple punishments is not violated if the Legislature has specifically authorized cumulative punishments under two statutes; however, if the Legislature has expressed a clear intention to prohibit multiple punishments, it is a violation of double jeopardy to convict a defendant for both

offenses in a single trial. If the Legislature's intent is not clear, courts apply the "abstract legal elements" test articulated in *People v Ream*, 481 Mich 223 (2008), which focuses on the statutory elements of the offense to determine whether the Legislature intended for multiple punishments. Under this test, it does not violate double jeopardy protections to convict a defendant of multiple offenses if each of the offenses has an element that the other does not.

2. The Court of Appeals erred by concluding that the Legislature did not express a clear intent with regard to multiple punishments arising under MCL 257.625(1) and (5). Although these provisions do not clearly evidence the Legislature's intent when read in isolation, reading MCL 257.625 as a whole indicates that the Legislature specifically authorized multiple punishments for an individual who violates MCL 257.625(7) by driving with a minor while intoxicated and, by that same conduct, also commits OWI-injury under MCL 257.625(5) or OWI causing death under MCL 257.625(4). The fact that there is no similar provision expressly authorizing multiple punishments for violating MCL 257.625(1) and MCL 257.625(5) indicates that the Legislature did not intend to permit a defendant to be convicted of both offenses for the same criminal conduct. Accordingly, the trial court violated double jeopardy by convicting defendant of both OWI and OWI-injury.

Court of Appeals' judgment affirmed on different grounds; case remanded to the trial court for resentencing.

CONSTITUTIONAL LAW — DOUBLE JEOPARDY — MULTIPLE PUNISHMENTS — OPERATING WHILE INTOXICATED.

Convicting a defendant of operating while intoxicated under MCL 257.625(1) and of operating while intoxicated causing serious impairment of the body function of another person under MCL 257.625(5) for a single intoxicated driving incident violates the constitutional protection against double jeopardy (US Const, Am V; Const 1963, art 1, § 15).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Bruce H. Edwards*, Assistant Attorney General, for the people.

State Appellate Defender Office (by *Malaika D. Ramsey-Heath*, *Michael L. Mittlestat*, and *Jacqueline J. McCann*) for defendant.

Amici Curiae:

David A. Moran for the Criminal Defense Attorneys of Michigan.

Victor Fitz, *Kym L. Worthy*, and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan.

VIVIANO, J. At issue before us is whether defendant's convictions of operating while intoxicated (OWI)[1] and operating while intoxicated causing serious impairment of the body function of another person (OWI-injury)[2] arising from a single intoxicated driving incident violated the double jeopardy clauses of the United States and Michigan Constitutions.[3] Although we agree with the Court of Appeals' conclusion that convicting defendant of both offenses violated his double jeopardy protections, we disagree with the reasoning employed by the Court of Appeals. In particular, the Court of Appeals erred by not recognizing the clear legislative intent reflected in the plain language of the statute precluding multiple punishments for OWI and OWI-injury. Accordingly, for the reasons stated below, we affirm the Court of Appeals' decision to vacate defendant's OWI conviction under MCL 257.625(1) on alternate grounds and remand to the trial court for resentencing.

I. FACTUAL AND PROCEDURAL BACKGROUND

In June 2012, while returning from a concert at which they had both been drinking alcohol, defendant

[1] MCL 257.625(1).

[2] MCL 257.625(5).

[3] US Const, Am V; Const 1963, art 1, § 15.

and his girlfriend got into an argument. Defendant grabbed the wheel from his girlfriend, who was driving, causing the car to go off the road and strike a tree. Defendant's girlfriend suffered a broken collar bone and a concussion as a result of the accident. Defendant had a blood alcohol level of 0.17 grams per 100 milliliters.

Defendant was charged with OWI and OWI-injury. A jury convicted defendant as charged. The trial court sentenced defendant to two concurrent terms of five years' probation, with the first nine months to be served in the county jail.

Defendant appealed to the Court of Appeals, arguing that the trial court violated the multiple punishments strand of the double jeopardy clauses by convicting him of both OWI and OWI-injury. The Court of Appeals agreed, vacated defendant's OWI conviction under MCL 257.625(1), and remanded the case for resentencing.[4] The prosecution moved for reconsideration, arguing that the Court of Appeals' analysis was contrary to *People v Ream*,[5] but the Court of Appeals denied the motion in a summary order.

The prosecution sought leave to appeal in this Court. We granted leave to consider whether defendant's convictions for both OWI and OWI-injury arising from the same incident constitutes a violation of the multiple punishments strand of double jeopardy under the United States and Michigan Constitutions.[6]

II. STANDARD OF REVIEW

This case presents questions of law regarding statutory interpretation and the application of our state and

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[4] *People v Miller*, unpublished opinion per curiam of the Court of Appeals, issued March 11, 2014 (Docket No. 314375).

[5] *People v Ream*, 481 Mich 223; 750 NW2d 536 (2008).

[6] *People v Miller*, 497 Mich 881 (2014).

federal Constitutions, which we review de novo.[7]

III. MULTIPLE PUNISHMENTS STRAND OF DOUBLE JEOPARDY

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb . . . ."[8] The Michigan Constitution similarly provides that "[n]o person shall be subject for the same offense to be twice put in jeopardy."[9] The prohibition against double jeopardy protects individuals in three ways: "(1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense."[10] The first two protections comprise the "successive prosecutions" strand of double jeopardy, while the third protection is known as the "multiple punishments" strand.[11] Because defendant was convicted of and sentenced for both OWI and OWI-injury arising from the same conduct at the same trial, this case involves the multiple punishments strand of double jeopardy.

The multiple punishments strand of double jeopardy "is designed to ensure that courts confine their sen-

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[7] *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008); *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

[8] US Const, Am V.

[9] Const 1963, art 1, § 15. Although we are not bound to interpret the Michigan Constitution consistently with similar provisions of the United States Constitution, "we have been persuaded in the past that interpretations of the Double Jeopardy Clause of the Fifth Amendment have accurately conveyed the meaning of Const 1963, art 1, § 15 . . . ." *People v Smith*, 478 Mich 292, 302 n 7; 733 NW2d 351 (2007).

[10] *Nutt*, 469 Mich at 574.

[11] *Smith*, 478 Mich at 299.

tences to the limits established by the Legislature" and therefore acts as a "restraint on the prosecutor and the Courts."[12] The multiple punishments strand is not violated "[w]here 'a legislature specifically authorizes cumulative punishment under two statutes . . . .' "[13] Conversely, where the Legislature expresses a clear intention in the plain language of a statute to prohibit multiple punishments, it will be a violation of the multiple punishments strand for a trial court to cumulatively punish a defendant for both offenses in a single trial.[14] "Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed."[15]

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[12] *People v Mitchell*, 456 Mich 693, 695; 575 NW2d 283 (1998); see also *Brown v Ohio*, 432 US 161, 165; 97 S Ct 2221; 53 L Ed 2d 187 (1977) ("Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional [double jeopardy] guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.").

[13] *Mitchell*, 456 Mich at 695, quoting *Missouri v Hunter*, 459 US 359, 368-369; 103 S Ct 673; 74 L Ed 2d 535 (1983).

[14] See *Garrett v United States*, 471 US 773, 779; 105 S Ct 2407; 85 L Ed 2d 764 (1985) (explaining "that the *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history"); *Hunter*, 459 US at 366 ("With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."); *Smith*, 478 Mich at 316 ("In interpreting 'same offense' in the context of multiple punishments, federal courts first look to determine whether the legislature expressed a clear intention that multiple punishments be imposed."); *Mitchell*, 456 Mich at 695-696 ("Where the issue is one of multiple punishment rather than successive trials, the double jeopardy analysis is whether there is a clear indication of legislative intent to impose multiple punishment for the same offense.").

[15] *Albernaz v United States*, 450 US 333, 344; 101 S Ct 1137; 67 L Ed 2d 275 (1981).

The Legislature, however, does not always clearly indicate its intent with regard to the permissibility of multiple punishments. When legislative intent is not clear, Michigan courts apply the "abstract legal elements" test articulated in *Ream* to ascertain whether the Legislature intended to classify two offenses as the "same offense" for double jeopardy purposes. This test focuses on the statutory elements of the offense to determine whether the Legislature intended for multiple punishments.[16] Under the abstract legal elements test, it is not a violation of double jeopardy to convict a defendant of multiple offenses if "each of the offenses for which defendant was convicted has an element that the other does not . . . ."[17] This means that, under the *Ream* test, two offenses will only be considered the "same offense" where it is impossible to commit the greater offense without also committing the lesser offense.[18]

In sum, when considering whether two offenses are the "same offense" in the context of the multiple punishments strand of double jeopardy, we must first determine whether the statutory language evinces a legislative intent with regard to the permissibility of multiple punishments. If the legislative intent is clear, courts are required to abide by this intent.[19] If, however, the legislative intent is not clear, courts must then apply the abstract legal elements test articulated in *Ream* to discern legislative intent.

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[16] *Ream*, 481 Mich at 238 (explaining that "[b]ecause the statutory elements, not the particular facts of the case, are indicative of legislative intent, the focus must be on these statutory elements").

[17] *Id*. at 225-226.

[18] *Id*. at 241.

[19] See *Mitchell*, 456 Mich at 695-696 (explaining that where the legislative intent is clear, " 'a court's task of statutory construction is at an end' "), quoting *Hunter*, 459 US at 368.

IV. ANALYSIS AND APPLICATION

Subsections (1) through (8) of MCL 257.625 establish different categories of operating while intoxicated offenses. In this case, we must determine whether double jeopardy precludes defendant's convictions of OWI under MCL 257.625(1) and OWI-injury under MCL 257.625(5) arising from a single intoxicated driving incident.

MCL 257.625(1) provides:

> A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, "operating while intoxicated" means any of the following:
>
> (a) The person is under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance.
>
> (b) The person has an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or, beginning October 1, 2018, the person has an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
>
> (c) The person has an alcohol content of 0.17 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

MCL 257.625(5) provides:

> A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1), (3), or (8) and by the operation of that motor vehicle causes a serious impairment of a body function of another person is guilty of a crime as follows:

> (a) Except as provided in subdivision (b), the person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not less than $1,000.00 or more than $5,000.00, or both. The judgment of sentence may impose the sanction permitted under section 625n. If the vehicle is not ordered forfeited under section 625n, the court shall order vehicle immobilization under section 904d in the judgment of sentence.
>
> (b) If the violation occurs while the person has an alcohol content of 0.17 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, and within 7 years of a prior conviction, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not less than $1,000.00 or more than $5,000.00, or both. The judgment of sentence may impose the sanction permitted under section 625n. If the vehicle is not ordered forfeited under section 625n, the court shall order vehicle immobilization under section 904d in the judgment of sentence.

As stated above, to determine whether defendant's convictions of both OWI and OWI-injury violated his double jeopardy rights, we must first determine whether the Legislature expressed a clear intent regarding the permissibility of multiple operating while intoxicated convictions arising from the same incident.

The Court of Appeals concluded, based on an examination of the plain language of MCL 257.625, that the Legislature did not "evince a clear expression of any intent to allow multiple punishments for the same offense."[20] In doing so, the Court focused on MCL 257.625(25) and (27). MCL 257.625(25)(b) defines "prior convictions" and includes as part of that definition a violation of "[t]his section" or a "substantially corresponding" local ordinance, federal law, or law of another state. MCL 257.625(27) provides that "[i]f 2 or

[20] *Miller*, unpub op at 4.

more convictions described in subsection (25) are convictions for violations arising out of the same transaction, only 1 conviction shall be used to determine whether the person has a prior conviction." The Court of Appeals concluded that the Legislature did not clearly state its intent with regard to multiple punishments under these subsections because Subsection (25) includes "as part of its definition of 'prior conviction' a conviction from a foreign jurisdiction of a law that 'substantially correspond[s] to a law of this state," which may allow multiple punishments for a single transaction and thus Subsection (27) merely "limit[s] how those multiple convictions are to be handled with respect to calculating a defendant's number of 'prior convictions.' "[21]

We agree with the Court of Appeals that MCL 257.625(25) and (27) do not indicate a clear legislative intent with regard to the permissibility of multiple punishments. While MCL 257.625(27) considers the possibility that a defendant could be convicted of multiple offenses arising out of the same transaction, it is not clear whether the Legislature contemplated these multiple offenses as arising solely under Michigan law, the laws of another jurisdiction that "substantially correspond[] to a law of this state," or a combination thereof.

Despite the Court of Appeals' proper analysis of these subsections, our review of MCL 257.625 as a whole leads us to conclude that the Legislature did express a clear intent with regard to multiple punishments arising under MCL 257.625(1) and (5). As with any statutory interpretation, we must give effect to the Legislature's intent by focusing first on the statute's

[21] *Id.*

plain language.[22] When statutory language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written.[23] Here, MCL 257.625(1) and (5) are silent on the issue of multiple punishments and thus do not, when read in isolation, clearly evidence the Legislature's intent on whether multiple punishments are allowed.

However, we do not quarantine the text when interpreting statutes. Instead, we must examine the statutory language as a whole to determine the Legislature's intent.[24] In this respect, we find it significant that the Legislature specifically authorized multiple punishments for some operating while intoxicated offenses in another subsection of the statute.[25] MCL 257.625(7) creates a separate operating while intoxicated offense for individuals who drive while intoxicated with a minor in the car (OWI-minor).[26] Subsection (7)(d) provides in relevant part:

> This subsection *does not prohibit a person from being charged with, convicted of, or punished for a violation of subsection (4) or (5) that is committed by the person while violating this subsection*. However, points shall not be assessed under section 320a for both a violation of subsection (4) or (5) and a violation of this subsection for conduct arising out of the same transaction.[27]

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[22] *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014).

[23] *Id*.

[24] *Id*. at 698.

[25] Although this argument was not made in the parties' briefs filed in this Court or the Court of Appeals, it was raised by defense counsel during oral arguments in this Court.

[26] MCL 257.625(7) proscribes "operat[ing] a vehicle in violation of subsection (1), (3), (4), (5), or (8) while another person who is less than 16 years of age is occupying the vehicle."

[27] Emphasis added.

Thus, under MCL 257.625(7)(d), the Legislature specifically authorized multiple convictions and punishments for a person who commits OWI-minor and by that same conduct also commits OWI-injury or causes "the death of another person" under MCL 257.625(4) (OWI-death).

The specific authorization for multiple punishments contained in MCL 257.625(7)(d) leads us to conclude that the Legislature did *not* intend to permit multiple punishments for OWI and OWI-injury offenses arising from the same incident. While Subsection (7) expressly authorizes multiple punishments for certain operating while intoxicated offenses, this authorization is limited to the circumstances described in MCL 257.625(7)(d). And interpreting this subsection in the context of the statute as a whole leads us to conclude that the Legislature intended to exclude all other multiple punishments under MCL 257.625.[28] This implication is particularly probative of legislative intent in this case because the express authorization of multiple punishments in Subsection (7)(d) involves one of the subsections under examination in this case, MCL 257.625(5). The fact that the Legislature expressly authorized multiple punishments for Subsection (5) and a subsection other than Subsection (1) demonstrates that the Legislature did not intend to permit multiple punishments for violations of Subsections (1) and (5).[29] In other words, if the Legislature had intended to allow multiple punishments for Subsections (1) and (5), it

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[28] *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012) (" 'We interpret th[e] words in [the statute in] light of their ordinary meaning and their context within the statute and read them harmoniously to give effect to the statute as a whole.' "), quoting *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011).

[29] See, e.g., *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993) ("Courts cannot assume that the Legislature inadver-

clearly knew how to do so, as evidenced by the specific authorization in MCL 257.625(7)(d).[30] But neither MCL 257.625(1) nor (5) contains similar language specifically authorizing the conviction of and punishment for multiple offenses. Thus, in light of MCL 257.625(7)(d), the omission of a similar clause providing explicit authority to convict a defendant of multiple operating while intoxicated offenses arising out of the same incident in either MCL 257.625(1) or (5) is a clear indication that the Legislature did not intend for defendants to be convicted of and punished for OWI and OWI-injury arising out of the same incident.

Further, to reach the opposite conclusion would violate our well-recognized rule that 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."[31] That is, had the Legislature generally intended to allow multiple punishments for every category of operating while intoxicated offense arising from the same conduct, there would have been no need for the Legislature to specifically authorize multiple punishments for OWI-minor and OWI-death or OWI-injury. To interpret MCL 257.625 as permitting multiple punishments for other operating while intoxicated offenses would improperly render the specific authorization under MCL 257.625(7)(d) surplusage.

Therefore, the Court of Appeals erred by concluding that the Legislature did not "evince a clear expression of any intent to allow . . . multiple punishments for the

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tently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there.").

[30] See *People v Houston*, 473 Mich 399, 410; 702 NW2d 530 (2005).

[31] *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

same offense."[32] In light of the express statutory language permitting multiple punishments in MCL 257.625(7)(d), the fact that MCL 257.625(1) and (5) do not contain any express authorization for multiple punishments indicates that the Legislature did not intend to permit a defendant to be convicted of both of these offenses for the same criminal conduct.[33] Accordingly, we hold that the trial court violated the double jeopardy prohibition by convicting defendant of both OWI under MCL 257.625(1) and OWI-injury under MCL 257.625(5).[34]

V. CONCLUSION

We conclude that defendant's convictions of both OWI and OWI-injury for the same intoxicated driving incident violates the multiple punishments prong of the double jeopardy clauses. Based on the plain language of MCL 257.625, the Legislature expressed a clear intent not to allow conviction of and punishment

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[32] *Miller*, unpub op at 4.

[33] Because the Legislature evinced a clear intent with regard to the permissibility of multiple punishments based on the plain language of the statute, the Court of Appeals did not need to employ *Ream*'s abstract legal elements test. However, even assuming that resort to *Ream* was necessary, the Court of Appeals did not apply *Ream* correctly because it compared the elements of each offense *as charged* rather than focusing on the *abstract statutory elements* of the two offenses, as required by *Ream*.

[34] While plaintiff argues that there is no double jeopardy violation because defendant was sentenced to concurrent, rather than consecutive, sentences and thus does not face multiple sentences, we find this argument unpersuasive. A concurrent sentence does not eliminate the potential collateral consequences of two convictions for the same offense. See *Ball v United States*, 470 US 856, 864-865; 105 S Ct 1668; 84 L Ed 2d 740 (1985) (including as examples of the collateral consequences of a second conviction as potentially "delay[ing] the defendant's eligibility for parole or result[ing] in an increased sentence under a recidivist statute for a future offense").

for multiple offenses arising from the same conduct, except where explicitly authorized by the statute. Therefore, the Court of Appeals reached the right result when it vacated defendant's OWI conviction.[35] However, the Court of Appeals did so for the wrong reasons. Accordingly, we affirm the Court of Appeals' decision to vacate defendant's OWI conviction under MCL 257.625(1) on alternate grounds and remand to the trial court for resentencing.

YOUNG, C.J., and MARKMAN, KELLY, ZAHRA, MCCORMACK, and BERNSTEIN, JJ., concurred with VIVIANO, J.

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[35] *People v Herron*, 464 Mich 593, 609; 628 NW2d 528 (2001) (explaining that "it is an appropriate remedy in a multiple punishment double jeopardy violation to affirm the conviction of the higher charge and to vacate the lower conviction").

DETROIT EDISON COMPANY v DEPARTMENT OF TREASURY

Docket No. 148753. Argued April 7, 2015 (Calendar No. 1). Decided July 22, 2015.

The Detroit Edison Company brought an action in the Court of Claims against the Department of Treasury, seeking, in part, a refund of use taxes paid under protest for the tax period January 1, 2003, through September 30, 2006. Plaintiff alleged that certain property that had been subjected to the tax was exempt from the tax under the industrial-processing exemption of the Use Tax Act, MCL 205.94o, because the property, located outside plaintiff's generation plants, was used to continue the processing of the electricity. Specifically, plaintiff initially generates electricity at approximately 15,000 to 25,000 volts. To transmit the electricity through the electric system, plaintiff ups the voltage to 115,000 to 500,000 volts. Plaintiff then uses property, such as transformers, to lower the voltage as the electricity nears the consumer. Plaintiff uses other property to monitor the voltage levels across the system. The Court of Claims, Paula J. M. Manderfield, J., granted summary disposition in favor of plaintiff. Defendant appealed. The Court of Appeals, MURPHY, C.J., and FITZGERALD and BORRELLO, JJ., affirmed. 303 Mich App 612 (2014). Defendant sought leave to appeal, and the Supreme Court granted the application. 497 Mich 873 (2014).

In an opinion by Justice MARKMAN, joined by Chief Justice YOUNG and Justices VIVIANO and BERNSTEIN, the Supreme Court *held*:

Under the industrial-processing exemption, when property is simultaneously used for exempt industrial-processing activity and nonexempt shipping and distribution activities, the taxpayer is entitled to an industrial-processing exemption based on the percentage of exempt use to total use as determined by a reasonable formula or method approved by the Department of Treasury.

1. The Use Tax Act, MCL 205.91 *et seq*., imposes a 6% tax on a consumer's use, storage, and consumption of all tangible personal property in Michigan. But under the industrial-processing exemption, MCL 205.94o, the tax does not apply to property sold

to an industrial processor for use or consumption in industrial processing. MCL 205.94o(7)(b) defines "industrial processor" as a person who performs the activity of converting or conditioning tangible personal property for ultimate sale at retail or use in the manufacturing of a product to be ultimately sold at retail. Plaintiff is an industrial processor because it generates electricity by converting tangible personal property for ultimate sale at retail. MCL 205.94o(7)(a) defines "industrial processing" as the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail. Industrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage. Under MCL 205.92 of the Use Tax Act, electricity is tangible personal property. Altering the voltage of the electricity conditions the electricity for ultimate sale at retail because the voltage level at which the electricity is initially generated is not appropriate for ordinary use by a consumer. Altering the voltage also transforms the quality or character of the electricity because voltage is an essential attribute of electricity. Therefore, altering the voltage is an industrial-processing activity. Industrial processing of electricity does not become complete until final distribution to the consumer because there is no previous point at which the finished goods come to rest in finished goods inventory storage. The Court of Appeals correctly concluded that the electric system is used for exempt industrial-processing activity.

2. MCL 205.94o(6)(b) excludes from the definition of "industrial processing" sales, distribution, warehousing, shipping, and advertising activities. The flow of electricity to substations and consumers constitutes distribution and shipping of the electricity. Accordingly, from the time electricity leaves the generation plant until it is distributed to the consumer, the electric system is simultaneously involved in industrial-processing activity under MCL 205.94o(7)(a) and distribution and shipping activities under MCL 205.94o(6)(b). Therefore, the Court of Appeals also correctly determined that the electric system is simultaneously used for both exempt and nonexempt activities.

3. The Court of Appeals erred to the extent it concluded that plaintiff was entitled to the industrial-processing exemption for the entire electric system. Under MCL 205.94o(2), the property used in industrial processing is exempt only to the extent that it

is used for industrial processing, and the exemption is limited to the percentage of exempt use to total use determined by a reasonable formula or method approved by the Department of Treasury. To determine the percentage of exempt use to total use, it is necessary to ascertain both the use of the property for exempt activity and the sum of the uses of the property for exempt and nonexempt activities. In this case, the record showed that the exempt use of the electric system included, at a minimum, alteration of the voltage. Total use of the electric system was the sum of the uses for exempt activity plus the nonexempt distribution and shipping activities.

4. Mich Admin Code, R 205.115(4) states that the sale of tangible personal property consumed or used in the transmission or distribution of electricity is taxable. But agencies cannot exercise legislative power by creating law or changing the laws enacted by the Legislature. The Court of Appeals correctly held that the rule, therefore, is invalid to the extent it conflicts with MCL 205.94o.

Affirmed in part, reversed in part, and remanded to the Court of Claims for defendant to approve a reasonable formula or method for determining the percentage of exempt use to total use of the property.

Justice KELLY, joined by Justices ZAHRA and MCCORMACK, dissenting, would have held that industrial processing ends once the electricity leaves the power plant, and would have reversed the judgment of the Court of Appeals to the extent it held that plaintiff was entitled to the industrial-processing exemption for property used outside its plants. Electricity that has left plaintiff's plants does not undergo further changes in form, composition, quality, combination, or character. While the voltage is reduced, for efficiency, during the distribution process, the fundamental nature of the electricity—the flow of electrons—never changes. Producing electricity at a high voltage simply allows plaintiff to supply its product more efficiently across further distances. Because both shipping and distribution are excluded from the definition of industrial processing, activity occurring after the production of a good is not part of the industrial processing of that good. The equipment used by plaintiff to convey electricity to its customers does not qualify for the industrial-processing exemption. Electricity is a vendible good as soon as it leaves the plant. Because plaintiff only engages in shipping and distributing electricity once the electricity leaves its production facilities, it does not use any property in industrial processing outside its production facilities under the industrial-processing exemption. Therefore, all equip-

ment used in transmitting and distributing electric power outside its generating plants is subject to the use tax, and apportionment is not appropriate in this instance.

1. TAXATION — USE TAX ACT — WORDS AND PHRASES — INDUSTRIAL PROCESSING.

"Industrial processing" for purposes of the industrial-processing exemption in the Use Tax Act, is defined as the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail; industrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage; altering the voltage of electricity after it leaves the generation plant is an industrial-processing activity; industrial processing of electricity does not become complete until final distribution to the consumer (MCL 205.94o).

2. TAXATION — USE TAX ACT — INDUSTRIAL-PROCESSING EXEMPTION — SIMULTANEOUS EXEMPT AND NONEXEMPT ACTIVITIES — APPORTIONMENT.

Under the industrial-processing exemption in the Use Tax Act, when property is simultaneously used for exempt industrial-processing activity and nonexempt shipping and distribution activities, the taxpayer is entitled to an industrial-processing exemption based on the percentage of exempt use to total use as determined by a reasonable formula or method approved by the Department of Treasury (MCL 205.94o).

Honigman Miller Schwartz and Cohn LLP (by *Patrick R. Van Tiflin*, *John D. Pirich*, *Lynn Gandhi*, and *June Summers Haas*) for Detroit Edison Company.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Zachary C. Larsen* and *Michael R. Bell*, Assistant Attorneys General, for the Department of Treasury.

Amici Curiae:

Clark Hill PLC (by *Cynthia M. Filipovich*) for the Michigan Manufacturers Association.

James R. Holcomb for the Michigan Chamber of Commerce.

Foster, Swift, Collins & Smith, PC (by *Richard C. Kraus* and *Todd W. Hoppe*), for the Michigan Milk Producers Association.

Dykema Gossett PLLC (by *Wayne D. Roberts*, *Shaun M. Johnson*, and *Elisa J. Lintemuth*) for International Transmission Company.

MARKMAN, J. The Use Tax Act (UTA), MCL 205.91 *et seq*., imposes a 6% tax "for the privilege of using, storing, or consuming tangible personal property in this state . . . ." MCL 205.93(1). However, the UTA exempts from the use tax property sold to "[a]n industrial processor for use or consumption in industrial processing." MCL 205.94o(1)(a). At issue here is whether and to what extent, if any, an electric utility is entitled to the industrial-processing exemption for tangible personal property located outside its generation plants. The Court of Appeals held that plaintiff was entitled to the full industrial-processing exemption for the property.

We hold that the property here is simultaneously used for exempt "industrial processing" activity under MCL 205.94o(7)(a) and nonexempt "distribution" and "shipping" activities under MCL 205.94o(6)(b). In these circumstances, the taxpayer is entitled to the industrial-processing exemption based on the "percentage of exempt use to total use determined by a reasonable formula or method approved by the [Department of Treasury]." MCL 205.94o(2). Accordingly, we affirm the judgment of the Court of Appeals in part, reverse in part, and remand to the Court of Claims for further proceedings.

I. FACTS AND HISTORY

Plaintiff, Detroit Edison Company (DTE), is an electric utility that is responsible for generating, transmitting, and distributing electricity to residential, commercial, and industrial consumers. The electricity is initially generated at approximately 15,000 to 25,000 volts within each of plaintiff's generation plants. However, to transmit electricity throughout the electric system, plaintiff must then "step up" the voltage to between 115,000 and 500,000 volts as the electricity is transmitted from the generation plant to substations from which the electricity is then distributed to consumers.

Electricity is not usable at the high voltage levels at which it exists when it is initially generated and as it moves throughout the electric system. For instance, most residential consumers use electricity at the 120/240 volt[1] level. For this reason, the electric system employs tangible personal property, such as transformers, at the substations to "step down" the voltage as the electricity nears the consumer. In addition to transformers, the electric system employs a variety of other tangible personal property, including fuses, circuit breakers, cables, and poles, to monitor the voltage levels and ensure that the consumer receives a useable product.

Defendant conducted a use-tax audit for the period between January 1, 2003, and September 30, 2006, and determined that plaintiff had a deficiency because it had claimed the industrial-processing exemption from the use tax for tangible personal property located

[1] For the typical home, the 240-volt level is obtained across two 120-volt lines.

outside its generation plants.[2] Accordingly, defendant issued a notice of intent to assess in the amount of $11,020,506 in tax plus interest—an amount that was subsequently corrected upward to $14,046,249 plus interest. Ultimately, defendant issued a final assessment in the amount of $13,102,133.54 plus interest. Plaintiff paid the deficiency under protest and filed suit in the Court of Claims, seeking a refund for the use tax and interest paid under protest, as well as statutory costs, interest, and attorney fees.[3] The parties filed competing motions for summary disposition under MCR 2.116(C)(10). The Court of Claims eventually granted summary disposition in favor of plaintiff, reasoning that it was clear "that electricity is continuing to be processed up until the point at which it reaches the customer's meter, because the voltage and current levels are drastically changed multiple times at set points, the last being at or near the customer's meter . . . ."

Defendant appealed, and the Court of Appeals affirmed. *Detroit Edison Co v Dep't of Treasury*, 303 Mich App 612; 844 NW2d 198 (2014). The Court of Appeals held that the "machinery and equipment are concurrently used in a unified system for purposes of both distribution *and* industrial processing. In such a situation, the caselaw is clear that the 'industrial process-

[2] There is no dispute that plaintiff may claim the industrial-processing exemption from the use tax for tangible personal property that is used or consumed in industrial processing *within* its generation plants. This case pertains only to whether plaintiff is also entitled to the exemption for tangible personal property located *outside* its plants. For clarity, we refer to this property as the "electric system" throughout this opinion.

[3] Plaintiff also sought a refund of use tax and interest allegedly paid on certain computer-related services. The Court of Claims ruled that plaintiff was not entitled to a refund in this regard and the propriety of that ruling is not before this Court.

ing' exemption applies to the machinery and equipment *in full*." *Id*. at 630. We granted defendant's application for leave to appeal in this Court. *Detroit Edison Co v Dep't of Treasury*, 497 Mich 873 (2014). Oral arguments were heard on April 7, 2015.

II. STANDARD OF REVIEW

"A trial court's ruling on a motion for summary disposition is a question of law, which this Court reviews de novo." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 317; 783 NW2d 695 (2010). Questions of statutory interpretation are also reviewed de novo. *Klooster v Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011).

III. ANALYSIS

A. USE TAX AND EXEMPTION

The UTA "imposes a 6% tax on a consumer's use, storage, and consumption of all tangible personal property in Michigan." *Andrie Inc v Dep't of Treasury*, 496 Mich 161, 164; 853 NW2d 310 (2014). At the time relevant to this case, MCL 205.93(1) of the UTA provided in pertinent part:

> There is levied upon and there shall be collected from every person in this state a specific tax for the privilege of using, storing, or consuming tangible personal property in this state at a rate equal to 6% of the price of the property or services . . . . [As amended by 2002 PA 511.]

The UTA industrial-processing statute, MCL 205.94o, provided in pertinent part:

> (1) The tax levied under this act does not apply to property sold to the following after March 30, 1999, subject to subsection (2):

(a) An industrial processor for use or consumption in industrial processing.

(b) A person, whether or not the person is an industrial processor, if the tangible personal property is intended for ultimate use in and is used in industrial processing by an industrial processor.

(c) A person, whether or not the person is an industrial processor, if the tangible personal property is used by that person to perform an industrial processing activity for or on behalf of an industrial processor.

* * *

(2) The property under subsection (1) is exempt only to the extent that the property is used for the exempt purpose stated in this section. The exemption is limited to the percentage of exempt use to total use determined by a reasonable formula or method approved by the department.

(3) Industrial processing includes the following activities:

* * *

(d) Inspection, quality control, or testing to determine whether particular units of materials or products or processes conform to specified parameters at any time before materials or products first come to rest in finished goods inventory storage.

* * *

(j) Production material handling.

(k) Storage of in-process materials.

* * *

(6) Industrial processing does not include the following activities:

* * *

(b) Sales, distribution, warehousing, shipping, or advertising activities.

* * *

(7) As used in this section:

(a) "Industrial processing" means the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail. Industrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage.

(b) "Industrial processor" means a person who performs the activity of converting or conditioning tangible personal property for ultimate sale at retail or use in the manufacturing of a product to be ultimately sold at retail. [As enacted by 1999 PA 117.]

"The industrial processing exemption is, in part, the product of a targeted legislative effort to avoid double taxation of the end product offered for retail sale or, in other terms, to avoid 'pyramiding the use and sales tax.' " *Elias Bros Restaurants, Inc v Treasury Dep't*, 452 Mich 144, 152; 549 NW2d 837 (1996), quoting *Int'l Research & Dev Corp v Dep't of Revenue*, 25 Mich App 8, 13; 181 NW2d 53 (1970). "Pyramiding occurs when both use and sales taxes are imposed on the production and sale of retail goods." *Elias Bros*, 452 Mich at 152. "[T]o determine whether the industrial processing exemption applies, it is necessary to consider the *activity* in which the equipment is engaged and not the *character* of the equipment-owner's business." *Id*. at 157 (emphasis added).

MCL 205.92 of the UTA specifically provides that electricity constitutes "tangible personal property." Effective July 23, 2002, MCL 205.92(*l*) read as follows:

> "Tangible personal property" beginning September 20, 1999, includes electricity, natural or artificial gas, or steam and also the transmission and distribution of electricity used by the consumer or user of the electricity, whether the electricity is purchased from the delivering utility or from another provider. [As amended by 2002 PA 511.]

Effective September 1, 2004, MCL 205.92(k) reads as follows:

> "Tangible personal property" means personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses and includes electricity, water, gas, steam, and prewritten computer software. [As amended by 2004 PA 172.]

Accordingly, there is no dispute that electricity constitutes "tangible personal property" for purposes of the industrial-processing exemption.[4] MCL 205.92. In addition, there is no dispute that plaintiff is an "industrial processor" because by generating electricity it "performs the activity of converting or conditioning tangible personal property for ultimate sale at retail . . . ." MCL 205.94o(7)(b). With that in mind, we address whether plaintiff's tangible personal property outside the generation plants is exempt from the use tax under the industrial-processing exemption.

We start with a discussion of "industrial processing" under MCL 205.94o(7)(a) and only then address MCL 205.94o(2) for three reasons. First, the introductory sentence of MCL 205.94o(2) provides that "[t]he property under subsection (1) is exempt only to the extent that the property is used for the exempt purpose stated

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[4] Electricity is also "tangible personal property" for purposes of MCL 205.93(1). That is, electricity is subject to the use tax because it is deemed "tangible personal property" in MCL 205.92. In this case, we are only concerned with electricity as "tangible personal property" for purposes of the industrial-processing exemption, MCL 205.94o.

in this section." Therefore, before addressing the second sentence of MCL 205.94o(2), it is initially necessary to assess whether and to what extent the property is used for the "exempt purpose," i.e., industrial processing. This is the threshold inquiry required by the first sentence of MCL 205.94o(2), and MCL 205.94o(7)(a) defines "industrial processing."

Second, the next sentence of MCL 205.94o(2) provides that "[t]he exemption is limited to the percentage of exempt use to total use determined by a reasonable formula or method approved by the department." Thus, similarly to the introductory sentence of MCL 205.94o(2), the second sentence requires an initial assessment of whether and to what extent property is put to the "exempt use" of industrial processing.

Third, the overall concern of the industrial-processing exemption, MCL 205.94o, is, of course, industrial processing. It is only logical, therefore, to first determine whether "industrial processing" has occurred. Because "industrial processing" is defined by MCL 205.94o(7)(a), the analysis begins there. If "industrial processing" activity is not occurring under either MCL 205.94o(7)(a) or MCL 205.94o(3), the latter of which specifically enumerates certain activities that constitute "industrial processing," the analysis is complete and the taxpayer is entitled to no exemption. On the other hand, if "industrial processing" activity is occurring, it is then necessary to analyze the remaining provisions of MCL 205.94o, including but not limited to Subsection (2), to determine the measure of the exemption.

B. INDUSTRIAL PROCESSING

The initial consideration is whether altering the voltage of the electricity after it is transmitted by the

generation plant satisfies the definition of "industrial processing" under MCL 205.94o(7)(a). Again, this provision states in pertinent part:

> "Industrial processing" means the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail . . . . Industrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage. [MCL 205.94o(7)(a).]

The first inquiry under MCL 205.94o(7)(a) is whether altering the voltage satisfies the first sentence, *to wit*, whether altering the voltage constitutes "converting or conditioning [electricity] by changing the form, composition, quality, combination, or character . . . for ultimate sale at retail." Because these words are undefined by statute, it is appropriate to consult a dictionary. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011) ("We may consult dictionary definitions to give words their common and ordinary meaning."). "Condition" means "to put in a fit or proper state." *Random House Webster's College Dictionary* (1997). "Quality" means "an essential characteristic, property, or attribute." *Id*. "Character" means "the aggregate of features and traits that form the individual nature of a person or thing." *Id*.

We conclude that altering the voltage "condition[s]" the electricity "for ultimate sale at retail." MCL 205.94o(7)(a). The industrial-processing exemption inquires whether tangible personal property constitutes a "finished good." MCL 205.94o(7)(a). The parties' various experts agree that the voltage levels at which the electricity is initially generated are not in their final form, such that they would be appropriate for

ordinary use by the consumer.[5] Thus, altering the voltage "conditions" the electricity for ultimate sale at retail because the electricity is not "finished" and, therefore, not suitable for consumption until that voltage has been lowered.

Furthermore, altering the voltage transforms the "quality" and "character" of the electricity. The parties' experts agree that the tangible personal property generated by plaintiff—whether it is characterized as "electricity" or "electric power"—is composed of both voltage and current. Put simply, electricity is measured, at least in part, by voltage. Because electricity is measured in this way, voltage is an essential attribute, and an inherent feature, of electricity. Altering the voltage therefore alters the "quality" and "character" of the electricity. Accordingly, altering the voltage constitutes an industrial-processing activity by satisfying the initial sentence of MCL 205.94o(7)(a).

The next inquiry required under MCL 205.94o(7)(a) is whether the industrial processing of the electricity outside the generation plant satisfies the second sentence, which provides that "[i]ndustrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage." Defendant does not dispute that industrial processing begins before the electricity has been transmitted from the generation plant. And defendant has identified no point at which the electricity comes to rest in inventory storage. And nowhere does the record otherwise suggest that electricity ever comes to rest in inventory

[5] The dissent concedes this fact as well. *Post* at 60 ("The Court of Appeals erred when it overemphasized DTE's claim that the electricity is not in its final, safe form until it reaches customers.").

storage. Moreover, electricity is never a "finished good" until the voltage has been reduced to a level approximating 120/240 volts for the typical residential consumer and 480 volts for the typical industrial consumer. We conclude as a result that industrial processing of electricity does not become complete until final distribution to the *consumer* because there is simply no point within the electric system at which "finished goods first come to rest in finished goods inventory storage" before that point.[6]

For these reasons, the industrial processing of electricity under MCL 205.94o(7)(a) occurs throughout the electric system from its initial generation until its final distribution to the consumer.[7] We therefore affirm the Court of Appeals' conclusion that the electric system is used for exempt "industrial processing" activity.

C. DISTRIBUTION AND SHIPPING

The second consideration is whether the equipment is somehow *excluded* from the industrial-processing exemption by MCL 205.94o(6)(b), which reads:

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[6] To be clear, we conclude from the record before us that "industrial processing" is complete when the electricity is finally delivered to the consumer *at the meter* because at this point, the consumer has received a "finished good." Indeed, we note that plaintiff specifically argues that the "finished good" is "delivered once electricity *reaches the customer's meter* in a form usable by the customer." (Emphasis added.) We do not intend to suggest that further modification of this "finished good" by the consumer for the consumer's unique needs constitutes additional "industrial processing" activity.

[7] We do not suggest that alteration of the voltage is the *only* "industrial processing" that may occur within the electric system. For example, the record here suggests that some equipment is being used to monitor voltage levels. The use of this equipment for monitoring might be considered "industrial processing" under MCL 205.94o(3)(d), which provides that "industrial processing" includes "[i]nspection, quality control, or testing . . . ."

> (6) Industrial processing does not include the following activities:
>
> * * *
>
> (b) Sales, distribution, warehousing, shipping, or advertising activities.

"Distribution" describes "an act or instance of distributing," *Random House Webster's College Dictionary* (1997), and "shipping" describes "the act or business of a person or thing that ships goods," *id*. The electric system moves electricity from each substation, either to other substations, or to the consumer. This movement, or flow, of electricity constitutes "distribution" and "shipping" of the electricity from the generation plant to the consumer. Thus, the electric system is involved in "distribution" and "shipping" activities, and industrial processing "does not include" these activities. MCL 205.94o(6)(b). Accordingly, from the time when electricity leaves the generation plant until it is finally distributed to the consumer, the electric system is *simultaneously* involved in "industrial processing activity" under MCL 205.94o(7)(a) and "distribution" and "shipping" activities under MCL 205.94o(6)(b). We therefore also affirm the Court of Appeals' conclusion that the electric system is simultaneously used for exempt and nonexempt activities.

Defendant argues that when "an activity is 'industrial processing' under [MCL 205.94o(7)(a)], but when a specified 'exclusion' applies, it will take the activity outside of the exemption." That is, defendant argues, distribution and shipping are "specific modifier[s]" to the general definition of industrial processing. See *In re Haley*, 476 Mich 180, 198; 720 NW2d 246 (2006) ("[I]t is a settled rule of statutory construction that where a statute contains a specific statutory provision

and a related, but more general, provision, the specific one controls."). See also *Ter Beek v City of Wyoming*, 495 Mich 1, 22; 846 NW2d 531 (2014) ("It is well accepted that when two legislative enactments seemingly conflict, the specific provision prevails over the more general provision."). We respectfully disagree with defendant's analysis.

The "general/specific" rule of statutory interpretation, although a longstanding and honorable interpretative canon, is utterly inapplicable in this case. It is a rule that applies only in circumstances in which some subject in dispute has been removed, or carved out from, a general category of treatment, to which it would *otherwise* belong, and placed within a more narrow category of treatment to which it belongs by specific definition, *to wit*, in those circumstances in which the statutory issue is presented in the following form: should the subject in dispute be treated in accordance with the general category to which it belongs or in accordance with the more specific category to which it also belongs? See *In re Landaal*, 273 Mich 248, 252; 262 NW2d 897 (1935), quoting *Crane v Reeder*, 22 Mich 322, 334 (1871):

> [W]here there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provision . . . . [Quotation marks omitted.]

That is, the rule only applies when there is some statutory tension or conflict between two possible treatments of a subject, e.g., when an agricultural statute sets different tax rates for "fruits" and "apples." There is no such conflict or tension here. Rather, there

are subjects or activities ("industrial processing") that fall within the category of "industrial processing," and there are other subjects or activities ("distribution" and "shipping") that do not fall within the category of "industrial processing." These categories are separate and distinct, and there is nothing to suggest that one category can be viewed as being more "general" or "specific" than the other. In short, the nonexempt activities in MCL 205.94o(6)(b) are in no way within the scope of MCL 205.94o(7)(a), and the exempt activity in MCL 205.94o(7)(a) is in no way within the scope of MCL 205.94o(6)(b). Accordingly, there is no hierarchy among tax categories, no conflict or tension as to the treatment of any specific activity, and, for the reasons set forth later in Part III(E) of this opinion, no "all or nothing" conferral of the tax exemption.

D. RULE 65

Defendant also argues that plaintiff is not entitled to the industrial-processing exemption by operation of Mich Admin Code, R 205.115(4)—known as Rule 65(4) of the Specific Sales and Use Tax Rules promulgated by defendant. The rule was enacted under MCL 24.207 of the Administrative Procedures Act[8] with the force of law. See *Danse Corp v Madison Hts*, 466 Mich 175, 181; 644 NW2d 721 (2002) ("In order for an agency regulation . . . of general applicability to have the force of law, it must fall under the definition of a properly promulgated rule."). Rule 65(4) reads as follows:

> The sale of tangible personal property consumed or used in the transmission or distribution of electricity, gas, or steam is taxable. Such transmission or distribution starts at the place where the product leaves the immediate premises from which it is manufactured.

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[8] MCL 24.201 *et seq*.

Under Rule 65(4), the use tax may be applied to the electric system because the electric system is "tangible personal property . . . used in the transmission or distribution of electricity . . . ."[9] Nonetheless, and despite the fact that Rule 65(4) is a "properly promulgated rule," it does not control the outcome of this case.

"Perhaps the most fundamental aspect of the 'legislative power' . . . is the power to tax and to appropriate for specified purposes." *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 141; 719 NW2d 553 (2006). "[A]gencies cannot exercise legislative power by creating law or changing the laws enacted by the Legislature." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 98; 754 NW2d 259 (2008). Therefore, when the Legislature has exempted certain tangible personal property from the use tax by enacting MCL 205.94o, defendant cannot impose the use tax on that property through the rulemaking process. See *R C Mahon Co v Dep't of Revenue*, 306 Mich 660, 666; 11 NW2d 280 (1943) ("[L]iability for payment of the sales (and use) tax is controlled by statute. It cannot be imposed by rulings or regulations of the board (department.)") (citation and quotation marks omitted). As explained in Part III(C) of this opinion, we conclude that plaintiff is entitled to the industrial-processing exemption for the electric system under MCL 205.94o—at least in *part*—because exempt industrial-processing activity and nonexempt activities

[9] We note that Rule 65(4) simply provides that the electric system "is taxable." It does not provide that the electric system is *entirely* taxable. That is, the rule does not provide that the electric system is *completely* excluded from the industrial-processing exemption, as defendant contends. In any event, we need not address whether Rule 65(4) establishes that the electric system is completely excluded from the industrial-processing exemption because, as explained later in this opinion, MCL 205.94o would control in any event over Rule 65(4) to the extent the rule altogether precluded the exemption.

are occurring simultaneously. MCL 205.94o(2) contemplates that in such a situation the taxpayer is entitled to *some* measure of an exemption. Rule 65(4), on the other hand, may be read to provide that the electric system is entirely taxable. Accordingly, Rule 65(4) directly conflicts with MCL 205.94o to the extent that the rule can be read to deprive electric utilities, such as plaintiff, of the entirety of the industrial-processing exemption for tangible personal property located outside the generation plants. Because defendant cannot through the rulemaking process "chang[e] the laws enacted by the Legislature," *In re Complaint of Rovas*, 482 Mich at 98, MCL 205.94o is controlling and Rule 65(4) is invalid to the extent it is in conflict with MCL 205.94o. We again affirm the Court of Appeals' conclusion in this regard.

E. APPORTIONMENT

To reiterate, the electric system is used for tax-exempt activity under MCL 205.94o(7)(a), as well as for nonexempt activities under MCL 205.94o(6)(b). Furthermore, Rule 65(4) does not govern the outcome of this case. The next consideration is whether, and to what extent, the tax on the electric system may be apportioned between exempt and nonexempt activities under MCL 205.94o(2).[10]

Once again, MCL 205.94o(2) reads:

> The property under subsection (1) is exempt only to the extent that the property is used for the exempt purpose

[10] For simplicity, we refer to MCL 205.94o(2) as an apportionment provision because it describes how to apply the exemption. The exemption applies to property "used for the exempt purpose" and, by implication, does not apply to property *not* "used for the exempt purpose." The exemption must, therefore, be "apportioned" on the basis of the use of the property.

> stated in this section. The exemption is limited to the percentage of exempt use to total use determined by a reasonable formula or method approved by the department.

The electric system is used for "the exempt purpose stated in this section"—industrial processing—until that point at which the electricity is finally distributed to the consumer. This is because MCL 205.94o(7)(a) provides that "[i]ndustrial processing. . . ends when finished goods first come to rest in finished goods inventory storage," and as already observed, electricity never comes to rest in finished goods inventory storage; rather, it continues to be processed until final delivery is made to the consumer. Industrial processing therefore occurs throughout the electric system[11] under MCL 205.94o(7)(a).[12] Furthermore, as already explained, nonexempt "distribution" and "shipping" activities under MCL 205.94o(6)(b) also occur throughout the electric system until final delivery is made to the consumer. Accordingly, because the electric system is simultaneously used for both exempt and nonexempt activities, it is necessary to consider MCL 205.94o(2).

MCL 205.94o(2) provides in relevant part that "[t]he property under subsection (1) is exempt only to the extent that the property is used for the exempt purpose stated in this section." The electric system satisfies MCL 205.94o(1) because plaintiff is an "industrial processor" and, as explained previously, the electric system is used for "industrial processing." See MCL 205.94o(1)(a) (stating that the tax levied under the UTA does not apply to property sold to "[a]n industrial

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[11] See note 6 of this opinion.

[12] We again note that "industrial processing" may occur under other circumstances as well, e.g., MCL 205.94o(3)(d) (noting that industrial processing includes "[i]nspection, quality control, or testing").

processor for use or consumption in industrial processing"). Moreover, the only conceivable "exempt purpose" of MCL 205.94o is industrial processing, and as a result, the electric system is exempt from the use tax "only to the extent that [it] is used for" industrial processing.

To identify the extent to which the electric system is used for industrial processing, MCL 205.94o(2) further provides that the exemption "is limited to the percentage of exempt use to total use . . . ." The term "exempt use" refers to use of the property for industrial-processing activity because industrial-processing activity is the *only* exempt activity identified in MCL 205.94o.[13] Therefore, "total use" must refer to the aggregate use of the property for exempt activity and all other activities. That is, "total use" is the sum of the property's uses for all exempt and nonexempt activities. Whether those two types of activities happen to occur simultaneously is irrelevant to the statutory apportionment scheme. And as a simple matter of mathematics, "total use"—the sum of *all* uses—must equal 100%. We therefore reverse the Court of Appeals to the extent that it concluded that plaintiff was entitled to the industrial-processing exemption for the entire electric system.[14]

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[13] "Industrial processing" activity is generally defined by MCL 205.94o(7)(a). However, the statute also provides that certain specific activities that do not satisfy the general MCL 205.94o(7)(a) definition nonetheless constitute "industrial processing" activity for purposes of the statute. See, e.g., MCL 205.94o(3)(h) (stating that industrial processing includes "[p]rocessing of production scrap and waste up to the point it is stored for removal from the plant of origin"). Still, only property used for a single activity is exempt from the use tax: property used for industrial processing.

[14] In so concluding, the Court of Appeals relied on caselaw applying a version of the UTA that predated the enactment of MCL 205.94o and its apportionment provision. See, e.g., *Mich Milk Producers Ass'n v Dep't of Treasury*, 242 Mich App 486, 495; 618 NW2d 917 (2000) (which applied

To determine the "percentage of exempt use to total use," MCL 205.94o(2), it is necessary to ascertain both the use of the property for exempt activity and the sum of the uses of the property for exempt and nonexempt activities. Then, the "percentage of exempt use to total use" must be determined on the basis of "a reasonable formula or method approved by the department." MCL 205.94o(2). Once this percentage has been identified, the industrial-processing exemption "is limited to" this percentage. *Id*.[15]

In the case at hand, the record shows that the "exempt use" of the electric system includes, at a

a former version of the agricultural-production exemption, MCL 205.94(1)(f), and concluded that "concurrent taxable use with an exempt use does not remove the protection of exemption"). The Court of Appeals erred in this regard because before the enactment of MCL 205.94o, the industrial-processing statute, see former MCL 205.94(g), as amended by 1998 PA 491, did not include an apportionment provision. See *Mich Allied Dairy Ass'n v State Bd of Tax Admin*, 302 Mich 643, 650; 5 NW2d 516 (1942) ("Where an article has more than one use, one or more (but not all) of which are within the agricultural producing or industrial processing exemptions, the legislature could have provided that the portion of the value of the article representing its nonexempt uses should bear the tax, but it has not done so."). As the Legislature has now enacted an apportionment provision, MCL 205.94o(2), we conclude that plaintiff is not entitled to the full, but a proportionate, industrial-processing exemption for the electric system.

[15] These principles apply where, as here, tangible personal property is *simultaneously* used for exempt and nonexempt activities. These principles would equally apply when property is used during *discrete* periods for exempt and nonexempt activities. That is, when property is used exclusively for exempt activity during one period and exclusively for nonexempt activity during another period, it would still be necessary to determine "the percentage of exempt use to total use" under MCL 205.94o(2). Furthermore, when property is used exclusively for exempt activity without any use for nonexempt activity, it is unnecessary to address MCL 205.94o(2) because the taxpayer is entitled to claim the industrial-processing exemption on 100% of the property used for industrial-processing activity, although application of the apportionment formula of MCL 205.94o(2) would nonetheless compel the same result.

minimum, alteration of the voltage under MCL 205.94o(7)(a).[16] And "total use" of the electric system is the sum of the uses for such exempt activity plus the nonexempt "distribution" and "shipping" activities under MCL 205.94o(6)(b).

To be clear, we do not purport to recite a formula that applies to this case or any other case. Rather, MCL 205.94o(2) is quite clear that the "reasonable formula or method" must be "approved by the [Department of Treasury]." We simply hold that under MCL 205.94o(2), when property is simultaneously used for both exempt and nonexempt activities, defendant must give some recognition to both exempt and nonexempt activity in calculating "total use" under MCL 205.94o(2). That is, defendant cannot conclude under the statute that the nonexempt activity or activities wholly trump the exempt activity. Conversely, defendant cannot conclude under the statute that the exempt activity wholly trumps the nonexempt activity or activities.

We emphasize defendant's role in approving "a *reasonable* formula or method" to determine the "percentage of exempt use to total use" pursuant to MCL 205.94o(2) (emphasis added). The "percentage of exempt use to total use" will in many cases be a highly fact-specific inquiry that depends on a multitude of

[16] We do not express an opinion regarding whether elements of the electric system are also being used for other exempt "industrial processing" activities under MCL 205.94o(3). Accordingly, we reemphasize that we have not necessarily accepted plaintiff's argument that elements of the electric system are used for exempt "industrial processing" under MCL 205.94o(3)(d)—as opposed to under MCL 205.94o(7)(a)—with regard to which we *do* accept the argument that exempt "industrial processing" occurs. Ultimately, in approving an apportionment formula pursuant to MCL 205.94o(2), defendant shall assess all possible activities consistently with the principles set forth in this opinion.

considerations, and we do not intend to suggest that apportionment under MCL 205.94o(2) can be ascertained and applied without regard to the unique character and extent of the various uses of the property.[17]

Defendant has contended throughout these proceedings that plaintiff is not entitled to any industrial-processing exemption for the electric system. For the reasons explained herein, we disagree because the electric system is simultaneously used for exempt and nonexempt activities and MCL 205.94o(2) provides that plaintiff is entitled to the industrial-processing exemption on the basis of the "percentage of exempt use to total use" of the electric system. This percentage is to be "determined by a reasonable formula or method approved by the [Department of Treasury]." Because the electric system is used for at least some exempt activity relative to total activity, defendant's determination that plaintiff is not entitled to any industrial-processing exemption is inconsistent with MCL 205.94o(2). Therefore, we remand to the Court of Claims for defendant to approve a "reasonable formula or method" for determining the "percentage of exempt use to total use" consistent with the principles set forth in this opinion and subject to the initial review of the Court of Claims.[18]

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[17] Because MCL 205.94o(2) sets forth the applicable apportionment formula, we conclude that Mich Admin Code, R 205.90(8) is not controlling to the extent that it conflicts with MCL 205.94o(2).

[18] We recognize that neither party has yet sought to identify the "percentage of exempt use to total use" consistently with the principles set forth in this opinion. Instead, plaintiff has consistently asserted that it is entitled to a 100% exemption for the electric system, while defendant has consistently asserted that plaintiff is entitled to no exemption. We find it necessary to remand to the Court of Claims for further proceedings because, in our judgment, defendant has not yet satisfied its statutory obligation to approve a "reasonable formula or method."

IV. RESPONSE TO DISSENT

According to the dissent, "[t]he purpose of what DTE claims as industrial processing is . . . simply a means of distributing its product—electric power—most efficiently, not a means of producing a different product." *Post* at 61. We respectfully disagree. The electricity is initially generated at about 15,000 to 25,000 volts, so the voltage must necessarily be altered before a useable product has been made available. Therefore, even assuming for the sake of argument that the "purpose," as opposed to the physical reality, of an activity is determinative with regard to whether a taxpayer is entitled to the industrial-processing exemption, see MCL 205.94o(2), altering the voltage of electricity to render it usable by customers fully serves an industrial-processing purpose.

The dissent concludes that altering the voltage does not constitute "industrial processing" activity under MCL 205.94o(7)(a) because "[t]he fundamental nature of electricity—the flow of electrons—is not fundamentally altered after leaving the production facility." *Post* at 62. We disagree because "industrial processing" activity under MCL 205.94o(7)(a) is not limited to those situations in which the "fundamental nature" of the tangible personal property at issue—here, electricity—is "fundamentally altered." Rather, "industrial processing" activity under MCL 205.94o(7)(a) is defined more broadly to encompass actions that result in "changing the form, composition, quality, combination, or character" of the property. In our view, such changes unquestionably take place in the instant circumstances.

We also believe that the dissent errs by failing to give meaning to the *entire* definition of "industrial processing," in particular the language providing that

"[i]ndustrial processing . . . ends when finished goods *first come to rest in finished goods inventory storage*." MCL 205.94o(7)(a) (emphasis added). Even if the dissent is correct that electricity constitutes a "finished good" at the moment it leaves the generation plant—notwithstanding that it is altogether unusable by any actual consumer until final delivery—there is no point at which electricity "first come[s] to rest in finished goods inventory storage." By concluding that "industrial processing" activity under MCL 205.94o(7)(a) ends when electricity leaves the generation plant, the dissent reads the language "first come[s] to rest in finished goods inventory storage" out of the statute entirely, contrary to all traditional rules of statutory interpretation. See *Hannay v Dep't of Transp*, 497 Mich 45, 57; 860 NW2d 67 (2014) ("[C]ourts 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.") (citation and quotation marks omitted).[19]

Furthermore, we also disagree with the dissent because it fails to take into account that tangible personal property can be *simultaneously* used for exempt "industrial processing" activity under MCL 205.94o(7)(a) and MCL 205.94o(3) and nonexempt "distribution" and

[19] Although not entirely clear, the dissent appears to suggest that exempt "industrial processing" activity generally occurs only within a factory, and, therefore, "industrial processing" activity outside a factory is generally nonexempt activity. To the extent this is the dissent's view, we respectfully disagree. The language "first come[s] to rest in finished goods inventory storage" clearly contemplates that exempt "industrial processing" activity may occur within or without the factory. Moreover, we are not the first court to conclude that industrial processing and delivery are not mutually exclusive. See, e.g., *Mich Allied Dairy Ass'n*, 302 Mich at 649-650 (holding the fact that milk bottles and cans were used for delivery to the consumer did not render them nonexempt given that the bottles and cans were also used for industrial processing).

"shipping" activities under MCL 205.94o(6)(b). There is no language in the industrial-processing statute that provides that the use of tangible personal property for one or more nonexempt activities forecloses the simultaneous use of that same property for exempt "industrial processing" activity. Accordingly, the activities enumerated in MCL 205.94o(6)(b) are not "specific modifier[s]" to the "general definition" of industrial processing set forth in MCL 205.94o(7)(a), as defendant suggests. Rather, MCL 205.94o(6) sets forth those activities that do *not* constitute "industrial processing," and MCL 205.94o(7)(a) and MCL 205.94o(3) set forth the activity that *does* constitute "industrial processing."

V. CONCLUSION

The industrial-processing exemption provides that it is applicable to "the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail . . . . Industrial processing . . . ends when finished goods first come to rest in finished goods inventory storage." MCL 205.94o(7)(a). Altering the voltage "condition[s]" the electricity by changing its "quality" and "character" "for ultimate sale at retail." Furthermore, electricity is not a "finished good" until it is set at a usable voltage, and it does not "come to rest in finished goods inventory storage" at any point throughout the electric system. Industrial processing therefore occurs throughout the electric system. Because exempt and nonexempt activities are simultaneously occurring, it is necessary to determine the "percentage of exempt use to total use" by identifying and comparing the use of the property for exempt activity with the use of the property for all activities, both exempt and nonexempt. MCL 205.94o(2).

This percentage must be determined on the basis of a "reasonable formula or method approved by the [Department of Treasury]." *Id*. The record has not been sufficiently developed in this regard. Therefore, a remand to the trial court is necessary for defendant to approve a "reasonable formula or method" to determine the percentage of plaintiff's exempt use to total use of the electric system and, thus, the industrial-processing exemption to which plaintiff is entitled. The trial court must review this formula or method in light of the statute and enter an order consistent with the reasonable formula or method. Accordingly, we affirm the judgment of the Court of Appeals in part, reverse in part, and remand to the trial court for further proceedings consistent with this opinion.

YOUNG, C.J., and VIVIANO and BERNSTEIN, JJ., concurred with MARKMAN, J.

KELLY, J. (*dissenting*). I respectfully dissent from the majority's conclusion that plaintiff, Detroit Edison Company (DTE), engages in industrial processing after electric power leaves its plants. While DTE engages in industrial processing when, at the plant, it takes in raw materials and transforms those raw materials into electric power,[1] industrial processing ends once the electric power leaves the plant. Electric power generated at the power plant is distributed through the electric grid. While its voltage is adjusted as it travels through the electric grid, the "thing" produced—electric power—is not. Like ordinary industrial goods

[1] Electric power generated at a plant is measured in wattage. See 2 *Shorter Oxford English Dictionary* (6th ed) (defining "wattage" as "an amount of electrical power"). That the primary function of plants is to generate power is reflected in the commonly used term "power plant."

that are packaged for efficiency, DTE transmits the same electric power on high voltage wires to reach customers.

As a result, I would hold that because the electric power does not change after it leaves DTE's production facility, it is a finished good at that time. Because DTE's shipping and distribution of electricity does not constitute industrial processing, it is not entitled to the industrial-processing exemption for equipment located outside its production facilities. For these reasons I would not address the issue of apportionment, as it is not necessary in this case. Instead, I would reverse the Court of Appeals, vacate the judgment of the Court of Claims, and remand this case to the Court of Claims for further proceedings.

I. LEGAL ANALYSIS AND APPLICATION

The Michigan Use Tax Act, MCL 205.91 *et seq*., imposes a tax on every person "for the privilege of using, storing, or consuming tangible personal property in this state at a rate equal to 6% of the price of the property."[2] MCL 205.94o(1)(a) provides the general rule that the use tax "does not apply to property sold to" "[a]n industrial processor for use or consumption in industrial processing."

MCL 205.94o both defines "industrial processing" and provides specific examples of what activities are included and excluded from that definition. Subsection (7)(a) defines "industrial processing" as

> the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product

[2] MCL 205.93(1).

> to be ultimately sold at retail or affixed to and made a structural part of real estate located in another state. Industrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage.

Subsection (6)(b) specifies, in relevant part, that industrial processing does *not* include "[s]ales, distribution, warehousing, shipping, or advertising activities." Subsection (3)(d) in turn provides that industrial processing includes, among other activities, "[i]nspection, quality control, or testing to determine whether particular units of materials or processes conform to specified parameters at any time before materials or products first come to rest in finished goods inventory storage." This Court has clarified that "to determine whether the industrial processing exemption applies [in a particular case], it is necessary to consider the activity in which the equipment is engaged and not the character of the equipment-owner's business."[3]

Producing and transmitting electricity requires an integrated, interrelated, and interconnected system that includes generation plants, substations, transmission lines, distribution systems, transformers, and meters spread over a large geographic area, known as the electric system. Typically, electricity is first produced by converting raw materials such as coal, oil, or natural gas into heat. That heat then boils water to form steam, which turns a turbine shaft connected to a generator.[4] "[A] generator is a magnet spinning inside

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[3] *Elias Bros Restaurants, Inc v Treasury Dep't*, 452 Mich 144, 157; 549 NW2d 837 (1996).

[4] Barnett & Bjornsgaard, *Electric Power Generation: A Nontechnical Guide* (Tulsa: PennWell Publishing Co, 2000), p 112.

a coil of wire," inducing an electric current in the coil.[5] Defendant, the Department of Treasury (the Department), concedes, and I agree, that this process constitutes industrial processing.

The Department, however, maintains that DTE's subsequent activity—transmitting and distributing electricity—is not "industrial processing" under the plain language of MCL 205.94o. Rather, industrial processing ends when transmitting and distributing begin, whether the consumer good is electricity or any other product. In contrast, DTE claims that the exemption applies to property used up to the point when finished goods arrive at inventory storage, which, it argues, occurs when the electricity enters into a customer's meter. To determine which interpretation controls, this Court must determine the Legislature's intended scope of the industrial-processing exemption as applied to the production of electricity.

A. DEFINITION OF INDUSTRIAL PROCESSING

The Legislature presumably had the basics of industrial processing in mind when crafting the industrial-processing exemption. Raw materials are brought into a production facility and then used to create a good by " 'a process of manufacturing, development, [and] preparation for the market.' "[6] The newly produced good must then be transported to a retailer or customer. Typically, a definite and distinct point in time delineates when the manufacturer ceases production of a good and begins distribution. Once distribution

[5] *Id*. at 101.

[6] *Bay Bottled Gas Co v Dep't of Revenue*, 344 Mich 326, 330; 74 NW2d 37 (1955), quoting *Moore v Farmers Mut Mfg & Ginning Co*, 51 Ariz 378, 382; 77 P2d 209 (1938).

begins, the manufacturer cannot claim the industrial-processing exemption for property that it uses in that activity.

While electric power does not seem to fit neatly within this description of manufacturing, DTE creates electricity using raw materials, and this newly created electricity leaves the power plant destined for end users. While electricity cannot be packed into a shipping container and delivered on a truck or train, as many consumer goods can be, the General Sales Tax Act[7] nevertheless recognizes electricity as tangible personal property.[8]

DTE argues that industrial processing is clearly defined in the statute and is not complete until its good, electricity, is in its final form, usable by and ready for sale to the customer.[9] It claims that equipment located outside the generation plant converts, conditions, and changes the character of the electricity and that this process is necessary before the electricity is ready for customers. DTE claims that the character of electricity is constantly changing during this phase.

Contrary to DTE's claims, power that has left DTE's plants does not change in "form, composition, quality, combination, or character . . . ."[10] The Court of Appeals erred when it overemphasized DTE's claim that the electricity is not in its final, safe form until it reaches customers. DTE creates a consumable good, electricity, and as with any good, DTE requires a means to

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[7] MCL 205.51 *et seq*.

[8] MCL 205.51a(q) (" 'Tangible personal property' means personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses and includes electricity, water, gas, steam, and prewritten computer software.").

[9] See MCL 205.94o(7).

[10] MCL 205.94o(7)(a).

distribute and transport this good to its customers. While the electricity's voltage happens to be reduced during the distribution process for purposes of efficiency, the fundamental nature of the electric power never changes. On this point, the expert testimony proffered by the Department is instructive: "Through the use of transformers stepping up and stepping down the voltage, the composition and character of the electricity is not changed."[11] While transformers assist in distributing, transmitting, and delivering electricity to DTE's customers, they do not alter the nature, composition, or character of electric power initially generated at a power plant. Producing electricity at a high voltage rate allows DTE to supply its product more efficiently across further distances, thus allowing it to create a larger customer base. The purpose of what DTE claims as industrial processing is, therefore, simply a means of distributing its product—electric power—most efficiently, not a means of producing a different product.[12] Indeed, as "[t]angible personal

[11] See also *Detroit Edison Co v Dep't of Treasury*, 303 Mich App 612, 616; 844 NW2d 198 (2014). The majority cites caselaw holding that milk pasteurization qualifies as industrial processing for purposes of the use-tax exemption and suggests that the same principle applies to electric power. See *Mich Allied Dairy Ass'n v State Bd of Tax Admin*, 302 Mich 643, 648-650; 5 NW2d 516 (1942). Unlike milk pasteurization before distribution, however, altering the voltage of electricity during the distribution process does not alter its composition or character. Rather, DTE made a business decision to step down the voltage of electricity in distributing it to customers, while Michigan law requires milk producers to pasteurize milk, a complex process which by its very nature is intended to change the composition and character of the product before it is offered for sale. See MCL 288.538.

[12] Other producers of electricity confirm that electricity is substantially unchanged after it leaves the production facility. See Kentucky Association of Electric Cooperatives, Inc., *How is Electricity Generated & Distributed?* <http://www.kaec.org/energy/article1.htm> (accessed June 19, 2015) [http://perma.cc/J9X3-S5UC] ("Once the turbines gen-

property used or consumed for the *preservation or maintenance* of a finished good," the equipment DTE uses to preserve and maintain the flow of energy is explicitly excluded from the definition of industrial processing.[13]

Electric power is a good capable of sale, but it must be transmitted to customers like any other good. The fundamental nature of electricity—the flow of electrons—is not fundamentally altered after leaving the production facility.

B. SPECIFIC EXCLUSIONS FROM "INDUSTRIAL PROCESSING"

This conclusion finds further support in MCL 205.94o(6)(b), under which the Legislature specifically excluded certain activities, including "[s]ales, distribution, warehousing, shipping, or advertising activities," from the industrial-processing exemption. Additionally, as noted earlier in this opinion, MCL 205.94o(5)(i) excludes "[t]angible personal property used or consumed for the preservation or maintenance of a finished good."

The Department maintains that industrial processing does not include the activity of conveying a product to a customer through shipping or distribution.[14] In-

erate the electricity, its voltage is significantly increased" before it is "routed onto a network of high-voltage transmission lines capable of efficiently transporting electricity over long distances."); General Electric, *Electricity 101 — Learn the Basics of Production* <https://powergen.gepower.com/plan-build/tools-resources/power-generation-basics/electricity-101.html> (accessed June 19, 2015) [http:// perma.cc/95UD-MQD3] ("Thick wires carry the electric current from the generator to a transformer, which increases the voltage of the electric current to 500,000 volts or more, before electricity can be sent to the power grid.").

[13] MCL 205.94o(5)(i) (emphasis added).

[14] See MCL 205.94o(6)(b).

deed, even if an activity would otherwise qualify as "industrial processing" under the statutory definition of that term, when an enumerated exclusion applies, the activity is not considered industrial processing for purposes of the exemption.[15] This is consistent with the rule of statutory construction that, when a general statutory definition conflicts with a specific modifier of that definition, the specific modifier trumps the general definition.[16]

Because distribution and shipping are not defined in the statute, each term must be given its plain meaning.[17] "Shipping" is defined as "[t]he act or business of transporting goods."[18] "Distribution" is a derivation of the verb "distribute," which means "[t]o divide and dispense in portions; parcel out."[19] Therefore, relevant to this case, shipping and distribution refer to the transmission of goods from an industrial processor to the consumer.

Because both distribution and shipping are excluded from the definition of industrial processing, activity occurring after the production of a good is not part of the industrial processing of that good. I agree with the Department that electricity is a vendible good when it leaves the production facility because it is capable of sale at that point. Therefore, the equipment used by DTE to convey that vendible good from its plants to its customers does not qualify for the industrial-processing

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[15] *Granger Land Dev Co v Dep't of Treasury*, 286 Mich App 601, 608-610; 780 NW2d 611 (2009).

[16] *Evanston YMCA Camp v State Tax Comm*, 369 Mich 1, 8; 118 NW2d 818 (1962).

[17] *Haynes v Neshewat*, 477 Mich 29, 36; 729 NW2d 488 (2007).

[18] *The American Heritage Dictionary of the English Language, New College Edition* (1981).

[19] *Id*.

exemption. Once the electricity leaves its plants, DTE delivers its product. The power lines and equipment outside its plants are simply the means by which DTE delivers the electric power that has been generated at its plants.

C. SPECIFIC INCLUSIONS IN "INDUSTRIAL PROCESSING"

Nevertheless, DTE argues that it is engaged in activities that are specifically included in the statutory definition of industrial processing: inspection, quality control, and testing. While the Court of Appeals and the majority in this Court have accepted this argument, I do not.

MCL 205.94o(3)(d) specifically includes within the industrial-processing exemption equipment used for "[i]nspection, quality control, or testing to determine whether particular units of materials or products or processes conform to specified parameters at any time before materials or products first come to rest in finished goods inventory storage." Neither DTE nor the Court of Appeals has accounted for the fact that the electricity is a vendible good *as soon as it leaves* the production facility. To be included within the definition of "industrial processing" for purposes of the exemption, MCL 205.94o(3)(d) requires that the "[i]nspection, quality control, or testing" occur "*before materials or products first come to rest in finished goods inventory storage.*"[20] The presence or absence of a physical storage location is not dispositive of whether an activity meets the requirement of MCL 205.94o(3)(d).

The majority sidesteps the fact that electricity *never* comes to "rest." Indeed, DTE's own expert stated that

[20] Emphasis added.

the inspection, quality control, and testing occur after the electricity leaves the plant simply because it promotes the efficient distribution of DTE's product: "It is not practical under the laws of physics . . . for generation plants to produce electricity at the 120/240 volt level as it would require a wire that is 46 [times] greater in circumference than what is available." The changes to the voltage, therefore, make it efficient to distribute electricity; they do not affect the *production* of electricity or the quantum of power generated that leaves the power plant. It is that amount that is quantified to determine the power plant's output and must be considered the fixed goods inventory storage as contemplated in MCL 205.94o.

The majority denies that electricity comes to rest in a finished goods inventory storage at any point. I disagree. The phrase "finished goods inventory storage" must be interpreted in the context of how electricity is actually produced and distributed. While electric power *never* "comes to rest" at all, the statute does not require goods to be stored in a physical or fixed location before being considered ready for distribution. Rather, the goods must reach a point at which shipping and distribution are appropriate. Consider, hypothetically, a widget that is produced on a conveyor belt that empties into a waiting delivery truck, which then leaves the facility the moment the widget is placed in the truck. Under this circumstance, industrial processing ceases when the widget is placed on the truck, even though it never comes to rest in a physical storage location before distribution. It is logical to reach the same conclusion here, given that the Legislature defined "tangible personal property" to include electricity. It is appropriate to judge DTE's activities by demarcating the line separating the production of electricity

from *distribution* to consumers.[21]

Because DTE only engages in shipping and distributing electricity once the electricity leaves its production facilities, it does not use any property in industrial processing outside its production facilities under the industrial-processing exemption. Therefore, all equipment used in transmitting and distributing electric power outside its generating plants is subject to the use tax.[22]

II. CONCLUSION

The majority characterizes changes in the voltage of electricity as industrial processing. I disagree. Changes in voltage merely affect the form in which electric power is distributed. DTE only transmits electricity at high voltages to provide for its efficient distribution. DTE is free to choose the most appropriate manner in which to send its product to customers. But that choice does not qualify it for the industrial-processing exemption with regard to the property used in carrying out that choice.

As the Department concedes, DTE engages in industrial processing inside its power plants when it uses industrial machinery to produce electricity. It is therefore entitled to the industrial-processing exemption from the use tax on property used during that process. However, once the electricity leaves DTE's power

[21] While I conclude that apportionment is not necessary, because no industrial processing occurs after electricity leaves DTE's production facilities, nothing in this opinion would preclude apportionment if necessary.

[22] Because I conclude that none of DTE's property outside its production facilities is exempt for purposes of the industrial-processing exemption, I do not consider how to apportion the exemption between exempt uses of the property and nonexempt uses under MCL 205.94o(2).

plants, the electricity is, and must be, consumed by the end users to whom it is distributed. Personal property used during this distribution process is therefore beyond the scope of the industrial-processing exemption and is subject to the use tax. I would thus hold that DTE may not claim any use-tax exemption for personal property used to distribute and transport electricity from its plants to customers. Therefore, I respectfully dissent and instead would reverse the Court of Appeals' judgment that DTE is entitled to an industrial-processing exemption for equipment located outside its production facilities, vacate the judgment of the Court of Claims, and remand this case to the Court of Claims for further proceedings.

ZAHRA and MCCORMACK, JJ., concurred with KELLY, J.

TYRA v ORGAN PROCUREMENT AGENCY OF MICHIGAN

FURR v McLEOD

Docket Nos. 148079, 148087, and 149344. Argued on application for leave to appeal May 5, 2015. Decided July 22, 2015.

Lisa Tyra filed an action against Organ Procurement Agency of Michigan (Organ Procurement); Steven Cohn, M.D., and William Beaumont Hospital (the Beaumont defendants); Dillip Samara Pungavan, M.D.; and John Doe in the Oakland Circuit Court, alleging medical malpractice after she suffered complications following a kidney transplant. Tyra sent a notice of intent to sue (NOI) to defendants under MCL 600.2912b and filed her complaint 112 days later, rather than waiting the 182 days required by MCL 600.2912b(1). Pungavan and Doe were dismissed from the action. Organ Procurement and the Beaumont defendants moved for summary disposition, claiming that the action should be dismissed with prejudice because Tyra had prematurely filed her complaint and the limitations period had expired so it could not be refiled. Tyra argued that defendants had waived the notice-period affirmative defense because their responsive pleadings had failed to put her on notice that she had not complied with the requirement. The court, Nanci J. Grant, J., granted summary disposition in favor of Organ Procurement and the Beaumont defendants, concluding that their failure to provide detailed facts concerning the affirmative defense did not waive the notice-period defense and the prematurely filed complaint failed to toll the running of the limitations period, which had since expired so that Tyra could not cure the notice-period error by refiling the complaint. Tyra appealed. The Court of Appeals, RONAYNE KRAUSE and STEPHENS, JJ. (WILDER, P.J., dissenting), reversed, holding that the trial court had discretion under MCL 600.2301 to allow Tyra to amend the filing date of her complaint. 302 Mich App 208 (2013). Organ Procurement (Docket No. 148079) and the Beaumont defendants (Docket No. 148087) both sought leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant the applications or take other peremptory action. 497 Mich 909, 910 (2014).

Susan and William Furr brought a medical malpractice action in the Kalamazoo Circuit Court against Michael McLeod, M.D., Tara B. Mancl, M.D., and others, alleging that Susan had suffered nerve damage during surgery. The Furrs served the healthcare providers with an NOI, but filed their complaint before the end of the applicable notice period set forth in MCL 600.2912b. The *Furr* defendants moved for summary disposition, contending that the running of the statutory limitations period had not been tolled by the filing of the premature complaint and the action was now barred. The Furrs contended that pursuant to *Zwiers v Growney*, 286 Mich App 38 (2009), the court could invoke MCL 600.2301 to ignore the premature filing, as long as doing so did not prejudice a substantial right of a party. The court, Alexander Lipsey, J., denied the motion for summary disposition. The *Furr* defendants sought leave to appeal. While the application was pending, the Supreme Court, in *Driver v Naini*, 490 Mich 239 (2011), clarified the role of *Burton v Reed City Hosp Corp*, 471 Mich 745 (2005), in medical malpractice disputes. In lieu of granting leave to appeal, the Court of Appeals remanded for the trial court to reconsider defendants' motion for summary disposition in light of the Supreme Court's decisions in *Burton* and *Driver*. On remand, the trial court concluded that both *Driver* and *Burton* were distinguishable and, on the basis of *Zwiers*, again denied defendants' motion for summary disposition. Defendants' application for leave to appeal was then granted by the Court of Appeals. The lead opinion by Judge WHITBECK, concluded that the Supreme Court's opinion in *Driver* had overruled the Court of Appeals' interpretation of the effects of *Bush v Shabahang*, 484 Mich 156 (2009), in *Zwiers* and that *Tyra*, 302 Mich App 208, was incorrectly decided to the extent that it concluded that *Zwiers* continued to be valid law. Judge WHITBECK stated that *Zwiers* was applicable only because MCR 7.215(J) required the Court to follow *Tyra* and affirm the denial of summary disposition. Noting the conflict, he requested that a special panel be convened to resolve the issue. Judge OWENS, concurring, agreed that the case was controlled by *Tyra* and that the trial court's decision must be affirmed. He stated, however, that because *Tyra* was correctly decided, a conflict panel should not be convened. Judge M. J. KELLY, concurring, agreed that *Tyra* was controlling and that a conflict panel should be convened, although he disagreed with the analysis in the lead opinion. The Court of Appeals then ordered that a special panel be convened to resolve the conflict with *Tyra* and that the opinions in *Furr* be vacated. 303 Mich App 801 (2013). The conflict panel, MURPHY, C.J., and MARKEY, BORRELLO, and

BECKERING, JJ. (O'CONNELL, TALBOT, and METER, JJ., dissenting), affirmed the decision of the trial court, concluding that there was no clear language in *Driver* overruling *Zwiers*. *Furr v McLeod*, 304 Mich App 677 (2014). The *Furr* defendants sought leave to appeal (Docket No. 149344). The Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 497 Mich 910 (2014).

In an opinion by Justice MARKMAN, joined by Chief Justice YOUNG and Justices KELLY and ZAHRA, the Supreme Court *held*:

Driver and *Zwiers* are clearly inconsistent, and *Driver* controls over *Zwiers*. Plaintiffs' filing of their complaints before the expiration of the notice period did not commence their actions or toll the running of the limitations period. And MCL 600.2301 cannot save plaintiffs' actions because MCL 600.2301 only applies to pending actions or proceedings and there never were pending actions in these cases because plaintiffs' complaints, filed before the notice period expired, could not commence an action. Even assuming that there were pending proceedings at the time plaintiffs filed their NOIs, the proceedings were no longer pending when the trial courts ruled on defendants' motions for summary disposition because the limitations periods had expired by that time and a proceeding cannot be pending if it is time-barred.

1. MCL 600.2912b(1) requires that the plaintiff in a medical malpractice action give the defendant written notice of the plaintiff's intent to sue before commencing the action. After providing this NOI, the plaintiff must wait for the applicable notice period, usually 182 days, to pass before filing the action. A claimant normally has two years from the time his or her claim accrues to file suit, but, under MCL 600.5856(c), the running of the limitations period is tolled during the notice period. Under MCL 600.5856(a), the filing of a medical malpractice complaint with the required affidavit of merit after the notice period has elapsed also tolls the running of the limitations period. The Supreme Court held in *Burton* that a complaint filed before the expiration of the notice period does not toll the running of the limitations period. In *Bush*, the Supreme Court held that a timely NOI will toll the running of the limitations period even if it contains content defects and that MCL 600.2301 may be used to cure content defects in an NOI if the substantial rights of the parties are not affected and the cure is in the furtherance of justice. In *Zwiers*, the Court of Appeals held, relying on *Bush*, that the filing of a complaint one day before the notice period expired did not affect the defendants' substantial rights and that MCL 600.2301 could be used to

reinstate the plaintiff's case. In *Driver*, the Supreme Court held that a plaintiff is not entitled to amend an NOI to add nonparty defendants so that the amended NOI relates back to the original filing for purposes of tolling the statute of limitations. *Driver* emphasized that under *Bush* an NOI must be timely filed, that *Bush* only held that MCL 600.2301 can be applied when an NOI fails to meet all the content requirements under MCL 600.2912b(4), and that MCL 600.2301 only applies to pending actions or proceedings. While *Zwiers* held that *Bush* altered the Court's holding in *Burton*, *Driver* held that nothing in *Bush* altered the Court's holding in *Burton*. *Zwiers* was thus overruled by *Driver*. Therefore, in these cases, plaintiffs' filing of their complaints before the expiration of the notice periods did not commence their actions or toll the running of the limitations periods. And MCL 600.2301 cannot save plaintiffs' actions because MCL 600.2301 only applies to pending actions or proceedings and there never were pending actions in these cases because plaintiffs' complaints, filed before the notice periods expired, could not commence an action. Even if the filing of the NOIs commenced "proceedings" for purposes of MCL 600.2301, the proceedings were no longer pending when the trial courts ruled on defendants' motions for summary disposition because the limitations periods had expired by that time and a proceeding cannot be pending if it is time-barred.

2. The Court of Appeals held that although the *Tyra* defendants did not adequately state the grounds for their notice-period defense in their first responsive pleadings, that failure was irrelevant under *Auslander v Chernick*, 480 Mich 910 (2007), which adopted the reasoning of Judge JANSEN's dissent in *Auslander v Chernick*, unpublished opinion per curiam of the Court of Appeals, issued May 1, 2007 (Docket No. 274079). Tyra failed to appeal this portion of the Court's opinion and did not brief it in the Supreme Court. Accordingly, the issue was abandoned. Moreover, appellees who have not cross-appealed may not obtain a decision that is more favorable to them than was rendered by the Court of Appeals, and under the holding of the Court of Appeals, the *Tyra* defendants might still have prevailed on their notice-period affirmative defense on remand, but a decision in the Supreme Court holding that the defense was waived would have meant that the *Tyra* defendants could not prevail on their notice-period affirmative defense. Therefore, it was appropriate for the Court to use its discretion and decline to address the sufficiency of the *Tyra* defendants' affirmative defenses.

Court of Appeals judgments reversed in both *Tyra* and *Furr*; trial court order granting defendants' motion for summary disposition reinstated in *Tyra*; *Furr* remanded to the trial court for entry of an order granting defendants' motion for summary disposition.

Justice VIVIANO, joined by Justices MCCORMACK and BERNSTEIN, concurring in part and dissenting in part, joined the majority opinion in full as it related to *Furr*, and agreed that the trial court correctly granted summary disposition in favor of Organ Procurement, but with regard to the Beaumont defendants, Justice VIVIANO would have affirmed the Court of Appeals on alternative grounds and remanded for further proceedings. With respect to the majority's abandonment holding, Justice VIVIANO stated that Tyra, having obtained a favorable ruling in the Court of Appeals, was not required to file an application for leave to appeal in order to press an alternative ground for affirmance. Further, any decision holding that the Beaumont defendants waived the notice-period defense would not result in an outcome more favorable to Tyra than that rendered by the Court of Appeals given that both holdings would result in a remand to the trial court for further proceedings. With respect to the merits of Tyra's argument, under MCR 2.111(F)(3), a party must state the facts constituting an affirmative defense. An affirmative defense is adequately stated if it reasonably apprises the plaintiff of the nature of the defense such that the plaintiff can take a responsive position. When read in context, Organ Procurement adequately stated its notice-period defense when it alleged that Tyra failed to comply with the notice provisions of MCL 600.2912b and that the action was therefore barred. In contrast, the Beaumont defendants broadly asserted the benefits of Michigan's tort reform acts, which amended or added 90 statutory sections. Such global allegations do not provide reasonable notice to allow a plaintiff to take a responsive position. Because the affirmative defense alleged by the Beaumont defendants was inadequate under MCR 2.111(F)(3), it should have been deemed waived. *Auslander*—which stands for the broad proposition that if a complaint is ineffective at commencing the action, the defendant has no obligation to file affirmative defenses—is analytically flawed, unsupported by our caselaw and court rules, and should be overruled. Defendants should be held to the same standard as plaintiffs: compliance with their procedural obligations under the court rules.

1. ACTIONS — MEDICAL MALPRACTICE — STATUTES OF LIMITATIONS — NOTICE OF INTENT TO FILE CLAIM — FILING THE COMPLAINT BEFORE THE EXPIRATION OF THE NOTICE PERIOD — FAILURE TO COMMENCE THE ACTION.

MCL 600.2912b(1) requires that the plaintiff in a medical malpractice action give the defendant written notice of the plaintiff's intent to sue (NOI) before commencing the action; after providing this NOI, the plaintiff must wait for the applicable notice period, usually 182 days, to pass before filing the action; a medical malpractice claimant normally has two years from the time his or her claim accrues to file suit, but, under MCL 600.5856(c), the running of the limitations period is tolled during the notice period, and under MCL 600.5856(a), the filing of a medical malpractice complaint with the required affidavit of merit after the notice period has elapsed also tolls the running of the limitations period; the filing of a complaint before the expiration of the notice period does not commence the action or toll the running of the limitations period.

2. PLEADINGS — AMENDMENTS — MEDICAL MALPRACTICE ACTIONS — DISREGARDING ERRORS AND DEFECTS — NOTICE OF INTENT TO FILE CLAIM — FILING THE COMPLAINT BEFORE THE EXPIRATION OF THE NOTICE PERIOD — EXPIRATION OF THE PERIOD OF LIMITATIONS.

Under MCL 600.2301, the court in which any action or proceeding is pending has power to amend any process, pleading or proceeding in the action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment is rendered therein, and the court at every stage of the action or proceeding shall disregard any error or defect in the proceedings that does not affect the substantial rights of the parties; but MCL 600.2301 cannot be used to amend a complaint that was not timely filed because the limitations period expired without the commencement of a medical malpractice action when the plaintiff filed the complaint before the expiration of the MCL 600.2912b notice period.

Mark Granzotto, PC (by *Mark Granzotto*), and *McKeen & Associates, PC* (by *Richard T. Counsman*), for Susan and William Furr.

Lipson, Neilson, Cole, Seltzer, & Garin PC (by *C. Thomas Ludden* and *Karen A. Smyth*) for Organ Procurement Agency of Michigan.

O'Connor, DeGrazia, Tamm, & O'Connor, PC (by *Julie McCann O'Connor* and *Richard M. O'Connor*), for Steven Cohn, M.D., and William Beaumont Hospital.

Smith Haughey Rice & Roegge (by *Stephanie C. Hoffer* and *Paul M. Oleniczak*) for Michael McLeod, M.D., Tara B. Mancl, M.D., Michigan State University Kalamazoo Center for Medical Studies, Inc., and Borgess Medical Center.

Amicus Curiae:

Willingham & Coté, PC (by *Kimberlee A. Hillock*, *David Nelson*, and *Michael W. Stephenson*), for Michigan Defense Trial Counsel.

MARKMAN, J. At issue here is whether *Zwiers v Growney*, 286 Mich App 38; 778 NW2d 81 (2009), was overruled by this Court in *Driver v Naini*, 490 Mich 239; 802 NW2d 311 (2011). The Court of Appeals held that *Zwiers* was not overruled in *Driver*. Because we conclude to the contrary, we reverse the judgment of the Court of Appeals in part in both *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208; 850 NW2d 667 (2013), and *Furr v McLeod*, 304 Mich App 677; 848 NW2d 465 (2014). In *Tyra*, we reinstate the trial court's order granting defendants' motion for summary disposition, and in *Furr*, we remand to the trial court for entry of an order granting defendants' motion for summary disposition.

I. FACTS AND HISTORY

A. *TYRA*

On June 9, 2007, plaintiff, Lisa Tyra, received a kidney transplant at defendant William Beaumont Hospital, with a kidney made available by defendant

Organ Procurement Agency of Michigan (Organ Procurement). Plaintiff allegedly suffered complications because the kidney did not constitute a proper match, and she now asserts that defendants should have identified this fact before the surgery.[1] On April 23, 2009, plaintiff sent defendants a timely notice of intent (NOI) to file a medical malpractice action. On August 13, 2009, 112 days after sending the NOI, plaintiff filed her complaint against defendants. When plaintiff filed her complaint, the 182-day notice period set forth in MCL 600.2912b(1) had not yet expired, and on January 13, 2010, Organ Procurement moved for summary disposition on the basis that plaintiff's complaint was filed prematurely, i.e., before the expiration of the 182-day notice period, and the period of limitations had since expired.[2] The hospital and Dr. Steven Cohn, the transplant surgeon, joined the motion on March 19, 2010, and on May 20, 2010, the trial court granted the motion. The trial court reasoned that, under *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005), the prematurely filed complaint failed to toll the running of the period of limitations and plaintiff could not cure the error by refiling the complaint.

On August 15, 2013, a divided Court of Appeals reversed the grant of summary disposition. *Tyra*, 302 Mich App 208. The Court of Appeals majority concluded that *Driver* had not overruled *Zwiers* and "on the basis of both *Zwiers* and the purpose behind MCL 600.2301,

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[1] Defendants Dillip Samara Pungavan (a nephrologist) and John Doe (believed to be a transplant coordinator) were dismissed from the case. General references in this opinion to the "defendants" in Docket Nos. 148079 and 148087 are to Organ Procurement, Steven Cohn, and William Beaumont Hospital.

[2] Assuming that plaintiff's complaint did not toll the running of the limitations period, it is undisputed that the period expired on December 8, 2009.

the trial court erred by failing to at least consider the possibility of allowing plaintiff to amend her complaint . . . ." *Id*. at 226. The Court accordingly remanded to allow "the trial court [to] exercise its discretion by either granting or denying that amendment pursuant to MCL 600.2301 and *Zwiers*." *Id*. at 227. Judge WILDER dissented on the basis that "*Zwiers* was undermined by the Supreme Court's subsequent decision in *Driver* . . . ." *Id*. at 231 (WILDER, P.J., dissenting).

Defendants (in two separate applications) sought leave to appeal in this Court, arguing that the Court of Appeals erred by concluding that *Zwiers* remained valid after *Driver*. We directed that oral argument be heard on defendants' applications for leave to appeal and instructed the parties to address "whether *Zwiers v Growney*, 286 Mich App 38 (2009), was overruled by this Court's decision in *Driver v Naini*, 490 Mich 239 (2011), and whether the defendant's affirmative defenses were defective because they did not specifically state the grounds for the defense." *Tyra v Organ Procurement Agency of Mich*, 497 Mich 909, 909-910 (2014).

B. *FURR*

On April 4, 2008, plaintiff Susan Furr allegedly suffered a severed nerve during surgery at defendant Borgess Medical Center. On April 4, 2010, plaintiff and her husband William Furr[3] sent defendants a timely NOI to file a medical malpractice action.[4] On September 30, 2010, 179 days after sending the NOI, plaintiffs filed their complaint against defendants. When plain-

[3] Plaintiff William Furr sued derivatively for loss of consortium.

[4] The NOI was dated April 1, 2010, but plaintiffs acknowledge that it was not actually mailed until April 4, 2010.

tiffs filed their complaint, the 182-day notice period set forth in MCL 600.2912b(1), as in *Tyra*, had not yet expired.[5] On November 24, 2010, defendants moved for summary disposition on the basis that plaintiffs' complaint was filed prematurely, i.e., before expiration of the 182-day notice period, and that the statute of limitations, also as in *Tyra*, had since expired.[6] On January 31, 2011, and again on May 22, 2012, after the Court of Appeals remanded for reconsideration in light of *Driver*, the trial court denied defendants' motion, citing *Zwiers* for the proposition that MCL 600.2301 permits a trial court to ignore noncompliance with MCL 600.2912b(1) when a defendant's substantial rights are not prejudiced.

On October 24, 2013, a divided Court of Appeals panel affirmed the trial court. *Furr v McLeod*, 303 Mich App 801 (2013). In his lead opinion, Judge WHITBECK asserted that but for *Tyra*, he would have reversed the trial court and held that *Driver* overruled *Zwiers*. Judge WHITBECK therefore requested the convening of a conflict-resolution panel. Judge M. J. KELLY, concurring, disagreed with Judge WHITBECK's analysis, but agreed that a conflict panel should be convened. Judge OWENS wrote a separate opinion, concurring in the result, but noting his own conclusion that *Tyra* was decided correctly. A conflict-resolution panel was convened and, pursuant to MCR 7.215(J)(5), the Court's original judgment in *Furr* was vacated. *Furr*, 303 Mich App 801. In a 4-3 decision, the Court of Appeals conflict panel then affirmed the trial court. *Furr*, 304 Mich App 677. The Court majority was "not

[5] Even assuming that the NOI had been sent on April 1, 2010, it is undisputed that the complaint was filed at least one day prematurely.

[6] Assuming that plaintiff's complaint did not toll the running of the period of limitations, it is undisputed that the period of limitations expired in October 2010.

prepared to hold that *Driver* overruled *Zwiers* by implication." *Id*. at 706. The dissenting judges would have reversed the trial court on the basis that *Driver* did overrule *Zwiers*. *Id*. at 706-707 (O'CONNELL, J., dissenting); *id*. at 707 (METER, J., dissenting).

Defendants sought leave to appeal, arguing that the conflict panel erred by ruling that *Driver* did not overrule *Zwiers*. This Court directed that oral argument be heard on defendants' application and directed the parties to address "whether *Zwiers v Growney*, 286 Mich App 38 (2009), was overruled by this Court's decision in *Driver v Naini*, 490 Mich 239 (2011)." *Furr v McLeod*, 497 Mich 910 (2014). Oral arguments in *Tyra* and *Furr* were heard on May 5, 2015.

II. STANDARD OF REVIEW

This Court reviews de novo decisions on motions for summary disposition. *IBM v Treasury Dep't*, 496 Mich 642, 647; 852 NW2d 865 (2014). This Court also reviews de novo issues of statutory interpretation. *Id*.

III. ANALYSIS

A. BACKGROUND

MCL 600.2912b(1) requires that the plaintiff in a medical malpractice action give the defendant written notice of the plaintiff's intent to file a claim before commencing a medical malpractice action against the defendant. After providing the NOI, the plaintiff must wait for the applicable notice period, usually 182 days, to pass before the plaintiff can file the medical malpractice action.[7] MCL 600.2912b(1) provides:

[7] The pertinent period may be shortened to 154 or even 91 days under circumstances not relevant here. See MCL 600.2912b(3) and (8). It is

> Except as otherwise provided in this section, a person *shall not commence* an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced. [Emphasis added.]

"In a medical malpractice action, a claimant normally has two years from the time his claim accrues to commence a suit." *Driver*, 490 Mich at 249, citing MCL 600.5838a(2) and MCL 600.5805(1) and (6). However, under MCL 600.5856(c), the running of the two-year period of limitations is tolled during the notice period. In addition, under MCL 600.5856(a), the filing of a complaint with the required affidavit of merit after the notice period has elapsed *also* tolls the running of the period of limitations.[8] MCL 600.5856 provides, in pertinent part:

> The statutes of limitations or repose are tolled in any of the following circumstances:
>
> (a) At the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.

* * *

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undisputed that the plaintiffs in these two cases filed their complaints before the expiration of the pertinent notice periods.

[8] MCL 600.2912d(1) provides that the plaintiff in a medical malpractice action "shall file with the complaint an affidavit of merit . . . ." In *Scarsella v Pollak*, 461 Mich 547, 549-550; 607 NW2d 711 (2000), this Court held that "[u]se of the word 'shall' indicates that an affidavit accompanying the complaint is mandatory and imperative," and therefore "the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit" and "because the complaint without an affidavit was insufficient to commence plaintiff's malpractice action, it did not toll the period of limitation." (Quotation marks and citation omitted.)

> (c) At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

Finally, MCL 600.2301, a statute of general applicability, provides:

> The court in which any action or proceeding is *pending*, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the *furtherance of justice*, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the *substantial rights* of the parties. [Emphasis added.]

In *Burton*, 471 Mich at 745, this Court held that "[a] complaint filed before the expiration of the notice period violates MCL 600.2912b and is ineffective to toll the limitations period," *id*. at 747, because "the failure to comply with the statutory requirement renders the complaint insufficient to commence the action," *id*. at 754, because MCL 600.2912b "unequivocally provides that a person 'shall not' commence an action alleging medical malpractice against a health professional or health facility until the expiration of the statutory notice period," *id*. at 752. *Burton* further held that "dismissal is an appropriate remedy for noncompliance with the notice provisions of MCL 600.2912b and that when a case is dismissed, the plaintiff must still comply with the applicable statute of limitations." *Id*. at 753. Therefore, if the statute of limitations has already expired, the case must be dismissed with prejudice.

In *Boodt v Borgess Med Ctr*, 481 Mich 558, 562-564; 751 NW2d 44 (2008), this Court held that "a plaintiff cannot commence an action before he or she files a notice of intent that contains all the information required under [MCL 600.2912b(4)]," and accordingly, "the filing of the complaint and the affidavit of merit that plaintiff was not yet authorized to file [because the NOI did not contain all the required information] could not possibly have tolled the period of limitations." *Boodt* further held that MCL 600.2301, which allows the court "to amend any process, pleading or proceeding" and to "disregard any error or defect in the proceedings," only applies to "pending" actions and "because the notice of intent was deficient, no action [was] pending . . . ." *Id*. at 563 n 4.

In *Bush v Shabahang*, 484 Mich 156, 161; 772 NW2d 272 (2009), this Court held that, under the 2004 amendments of MCL 600.5856, "if an NOI is timely, the statute of limitations is tolled despite defects contained therein." *Bush* further held that MCL 600.2301 "may be employed to cure defects in an NOI." *Id*. at 177.[9] Specifically, MCL 600.2301 "allows for amendment and disregard of 'any error or defect' where the substantial rights of the parties are not affected and the cure is in the furtherance of justice." *Id*. at 161. "A cure is in the furtherance of justice when a party makes a good-faith attempt to comply with the content requirements of [MCL 600.2912b]." *Id*. at 185.

In *Zwiers*, 286 Mich App at 52, the Court of Appeals, relying on *Bush* and MCL 600.2301, held that "[u]nder

[9] Although *Bush* reached a different result than *Boodt*, *Bush* did not overrule *Boodt*. This is explained by the fact that while *Bush* addressed the proper interpretation of MCL 600.5856, as amended by 2004 PA 87, *Boodt* involved the proper interpretation of the statute as it existed before it was amended by 2004 PA 87.

the circumstances of this case in which a complaint was inadvertently filed *one day early on a 182-day waiting period* and in which no one was harmed or prejudiced by the premature filing, it would simply constitute an injustice to deprive plaintiff of any opportunity to have the merits of her case examined and addressed by a court of law." Therefore, the court reversed the trial court's order granting the defendants' motion for summary disposition, "reinstated" the plaintiff's medical malpractice suit, and "remanded for further proceedings consistent with this opinion." *Id*. at 52-53.[10]

This Court denied the defendants' subsequent application for leave to appeal. *Zwiers v Growney*, 486 Mich 1058 (2010). Three justices would have reversed the Court of Appeals for the reasons stated in the dissenting statement in *Ellout v Detroit Med Ctr*, 486 Mich 1058 (2010). *Zwiers*, 486 Mich at 1058 (MARKMAN, J., dissenting). *Ellout* involved the identical issue and was decided on the same day as *Zwiers*. The dissent in *Ellout* stated:

> *Bush* is inapplicable here because it involved the filing of a *defective* notice of intent, while this case involves the filing of a complaint before the notice period expired. MCL 600.2301 is also inapplicable here because it only applies to "pending" actions, and there was no "pending" action here because a timely complaint had never been filed. As this Court recognized in *Burton*, MCL 600.2912b(1) unam-

[10] *Zwiers*, 286 Mich App at 46, stated that "[a]lthough application of *Burton* alone would require us to affirm the summary dismissal of plaintiff's case, the Court in *Burton*, as opposed to the case at bar, was not presented with an argument under MCL 600.2301," and "[g]iven that *Burton* did not address MCL 600.2301 and that *Bush* has shed new light on MCL 600.2301 and its effect on the NOI statute," "[w]e cannot blindly follow *Burton* if MCL 600.2301 and *Bush* demand a different outcome." *Zwiers* then concluded that MCL 600.2301 and *Bush* did, in fact, demand a different outcome.

> biguously states that a person "shall not commence an action" until the notice period has expired. Because plaintiff was not authorized to commence this action when she filed the complaint, no action has been commenced, and, thus, there is no pending action. As this Court explained in *Boodt v Borgess Med Ctr*, 481 Mich 558, 564 (2008), if a plaintiff fails to file a notice of intent that complies with the statutory requirements, that plaintiff is not authorized to file a complaint.
>
> Furthermore, allowing plaintiff to file a complaint before the notice period has expired would affect defendants' substantial rights because it would deprive them of the 154 or 182 days of notice that the statute clearly entitles them to.
>
> *Burton* and *Boodt* have not been overruled, and, thus, are still good law; and the Court of Appeals clearly did not follow *Burton* and *Boodt*. Therefore, I would reverse the Court of Appeals. [*Ellout*, 486 Mich at 1059 (MARKMAN, J., dissenting) (emphasis added).]

In *Driver*, 490 Mich at 243, we held that "a plaintiff is not entitled to amend an original NOI to add nonparty defendants so that the amended NOI relates back to the original filing for purposes of tolling the statute of limitations . . . ." *Driver* explained that "[t]he *Bush* majority held that when an NOI fails to meet all of the *content* requirements under MCL 600.2912b(4), MCL 600.2301 allows a plaintiff to amend the NOI and preserve tolling unless the plaintiff failed to make a good-faith effort to comply with MCL 600.2912b(4)." *Id*. at 252-253. Accordingly, *Driver* held that "the holding in *Bush* that a defective yet timely NOI could toll the statute of limitations simply does not apply here because CCA [the nonparty defendant] never received a timely, albeit defective, NOI." *Id*. at 253. Concerning the effect of *Bush* on *Burton*, *Driver* explained:

> Nothing in *Bush* altered our holding in *Burton*. The central issue in *Bush* involved the effect an NOI had on tolling when the NOI failed to comply with the *content* requirements of MCL 600.2912b(4). The central issue in *Burton* involved the effect the plaintiff's failure to comply with the *notice-waiting-period* requirements had on tolling. Indeed, the *Bush* Court repeatedly emphasized that the focus of MCL 600.5856(c) is compliance with the notice waiting period set forth in MCL 600.2912b. In contrast to placing doubt on the viability of *Burton*, this aspect of *Bush* aligned with *Burton*'s holding that a plaintiff must comply with the notice waiting period to ensure the complaint tolls the statute of limitations. [*Id*. at 257-258 (citations omitted).]

Driver also held that "MCL 600.2301 is inapplicable because there was no action or proceeding pending against CCA" because the "plaintiff's claim was already time-barred when he sent the NOI"; and "[a]n action is not pending if it cannot be commenced," and "[b]y its plain language, MCL 600.2301 only applies to actions or proceedings that are *pending*." *Id*. at 254 (quotation marks and citation omitted). Finally, *Driver* noted that "amendment of the original NOI to allow plaintiff to add CCA would not be 'for the furtherance of justice' and would affect CCA's 'substantial rights,' " because it would "deprive CCA of its statutory right to a timely NOI followed by the appropriate notice waiting period" and "CCA would also be denied its right to a statute-of-limitations defense." *Id*. at 254-255 (quotation marks and citations omitted).

In *Tyra*, 302 Mich App at 220-221, the Court of Appeals reluctantly relied on this Court's decision in *Burton*, and held that "a medical malpractice complaint filed prior to the expiration of the MCL 600.2912b waiting period does not commence the action and does not toll the running of the limitations period pursuant to MCL 600.5856(a)." The majority

recognized that "*Burton* has not been overturned" and that "citing to *Burton*, our Supreme Court recently reaffirmed that 'when a plaintiff fails to strictly comply with the notice waiting period under MCL 600.2912b, his or her prematurely filed complaint fails to commence an action that tolls the statute of limitations.' " *Tyra*, 302 Mich App at 223, quoting *Driver*, 490 Mich at 256.

However, relying on the Court of Appeals opinion in *Zwiers* and distinguishing *Driver*, the Court ultimately held that the *Tyra* plaintiff may be permitted to amend her complaint under MCL 600.2301. Specifically, the Court held that *Driver* is distinguishable because "[i]n *Driver*, the plaintiffs were barred from the initial step of the proceedings of filing the notice of intent, whereas here, there is no dispute that the notice of intent was proper" and that while "MCL 600.2301 cannot be used to create a filing out of whole cloth, . . . no such bootstrapping would occur here, where all the requisite documents actually exist." *Tyra*, 302 Mich App at 224. Relying on *Zwiers* and MCL 600.2301, the Court of Appeals remanded to the trial court for it to "examine whether the party seeking amendment lacked good faith and whether the party opposing amendment will suffer prejudice that cannot be remedied by a lesser sanction than dismissal." *Id*. at 226.

The Court of Appeals dissent, relying on *Burton* and *Driver* and believing that *Zwiers* was "significantly undermined by our Supreme Court's later decision in *Driver*," concluded that "plaintiff's complaint cannot be resurrected under MCL 600.2301." *Tyra*, 302 Mich App at 230 (WILDER, P.J., dissenting). The dissent explained:

> [T]he limitations period expired without commencement of a medical malpractice action because plaintiff's com-

> plaint was filed prematurely. Since [a]n action is not "pending" if it cannot be [or was not] "commenced," there was no *action* pending in the trial court to which MCL 600.2301 could be retroactively applied. Moreover, retroactive application of MCL 600.2301 would affect defendant's substantial rights because defendant would be "denied its right to a statute-of-limitations defense," which is plainly contrary to, and not in furtherance of, the Legislature's intent in enacting MCL 600.2912b. [*Id*. at 230 (quotation marks and citations omitted; alterations in original).]

In *Furr*, 303 Mich App 801, the Court of Appeals originally held that although the *Furr* plaintiffs filed their complaint before the end of the 182-day notice period, they could amend their prematurely filed complaint. In his lead opinion, however, Judge WHITBECK only reached that result because he concluded the Court was bound by *Tyra*. Judge WHITBECK asserted that *Tyra* was wrongly decided and called for a conflict-resolution panel. See MCR 7.215(J). Specifically, Judge WHITBECK believed that *Driver* overruled *Zwiers* because *Driver* held that "a plaintiff may only invoke MCL 600.2301 to correct a defective *content* requirement in the notice of intent." *Id*. at 809 (opinion by WHITBECK, J.).

In a split decision, the conflict panel held that *Driver* did not overrule *Zwiers*. *Furr*, 304 Mich App at 680. It further held that *Driver* is distinguishable from *Zwiers*, *Tyra*, and *Furr* because in *Driver* the plaintiff's claim was already time-barred when he sent the NOI, but "[i]n *Zwiers*, *Tyra*, and *Furr*, however, the NOIs were timely served on the defendants, so while *actions* had not been commenced because of the premature filing of complaints and no *actions* were therefore pending for purposes of MCL 600.2301, *proceedings* had been commenced given the timely NOIs and *pro-*

ceedings were therefore pending," and "MCL 600.2301 speaks of a pending 'action *or* proceeding.' " *Id*. at 694. The conflict panel held that *Driver* cannot be interpreted to mean that only content-based amendments are permitted under MCL 600.2301 because MCL 600.2301 "empowers a court to amend any process, pleading, or proceeding 'either in form *or* substance[.]' " *Id*. at 699, quoting MCL 600.2301 (alteration in original). The dissenting judges indicated that they were dissenting for the reasons stated in Judge WHITBECK's vacated opinion in *Furr* and in the dissenting opinion in *Tyra*. *Id*. at 706-707 (O'CONNELL, J., dissenting). Judge METER separately indicated that although he was a member of the panel that decided *Zwiers*, he believed that *Driver* overruled *Zwiers*.[11] *Id*. at 707 (METER, J., dissenting).

B. AFFIRMATIVE DEFENSES

In *Tyra*, 497 Mich at 910, we asked the parties to address "whether the defendants' affirmative defenses were defective because they did not specifically state the grounds for the defense." The Court of Appeals held that although the *Tyra* defendants did not adequately state the grounds for the affirmative defense of plaintiff's failure to comply with the notice period, that did

[11] In *Zwiers*, on remand, the trial court granted the defendants' motion for summary disposition, holding that the Supreme Court overruled the Court of Appeal's decision in *Zwiers*. The Court of Appeals reversed the trial court and held that "[t]he analysis engaged in by this Court in *Zwiers* is still applicable to the factual situation presented in the instant appeal." *Zwiers v Growney*, unpublished opinion per curiam of the Court of Appeals, issued June 24, 2014 (Docket No. 312133), p 3. Judge RIORDAN wrote a concurring opinion in which he stated, "If not for the *Furr* decision, I would affirm the trial court's order granting summary disposition in favor of the defendants." *Id*. (RIORDAN, J., concurring), p 1. An application for leave to appeal is currently pending in this Court in *Zwiers* (Docket No. 149815).

not matter because this Court held in *Auslander v Chernick*, 480 Mich 910 (2007),[12] that a plaintiff's failure to comply with the notice period remains available as a defense irrespective of whether the defendant adequately stated the grounds for the defense. Although the *Tyra* defendants appealed a different portion of the Court of Appeals' opinion, the *Tyra* plaintiff did not appeal this portion of the opinion. Indeed, the *Tyra* plaintiff has not even filed a brief in this Court. Because the *Tyra* plaintiff has not briefed the issue, it has been abandoned. *People v McGraw*, 484 Mich 120, 131 n 36; 771 NW2d 655 (2009) ("Failure to brief an issue on appeal constitutes abandonment."). Although "the failure of an appellee to file a responsive brief may not properly be considered to be a confession of substantive error," *People v Smith*, 439 Mich 954 (1992), appellees who have not cross-appealed "may not obtain a decision more favorable to them than was rendered by the Court of Appeals," *McCardel v Smolen*, 404 Mich 89, 94-95; 273 NW2d 3 (1978).[13] See also *In re MCI Telecom Complaint*, 460

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[12] Adopting *Auslander v Chernick*, unpublished opinion per curiam of the Court of Appeals, issued May 1, 2007 (Docket No. 274079) (JANSEN, J., dissenting).

[13] In his opinion concurring in part and dissenting in part, Justice VIVIANO asserts that "any decision holding that defendants waived the notice-waiting-period affirmative defense would not result in an outcome more favorable to plaintiff than that rendered by the Court of Appeals," because "[b]oth holdings would result in a remand to the trial court for further proceedings." We respectfully disagree. The Court of Appeals remanded to afford plaintiff "the opportunity to make an argument in support of amending the filing date of her complaint and affidavit of merit" and to allow the trial court to "exercise its discretion by either granting or denying that amendment pursuant to MCL 600.2301 and *Zwiers*." *Tyra*, 302 Mich App at 227. However, the Court of Appeals recognized that "the applicability of *Zwiers* to the instant case is unclear," especially since "plaintiff's prematurity in this case is vastly more egregious than that in *Zwiers*." *Id.* at 225. Therefore, pursuant to the remand of the Court of Appeals, defendants might still have

Mich 396, 432; 596 NW2d 164 (1999) ("Appellee Ameritech has neither applied for leave to cross appeal on this issue, nor offered this argument as an alternative rationale to support the favorable ruling it received below. Accordingly, this issue, itself, is not properly before the Court."); *McGraw*, 484 Mich at 131 n 36 ("[W]e do not contend that an appellee is required to file a cross-appeal to raise a waiver argument. We simply conclude that an appellee should at some point actually *raise* the waiver argument. And if he or she does not do so, this Court may . . . choose not to raise and address the argument on its own."). Given that the *Tyra* plaintiff has not briefed whether the *Tyra* defendants sufficiently pleaded their affirmative defenses, nor the relevance of this in light of *Auslander*, we need not address these issues and we will not do so here because plaintiff's abandonment of these issues has left us ill-equipped to address the merits of these issues. See *Wayne Co Employees Retirement Sys v Wayne Charter Co*, 497 Mich 36, 41; 859 NW2d 678 (2014) (stating that "[t]he county's abandonment of the issue on appeal . . . has left us ill equipped to address the merits" of the issue).[14]

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prevailed based on their notice-waiting-period affirmative defense. But if this Court were to hold that defendants waived this defense, defendants would not be able to prevail on this basis. Therefore, a decision holding that defendants waived the defense would, in fact, result in an outcome more favorable to plaintiff than that rendered by the Court of Appeals.

[14] Although Justice VIVIANO is correct that our orders granting oral argument on the applications directed the parties to address whether defendants sufficiently pleaded their affirmative defenses "[a]t oral argument," our orders also stated that "[t]he parties may file supplemental briefs . . . ." And while counsel for the plaintiffs filed a supplemental brief in *Furr*, the same counsel did not file a supplemental brief in *Tyra*. The issues in these cases are identical except that *Tyra* additionally involves the sufficiency-of-the-pleading-of-the-affirmative-defense issue. That is, while counsel believed that the substantive merit

C. *ZWIERS* OVERRULED

In both *Tyra*, 497 Mich at 909-910, and *Furr*, 497 Mich at 910, this Court directed the parties to address whether *Zwiers* was overruled by *Driver*. We hold that *Zwiers* was so overruled. As discussed earlier in this opinion, *Zwiers*, 286 Mich App at 49, held that *Bush* and MCL 600.2301 can be used to save a medical malpractice action that was never commenced before the statute of limitations expired when the complaint was filed before the expiration of the NOI waiting period because "*Bush* makes it abundantly clear that MCL 600.2301 is applicable to the entire NOI process and *any* compliance failures under the NOI statute." (Emphasis added.) However, *Driver*, 490 Mich at 258 n 68, held that "*Bush* repeatedly recognized that [an] NOI must be timely filed,"[15] that *Bush* only held that

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of the affirmative defense was an issue worthy of a supplemental brief, he did not apparently believe the procedural-pleading issue was similarly worthy. Further, although plaintiff's counsel did raise the latter issue at oral argument, he did not raise the arguments raised in Justice VIVIANO's thoughtful analysis. Finally, as Justice VIVIANO recognizes, the decision he would overrule, *Auslander*, does not seem to be causing "chaos" because "despite [its] purported authorization, defendants continue to follow our court rules and statutes by filing answers and affirmative defenses." In other words, it seems most defendants recognize that continuing to file sufficiently pleaded affirmative defenses, even if not compelled to do so, remains the most prudent course of action. For all these reasons, we do not believe this is the proper, or necessary, time to consider whether *Auslander* should be overruled. To make clear, although we possess the authority to address this issue, as we do most other issues before us on appeal, we choose to exercise our discretion not to do so in this case because by failing to file a brief in response to defendants' applications for leave to appeal, a cross-appeal, a supplemental brief, or even raise in oral argument anything resembling the arguments raised by Justice VIVIANO, the *Tyra* plaintiff, in our judgment, has left us ill-equipped to address the issue at this time and there appears to be no particular urgency to address the issue.

[15] See, for example, *Bush*, 484 Mich at 161 ("[T]he current statute, [MCL 600.5856(c)], makes clear that the question whether tolling

MCL 600.2301 can be applied "when an NOI fails to meet all of the *content* requirements under MCL 600.2912b(4)," *id*. at 252, and that MCL 600.2301 only applies to *pending* actions or proceedings, *id*. at 264. *Driver* and *Zwiers* are clearly inconsistent with one another, and *Driver* controls over *Zwiers*. See *People v Mitchell*, 428 Mich 364, 369; 408 NW2d 798 (1987) ("An elemental tenet of our jurisprudence, stare decisis, provides that a decision of the majority of justices of this Court is binding upon lower courts.").

While *Zwiers* held that *Bush* altered our holding in *Burton*,[16] *Driver*, 490 Mich at 257, expressly held that "[n]othing in *Bush* altered our holding in *Burton*."[17] As

applies is determined by the timeliness of the NOI."); *id*. ("[I]f an NOI is timely, the statute of limitations is tolled . . . ."); *id*. at 169 ("[T]he focus of the new [MCL 600.5856(c)] is unquestionably limited to compliance with the 'applicable notice period.' "); *id*. ("[I]f a plaintiff complies with the applicable notice period before commencing a medical malpractice action, the statute of limitations is tolled."); *id*. at 170 ("[A] plaintiff's NOI must comply only with the applicable notice period."); *id*. at 172 ("The plain language of [MCL 600.2912b(1)] mandates that a plaintiff shall not commence an action for medical malpractice without filing a timely NOI."); *id*. at 184 ("If a court ultimately determines that the [defendant's] response is not defective, plaintiff's complaint [if filed 154 days, rather than 182 days after the NOI] may be deemed untimely.").

[16] See *Zwiers*, 286 Mich App at 46, 52 (stating, "We cannot blindly follow *Burton* if MCL 600.2301 and *Bush* demand a different outcome," and concluding that a different outcome was required); *id*. at 40, 52 ("While *Burton*, standing alone, would compel us to affirm," "[p]ursuant to MCL 600.2301 and its interpretation by the *Bush* Court, we reverse . . . .") (citation omitted).

[17] In addition, while *Zwiers*, 286 Mich App at 51, held that the "defendants' substantial rights were not implicated or affected, and thus there would be no harm if a court corrected or disregarded the premature filing of the complaint and affidavit of merit," *Driver*, 490 Mich at 254-255, held that "[a]pplying MCL 600.2301 in the present case would deprive CCA of its statutory right to a timely NOI followed by the appropriate notice waiting period" and CCA "would also be denied its right to a statute-of-limitations defense," and thus applying MCL 600.2301 "would not be 'for the furtherance of justice' and would affect

already discussed, *Burton* held that the filing of a complaint before the expiration of the NOI waiting period does not commence an action or toll the running of the period of limitations. Therefore, in the instant cases (as well as in *Zwiers*), plaintiffs' filing of their complaints before the expiration of the NOI waiting period did not commence their actions or toll the running of the limitations period. And MCL 600.2301 cannot save plaintiffs' actions because MCL 600.2301 only applies to pending actions or proceedings and there never were pending actions in these cases. Plaintiffs' complaints, filed before the NOI waiting period expired, could not commence an action.

In addition, even assuming that a NOI does constitute part of a "proceeding," as *Bush* held, and, accordingly, that there were pending proceedings at the time plaintiffs filed their NOIs, the proceedings were no longer pending when the trial courts ruled on defendants' motions for summary disposition because the limitations periods had expired by that time. "A proceeding cannot be pending if it was time-barred . . . ." *Driver*, 490 Mich at 254. As a result, MCL 600.2301 is inapplicable.

Moreover, ignoring the defects in these cases would not be "for the furtherance of justice" and would affect defendants' "substantial rights." MCL 600.2301. That is, just as in *Driver*, 490 Mich at 255, "[a]pplying MCL 600.2301 in the present case[s] would deprive [defendants] of [their] statutory right to a timely NOI followed by the appropriate notice waiting period," and they "would also be denied [their] right to a statute-of-limitations defense." Therefore, even if MCL 600.2301

CCA's 'substantial rights.' " (Quotation marks and citations omitted.) This is yet another example of the inconsistencies between *Zwiers* and *Driver*.

was applicable here, it should not be viewed as having been satisfied.

Finally, plaintiffs argue that under MCL 600.5856(a), which states that the statute of limitations is tolled "[a]t the time the complaint is filed," the running of the limitations periods in these cases was tolled once the complaints were filed, even though the complaints were filed prematurely. However, this argument has been repeatedly rejected by this Court. First, in *Scarsella v Pollak*, 461 Mich 547, 552; 607 NW2d 711 (2000), we held that a complaint filed without an affidavit of merit does not toll the running of the limitations period because the contrary interpretation "would undo the Legislature's clear statement that an affidavit of merit 'shall' be filed with the complaint." (Citation omitted.) Later, in *Burton*, 471 Mich at 747, we held that a complaint filed before the expiration of the notice period does not toll the running of the limitations period. And in *Boodt*, 481 Mich at 562-564, this argument was rejected when we held that a complaint filed after the filing of a defective NOI does not toll the running of the period of limitations. As *Boodt*, 481 Mich at 564, explained:

> [P]laintiff failed to file a notice of intent that satisfied the requirements of [MCL 600.2912b(4)(e)], and, thus, plaintiff was not yet authorized to file a complaint and an affidavit of merit. Therefore, the filing of the complaint and the affidavit of merit that plaintiff was not yet authorized to file could not possibly have tolled the period of limitations.

Plaintiffs argue that these decisions should be overruled because they are inconsistent with MCL 600.1901, which states that "[a] civil action is commenced by filing a complaint with the court." This specific argument was addressed in a concurring state-

ment to this Court's order denying the plaintiff's motion for rehearing in *Boodt v Borgess Med Ctr*, 482 Mich 1001 (2008). As was stated:

> [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. [*Boodt*, 482 Mich at 1002 (MARKMAN, J., concurring) (third alteration in original).]

Although a civil action is generally commenced by filing a complaint, a medical malpractice action can only be commenced by filing a timely NOI 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. Because plaintiffs did not wait until the applicable notice period expired before they filed their complaints and affidavits of merit, they did not commence actions against defendants. Because the statute of limitations has since expired, plaintiffs' complaints must be dismissed with prejudice.

IV. CONCLUSION

For these reasons, we reverse the Court of Appeals in part in both cases. In *Tyra*, we reinstate the trial court's order granting defendants' motion for summary disposition, and in *Furr*, we remand to the trial court for entry of an order granting defendants' motion for summary disposition.

YOUNG, C.J., and KELLY, and ZAHRA, JJ., concurred with MARKMAN, J.

VIVIANO, J. (*concurring in part and dissenting in part*). Two steps forward, one step back. That is how I

would describe today's decision. Although it satisfactorily resolves the first issue in these appeals, the Court inexplicably leaves unresolved a compelling threshold issue raised by the plaintiff in *Tyra v Organ Procurement Agency of Mich*: if she is to be held to procedural requirements, so should defendants. More specifically, plaintiff[1] argued in the trial court that defendants waived the MCL 600.2912b notice-waiting-period affirmative defense because they failed to adequately plead it under MCR 2.111(F)(3). The Court of Appeals found merit in this argument, but determined that it was bound by *Auslander v Chernick*, 480 Mich 910 (2007), an order from this Court relieving defendants in medical malpractice cases from pleading affirmative defenses in response to complaints that failed to comply with statutory prerequisites. *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208, 211-220; 850 NW2d 667 (2013). After initially requesting oral argument on this issue, the Court now holds in Part III(B) of the majority opinion that plaintiff "abandoned" this argument. I dissent from this part of the Court's opinion. I would address the merits of plaintiff's claim that defendants' affirmative defenses were inadequate under MCR 2.111(F)(3) and, in so doing, would reject defendants' argument that they are exempted from pleading the § 2912b affirmative defense under *Auslander*.

I. ISSUE ABANDONMENT

The majority holds that plaintiff "abandoned" her affirmative defense argument because she failed to appeal this aspect of the Court of Appeals decision and

[1] References in this opinion to "plaintiff" are to Lisa Tyra, and references to "defendants" are to the Organ Procurement Agency of Michigan, Steven Cohn, and William Beaumont Hospital.

failed to file an answer to defendants' applications for leave to appeal. Both are true, but irrelevant and certainly no reason for the Court to take a pass on this issue.

First, plaintiff's failure to file a cross-appeal is a red herring. Having obtained a favorable decision in the Court of Appeals, plaintiff is not required—under the threat of "abandonment"—to file a separate application in order to press an alternative ground for affirmance. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994) ("A cross appeal was not necessary to urge an 'alternative ground for affirmance.' "). Contrary to the majority's implication, any decision holding that defendants waived the notice-waiting-period affirmative defense would not result in an outcome more favorable to plaintiff than that rendered by the Court of Appeals. Both holdings would result in a remand to the trial court for further proceedings.

Second, plaintiff's failure to file a written answer to defendants' applications is irrelevant. Our orders in this case specifically stated, "We direct the Clerk to *schedule oral argument* on whether to grant the application or take other action. *At oral argument, the parties shall address* . . . whether the [defendants'] affirmative defenses were defective because they did not specifically state the grounds for the defense." *Tyra v Organ Procurement Agency of Mich*, 856 NW2d 69, 70 (2014) (citation omitted; emphasis added). Plaintiff did exactly what was requested of her by this Court: plaintiff's counsel attended oral argument on defendants' applications and argued that defendants' affirmative defenses were inadequate and that *Auslander* was incorrectly decided. It is a perversity of the "abandonment" doctrine for this Court to avoid a preserved issue argued at the time and place directed by the

Court. In these circumstances, plaintiff has primed the appellate pump sufficiently for us to address the issue.[2]

II. ADEQUACY OF DEFENDANTS' AFFIRMATIVE DEFENSES

Plaintiff argues that defendants' affirmative defenses were inadequate to put her on notice that she failed to comply with the notice-waiting-period requirement of MCL 600.2912b. Michigan's pleading standard is codified in MCR 2.111. With respect to pleading affirmative defenses, MCR 2.111(F)(3) provides that "a party must state the facts constituting" an affirmative defense. An affirmative defense is adequate under MCR 2.111(F)(3) as long as it reasonably apprises the plaintiff of the nature of the defense such that the plaintiff can take a responsive position. *Hanon v Barber*, 99 Mich App 851, 856; 298 NW2d 866 (1980); *Ewing v Heathcott*, 348 Mich 250, 255; 83 NW2d 210 (1957). Put differently, an affirmative defense must be stated in sufficient factual detail to give the plaintiff fair notice of the defensive issues that the defendant will raise in the litigation.

With this standard in mind, and turning to the affirmative defenses alleged in this case, defendant Organ Procurement Agency of Michigan's (OPA) Affirmative Defense No. 11 stated:

> 11. Plaintiff failed to comply with the notice provisions of MCL 600.2912b; MSA 27A.2912b and that Plaintiff's

[2] Even if it were true, as the majority says, that plaintiff's failure to file a written response has left us ill-equipped to address this issue, there is a simple solution: enter an order granting defendants' applications and require the parties to file briefs on this question. At least then this case would be analogous to the one relied on by the majority. See *Wayne Co Employees Retirement Sys v Wayne Charter Co*, 495 Mich 983 (2014) (granting leave to appeal after hearing oral argument on the application), cited *ante* at 89.

action is thus barred; Defendant gives notice that it will move for summary disposition.

This defense certainly could have been more factually precise.[3] However, I am persuaded that it was specific enough to satisfy the pleading standard of MCR 2.111(F)(3). Affirmative Defense No. 11 alleged that plaintiff failed to comply with the "notice" provisions of § 2912b. Generally speaking, there are two ways in which a plaintiff can fail to comply with the notice requirements of § 2912b: timing or content. Here, it was clear that OPA was specifically referring to *timing* because, in the very next affirmative defense, OPA alleged a *content* deficiency. Affirmative Defense No. 12 alleged, "Plaintiff's claims are barred for failing to provide adequate information in her Notice of Intent as required by MCL 600.2912b." OPA's Affirmative Defense No. 11, when read in the context of the content-deficiency defense raised next, was sufficient to apprise plaintiff that the timing requirement of § 2912b was not satisfied and, thus, was sufficient to permit plaintiff to take a responsive position. See *Hanon*, 99 Mich App at 856 ("The primary function of a pleading is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position.") (quotation marks and citations omitted). I would, therefore, hold that OPA's affirmative defense was adequate under MCR 2.111(F)(3).[4]

In contrast to OPA's affirmative defense, the affirmative defense alleged by defendants Steven Cohn,

[3] For instance, in the companion case, *Furr v McLeod*, the *Furr* defendants alleged, "Plaintiffs failed to wait 182 days after serving their Notice of Intent before filing suit in contravention of MCL 600.2912b."

[4] In coming to the opposite conclusion and opining that the affirmative defense "pertained to the notice *itself*, as distinct from the notice period," *Tyra*, 302 Mich App at 215, the Court of Appeals overlooked that OPA alleged a separate affirmative defense pertaining to the notice itself.

M.D., and William Beaumont Hospital (collectively, the Beaumont defendants) was plainly inadequate. Their Affirmative Defense No. 4 stated:

> 4. If necessary, Defendants assert all of the benefits of the provisions set forth in Michigan's tort Reform Acts of 1986, 1993, and 1995 regarding non-economic caps, offsets, reduction to present value, offsets for collateral payments, such as insurance, social security, etc., and any other damage reduction deemed applicable by the Michigan Appellate Courts in interpretation of these statutes.

In alleging everything, the Beaumont defendants alleged nothing at all. See *Dacon v Transue*, 441 Mich 315, 330; 490 NW2d 369 (1992). Together, the four tort reform acts cited by the Beaumont defendants amended or added 90 statutory sections. See 1995 PA 249; 1995 PA 161; 1993 PA 78; 1986 PA 178. Global allegations like this do not provide reasonable notice to a plaintiff of how, why, or to what extent his or her cause of action is barred. It does not indicate the nature of the defense under MCL 600.2912b—indeed, it fails to mention the statute at all. Given this, it is virtually impossible for a plaintiff to take a responsive position to such a broad allegation as that set forth in Affirmative Defense No. 4.[5] For this reason, the Beaumont defendants' affirmative defense was inadequate under MCR 2.111(F)(3) and should be deemed waived.

The Beaumont defendants argue that this Court should nevertheless affirm the trial court's grant of summary disposition in their favor because, under our decision in *Auslander*, they were not obligated to raise

[5] In fact, when asked at oral argument whether their affirmative defense was sufficient to put plaintiff on notice, counsel for the Beaumont defendants conceded, "no, it was not."

the affirmative defense in the first place.[6] Indeed, the Court of Appeals was poised to hold that defendants waived their affirmative defenses, but stopped short of reversing the trial court because it was bound by our order in *Auslander*. Under no similar obligation to follow incorrectly decided cases from this Court, and seeing no basis in law or logic justifying *Auslander*, I would reject defendants' argument and overrule *Auslander*.

III. THE VALIDITY OF *AUSLANDER*

In *Auslander*, this Court held that medical malpractice defendants have no obligation to plead affirmative defenses in response to a complaint that failed to comply with statutory prerequisites. Our decision consisted of adopting the unpublished Court of Appeals dissenting opinion, which stated in relevant part: "I conclude that defendants were never required to raise or plead their asserted defenses in the first instance because this medical malpractice action was never properly commenced." *Auslander v Chernick*, unpublished opinion per curiam of the Court of Appeals, issued May 1, 2007 (Docket No. 274079) (JANSEN, J., dissenting), p 1.

Any discussion of *Auslander* should begin with a description of what it actually is: an exception to the general rule. In Michigan, the general rule is that affirmative defenses must be raised in the responsive

[6] Defendants also claim that the trial court granted a constructive amendment of their affirmative defenses. However, as the Court of Appeals pointed out, there is no indication that the trial court or the parties believed that any such constructive amendment occurred. *Tyra*, 302 Mich App at 217. Accepting this argument under these circumstances would improperly usurp the trial court's discretionary authority to grant leave to amend a pleading "when justice so requires." MCR 2.118(A)(2).

pleading or they are waived. MCR 2.111(F)(3) ("Affirmative defenses must be stated in a party's responsive pleading . . . ."); *Walters v Nadell*, 481 Mich 377, 389; 751 NW2d 431 (2008). An "affirmative defense" is a defense that does not refute the plaintiff's case on the merits, but which otherwise seeks to deny relief to the plaintiff for reasons unrelated to the plaintiff's prima facie case. See *Campbell v St John Hosp*, 434 Mich 608, 616; 455 NW2d 695 (1990). Asserting noncompliance with § 2912b—or any statutory precondition—does just that by alleging that the plaintiff is not entitled to relief based on his or her failure to comply with a procedural prerequisite. Therefore, this defense must be pleaded in a responsive pleading under the plain language of our court rules. MCR 2.111(F)(3).

Auslander stands for the broad proposition that if a complaint is ineffective at commencing the action, the defendant has no obligation to file affirmative defenses, or an answer for that matter. The legal basis for the *Auslander* exception was our holding in *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005), and other cases that a complaint filed in noncompliance with statutory prerequisites does not commence an action. *Auslander* (JANSEN, J., dissenting), unpub op at 1, citing *Scarsella v Pollak*, 461 Mich 547, 549-550; 607 NW2d 711 (2000) ("[T]he mere tendering of a complaint without the required affidavit of merit is insufficient to commence [a medical malpractice] lawsuit.") (quotation marks and citation omitted). *Burton*'s holding dealt with a question of *substantive* law: what is the legal effect of filing a complaint in contravention of a statutory requirement? And as a matter of substantive law, *Burton*'s answer is not unsound: a complaint that violates the requirement in MCL 600.2912b(1) that "a person

shall not commence an action" without complying with the notice waiting period cannot, as a matter of law, commence the action.

Auslander extended *Burton*'s logic into the procedural realm on the assumption that, if an action is defective as a matter of substantive law, that necessarily relieves a defendant from its procedural obligations. The basic legal flaw of *Auslander* is that it conflates substantive rules of law with procedural rules for enforcing those substantive legal standards. Under *Auslander*'s circular reasoning, a defendant is relieved of its obligation to allege and establish that a complaint is legally deficient because the complaint is legally deficient.

Although an action may be subject to attack because it was not commenced in compliance with a statutory prerequisite, the consequences that might flow from the failure to comply with the prerequisite are not self-executing. Our decision in *Saffian v Simmons*, 477 Mich 8; 727 NW2d 132 (2007), recognized as much. In that case, the defendant failed to respond to the plaintiff's complaint, which was accompanied by a defective affidavit of merit. In moving to set aside a subsequent default judgment, the defendant argued that he could not be defaulted because, since the plaintiff's affidavit of merit was defective, he never had an obligation to respond to the complaint. We rejected this argument and its underlying premise that our statutes and court rules permit defendants to unilaterally determine whether a plaintiff's pleading is adequate. *Id*. at 13. Instead, we said, "it is the court's province to determine the sufficiency of pleadings, not a defendant's." *Id*., citing *Saffian v Simmons*, 267 Mich App 297, 312; 704 NW2d 722 (2005) (ZAHRA, P.J., concurring in part and dissenting in part).

The same reasoning should apply to the notice-waiting-period prerequisite of § 2912b, or any statutory precondition for that matter. A defendant might *think* a complaint filed before the 182-day mark has been filed prematurely, but that determination is ultimately a legal question that must be resolved by the trial judge.[7] In order to facilitate orderly resolution of these legal issues, our court rules require parties to answer complaints and assert applicable affirmative defenses. As we said in *Saffian*:

> [T]his more orderly process of honoring the presumption of the validity of pleadings, requiring an answer, and then allowing the defendant to challenge the affidavit reduces the chaotic uncertainty that allowing the defendant to decline to answer would introduce. [Also], this rule advances the efficient administration of justice because to allow defendants to nitpick plaintiffs' affidavits and, upon discovering an imperfection, to decline to answer surely leads, as it did here, to challenged default judgments and the hearings those entail. On the other hand, no such hearings are necessitated if the procedure is to require an answer and then a motion by the defendant to challenge the affidavit. This approach will conserve judicial resources and is advisable for that reason. [*Id*. at 14.][8]

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[7] That determination is not always clear-cut given that plaintiffs may rightfully be able to file suit after 91 days or 154 days depending on the facts of the case. See MCL 600.2912b(3) and (8).

[8] I acknowledge that *Saffian*, arguably in dicta, distinguished between a *defective* affidavit of merit and *no* affidavit of merit. *Saffian*, 477 Mich at 13-14. I further acknowledge that, in rejecting the defendant's reliance on our decision in *Scarsella*, we said, "In *Scarsella*, we concluded that a medical malpractice complaint not accompanied by an affidavit of merit does not 'commence' a medical malpractice cause of action *and thus the defendant need not file an answer to preclude a default*." *Id*. at 13 (citation omitted; emphasis added). However, this was a misreading of our decision in *Scarsella*. We did not say in *Scarsella* that defendants were relieved of their obligation to file an answer. All that *Scarsella* held was that, as a substantive matter of law, failure to file a complaint along with an affidavit of merit does not "commence" an

Auslander's uncritical extension of *Burton*'s legal rule into the procedural realm failed to appreciate the difference between law and procedure. For example, the statute of limitations affirmative defense involves the legal determination that a complaint was filed outside a statutorily designated period of time for filing a complaint. MCL 600.5805(1) provides that "[a] person shall not bring or maintain an action . . . unless . . . the action is commenced within the periods of time prescribed by this section." The language of § 5805(1) and § 2912b(1) (and similar medical malpractice provisions) are materially identical—each prohibits a party from bringing an action unless certain conditions are satisfied. By *Auslander*'s logic, a complaint filed after the expiration of the statute of limitations is ineffective at "commencing" the action and, therefore, defendants should have no obligation to assert the statute of limitations affirmative defense at all. Yet, by court rule and caselaw, defendants are required to raise the statute of limitations defense in their first responsive pleading or else it is waived. See MCR 2.111(F)(3)(a); *Walters*, 481 Mich at 389.

By deviating from the accepted rule of requiring defendants to properly plead and prove legal defects in a plaintiff's filing, *Auslander* essentially elevates compliance with statutory prerequisites to the echelon of

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action or toll the running of the period of limitations. See *Scarsella*, 461 Mich at 549 ("We therefore conclude 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.") (quotation marks and citation omitted). *Auslander*—which itself involved the failure to file an affidavit of merit—reflects an exacerbation of *Saffian*'s error. See *Auslander* (JANSEN, J., dissenting), unpub op at 1, citing *Scarsella*, 461 Mich at 549-550. Thus, to the extent *Auslander* is based on the same misreading of *Scarsella* that the *Saffian* Court committed, it is based on a misinterpretation of our caselaw.

"lack of jurisdiction," a defense that is not subject to the raise-or-waive rule. And in this respect, *Auslander* is in tension with our decision 40 years ago that a similar notice-of-intent-to-sue requirement before filing suit was not jurisdictional. See *Lisee v Secretary of State*, 388 Mich 32, 41-42; 199 NW2d 188 (1972). Indeed, the Court of Appeals has held that "[the] [p]laintiff's failure in this particular case to comply with the notice requirement [of § 2912b] before commencing suit did not divest the circuit court of subject-matter jurisdiction." *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 708; 575 NW2d 68 (1997).

There is a fundamental tension between *Auslander* and the established rules that presuit notice requirements are not jurisdictional and that affirmative defenses must be pleaded or they are waived. This tension must be resolved in favor of the established rules, lest we invite the chaos that would ensue if *Auslander*'s rule were actually followed. As the Court of Appeals in *Saffian* put it:

> [T]o rule as defendant urges would create the opportunity for defendant to knowingly foster the running of the limitations period by ignoring a lawsuit and then simply bypass the default by attacking the affidavit of merit [or timeliness of the complaint], depriving plaintiff of the legitimate opportunity to cure a defect if attacked in an answer or affirmative defense. A defendant would suffer no adverse consequences if a postdefault attack on the affidavit [or complaint] were successful. In the meantime, a plaintiff's claim is laid to rest as the limitation period expires. [*Saffian*, 267 Mich App at 307.]

I would overrule *Auslander* as a wrongly decided, unnecessary incongruity in our law. As far as stare decisis goes, if "not all precedents are built alike," *McCormick v Carrier*, 487 Mich 180, 277; 795 NW2d 517 (2010) (MARKMAN, J., dissenting), then *Auslander*'s

foundation is weaker than most. It was an order entered without the benefit of briefing and argument; its reasoning consisted of adopting a short, unpublished dissenting opinion of the Court of Appeals; and the proposition it announced was unsupported by any citation of authority. Moreover, *Auslander* is a jurisprudential fish out of water, incompatible with the legal environment within which it exists, including: MCR 2.111(F)(3); MCR 2.603(A)(1); *Neal*, 226 Mich App at 708; *Lisee*, 388 Mich at 41-42; *Walters*, 481 Mich at 389; *Saffian*, 477 Mich at 13. It is a testament to its practical unworkability and lack of reliance interests that, despite *Auslander*'s purported authorization, defendants continue to follow our court rules and statutes by filing answers and affirmative defenses. See *Robinson v Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000) (stating that two relevant considerations under the doctrine of stare decisis are: "whether the decision at issue defies 'practical workability,' [and] whether reliance interests would work an undue hardship"). Furthermore, *Auslander* has been undermined by a 2010 amendment of MCR 2.112(L)(2)(a), requiring that "all challenges to a notice of intent to sue . . . be made by motion, filed pursuant to MCR 2.119, at the time the defendant files its first response to the complaint, whether by answer or motion[.]" See *Robinson*, 462 Mich at 464 (stating that another relevant consideration under the doctrine of stare decisis is "whether changes in the law or facts no longer justify the questioned decision"). A decision so contrary to the jurisprudential tide as *Auslander* can only hold on so long before it gives way to the undertow. Today the Court missed an opportunity to formally unmoor *Auslander* and give it the ceremonial burial at sea that it deserves.

IV. CONCLUSION

In this case, I would craft a simple, yet symmetrical, rule of law: Plaintiffs will be strictly held to the statutory waiting-period requirement; so too, defendants will be required to put plaintiffs on notice of the factual basis of their affirmative defenses. In other words, I would hold defendants to the same standard we hold plaintiffs: compliance with their procedural obligations under our rules. Because I do not agree with the majority's decision to sidestep this issue, I respectfully dissent from Part III(B) of the majority opinion.[9]

MCCORMACK and BERNSTEIN, JJ., concurred with VIVIANO, J.

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[9] Specifically, I join the majority opinion in full as it relates to *Furr*. I also agree that the trial court correctly granted summary disposition in favor of Organ Procurement Agency. However, as it relates to the Beaumont defendants, I would affirm the Court of Appeals on alternative grounds and remand for further proceedings consistent with this opinion.

PEOPLE v CAIN

Docket No. 149259. Argued March 11, 2015 (Calendar No. 2). Decided July 23, 2015.

Brandon L. Cain was convicted in the Wayne Circuit Court of two counts of first-degree premeditated murder, MCL 750.316(1)(a); two counts of felony murder, MCL 750.316(1)(b); two counts of torture, MCL 750.85; two counts of unlawful imprisonment, MCL 750.349b; carrying a firearm during the commission of a felony, MCL 750.227b; and being a felon in possession of a firearm, MCL 750.224f. At the start of the trial, the court, Vonda R. Evans, J., stated to the jury, "I will now ask you to stand and swear to perform your duty to try the case justly and to reach a true verdict." The court clerk then proceeded to swear in the jury, but mistakenly read the oath given to prospective jurors before voir dire (that they would answer the questions concerning juror qualifications truthfully) rather than the juror's oath set forth in MCR 2.511(H)(1). There was no objection to the failure to administer the proper oath. Defendant raised the issue of failing to properly swear the jury for the first time on appeal, moving for peremptory reversal of his convictions. The Court of Appeals granted the motion in an unpublished order, entered May 2, 2014 (Docket No. 314342), concluding that the failure to properly swear the jury was a structural error requiring a new trial. The prosecution sought leave to appeal, which the Supreme Court granted. 497 Mich 861 (2014).

In an opinion by Justice MARKMAN, joined by Chief Justice YOUNG and Justices KELLY, ZAHRA, and BERNSTEIN, the Supreme Court *held*:

Because the jurors were conscious of the gravity of the task before them and the manner in which that task was to be carried out, the two primary purposes served by the juror's oath, the error of failing to properly swear the jury in this case did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

1. Because defendant did not object to the trial court's failure to properly swear the jury and therefore did not preserve the issue for appellate review, relief could be granted only if defen-

dant (the person asserting that an error occurred) satisfied the four-pronged plain-error test set forth in *People v Carines*, 460 Mich 750 (1999), by showing (1) that an error occurred, (2) that the error was plain, that is, clear or obvious, and (3) that the error affected substantial rights, that is, that the outcome of the lower court proceedings was affected. If these elements are satisfied, the fourth *Carines* prong requires the appellate court to exercise its discretion in deciding whether to reverse, and (4) relief is warranted only when the appellate court determines that the plain, forfeited error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

2. The parties agreed that the failure to properly swear the jury constituted a plain error that satisfied the first and second *Carines* prongs, but disagreed about the third and fourth prongs. Even assuming that defendant had established the third prong, however, the trial court's failure did not seriously affect the fairness, integrity, and public reputation of the judicial proceedings in this case and defendant did not even argue that he was actually innocent. The fourth *Carines* prong is meant to be applied on a case-specific and fact-intensive basis. The operative inquiry is whether the error of failing to properly swear the jury in the particular case seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

3. The oath found in MCR 2.511(H)(1) imposes three duties on jurors: (1) to justly decide the questions submitted to them, (2) to render a true verdict, and (3) to do those things only on the evidence introduced and in accordance with the instructions of the court. The oath represents a solemn promise on the part of each juror to do his or her duty according to the dictates of the law to see that justice is done. The oath is administered to ensure that the jurors pay attention to the evidence, observe the credibility and demeanor of the witnesses, and conduct themselves at all times as befits one holding an important position.

4. The error here did not undermine the broader pursuits and values that the oath seeks to advance, however. One of the primary purposes of the oath (imparting to the jury members their duties as jurors) was alternatively fulfilled in large part by the trial court's instructions prescribing the particulars of the jurors' duties. The court instructed the jurors (1) that it was their responsibility to decide the facts of the case solely on the basis of the evidence presented and the law as the court gave it to them, (2) that they should not consider any other information regarding the trial that was not presented in the courtroom, (3) that they

should not discuss the case among themselves until deliberations began, and (4) that they should keep open minds about the case, setting aside any bias and prejudice. The court also explained the concepts of the presumption of innocence and reasonable doubt. The court's instructions encompassed in even greater detail duties equivalent to those prescribed in the oath.

5. Another virtue of the juror's oath is the powerful symbolism and sense of duty it imbues the oath-taker with and casts on the proceedings. That virtue was not lost in these proceedings. Each juror took a solemn oath to answer questions truthfully during voir dire, and each stated that he or she could be fair and impartial. In addition, before the start of the trial, the trial court instructed the jurors that they would be asked to stand and swear to perform their duty to try the case justly and reach a true verdict. The jurors then stood and the court clerk asked them to solemnly swear to answer the questions truthfully, to which the jurors collectively replied, "I do." The trial court then thoroughly explained to the jurors their duties and responsibilities. Finally, at the end of trial, the court reminded the jurors that they had taken an oath to return a true and just verdict based only on the evidence and the court's instructions on the law. Although these alternative efforts were not a perfect substitute for the oath required by MCR 2.511(H)(1), there was no reason to believe that the jurors did not understand the dignity and solemnity of the proceedings.

Court of Appeals' order vacated, convictions and sentences reinstated, and case remanded to Court of Appeals for consideration of defendant's remaining claims on appeal.

Justice VIVIANO, joined by Justice MCCORMACK, dissenting, stated that the juror's oath plays an essential role in every criminal trial and that the majority's holding rendered meaningless the requirement that those who judge another person's guilt or innocence do so under the solemn obligation and sanction of an oath or affirmation. Justice VIVIANO agreed that the issue was properly reviewed under the plain-error standard and that the error here was plain. After detailing the long history, significance, and meaning of what constitutes a trial by jury, Justice VIVIANO concluded that the Sixth Amendment necessarily requires a sworn jury and that the failure to swear the jury amounted to a literal deprivation of defendant's Sixth Amendment right to a jury trial. Further, he would have held that an unsworn jury constitutes a structural error because the juror's oath is woven into the very fabric of a trial and defies any attempt at quantifying the consequences of its absence as it relates to the jury's

> verdict. As a result, it is not amenable to the prejudice inquiry under the third *Carines* prong. With respect to the fourth *Carines* prong, Justice VIVIANO observed that although the majority began its analysis with that prong, there is substantial overlap between the characteristics of structural errors (that they necessarily render a trial fundamentally unfair) and the standard under the fourth prong (that the error has a serious effect on the fairness, integrity, and public reputation of the proceedings). The fact that a defendant has proved that a particular error is structural should also be sufficient to make the presumptive case that the fairness, integrity, or public reputation of the proceedings have been seriously affected. Adopting this approach—one that recognizes that a structural error provides a rebuttable presumption that the fairness of the proceedings was seriously affected while allowing the prosecution to identify aspects of the trial showing that the fairness, integrity, and public reputation of the proceedings were not seriously affected despite the structural error—would yield an approach to unpreserved structural errors (such as that in this case) that clarifies and better harmonizes the caselaw in this area. Employing this framework, Justice VIVIANO would have held that the failure to swear the jury had a fundamental and serious effect on the integrity of the proceedings; the instances in the trial record that the majority cited to conclude otherwise (features present in every criminal case) did not mitigate the fundamental unfairness that results when a defendant is tried by an unsworn jury.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Thomas M. Chambers*, Assistant Prosecuting Attorney, for the people.

Kristina Larson Dunne for defendant.

Amici Curiae:

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *B. Eric Restuccia*, Deputy Solicitor General, for the Attorney General.

Peter Jon Van Hoek for the Criminal Defense Attorneys of Michigan.

MARKMAN, J. This case presents a fundamental question that appellate courts often confront: whether to afford relief on the basis of a claim of error not raised in the trial court. As a general rule, appellate courts will not grant relief on belated claims of error unless the proponent establishes, among other things, that the unpreserved error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. Defendant here, who raised for the first time on appeal a claim that the trial court gave the wrong juror's oath, has failed to meet this burden. Our review of the record reveals that the jurors were conscious of the gravity of the task before them and the manner in which that task was to be carried out, the two primary purposes served by the juror's oath. Thus, we cannot say that the error here of failing to properly swear the jury seriously affected the fairness, integrity, or public reputation of the judicial proceedings. We therefore vacate the Court of Appeals' order holding to the contrary and reinstate defendant's convictions and sentences.

I. FACTS AND HISTORY

On February 28, 2012, Ashley Conaway and Abreeya Brown were abducted, tortured, and murdered. A month later, their bodies were found buried in a shallow grave, and defendant Brandon Cain and four others were charged in connection with the victims' deaths.[1] All five men were tried at a single trial with two separate juries, one for Cain and a codefendant

[1] Specifically, defendant was charged with two counts of first-degree premeditated murder, MCL 750.316(1)(a), two counts of felony murder, MCL 750.316(1)(b), two counts of torture, MCL 750.85, two counts of unlawful imprisonment, MCL 750.349b, carrying a firearm during the commission of a felony, MCL 750.227b, and being a felon in possession of a firearm, MCL 750.224f.

and another for the remaining codefendants. After three days of jury voir dire, defendant's jury was selected. At the start of trial, the court instructed the jury, "I will now ask you to stand and swear to perform your duty to try the case justly and to reach a true verdict." The clerk proceeded to swear in the jury, but mistakenly read the oath given to prospective jurors before voir dire:

> *The Clerk*: You do solemnly swear or affirm that you will true answers make to such questions as may be put to you touching upon your qualifications to serve as jurors in the cause now pending before the Court [sic]?[2]
>
> [*Jurors*]: (Collectively) I do.

There was no objection to the failure to administer the proper oath, although no one disputes that the oath given was incorrect.[3]

A lengthy trial followed, at the end of which the jury convicted defendant as charged. He was sentenced to mandatory terms of life in prison without parole for the murder convictions and various lesser term-of-years sentences for the remaining convictions. On appeal, defendant raised for the first time a challenge to the trial court's failure to properly swear the jury. Defendant's appellate counsel filed a motion for peremptory reversal of his convictions, which the Court of Appeals granted in an order, stating, "The failure to properly swear the jury is a structural error requiring a new trial. *People v Allan*, 299 Mich App 205; 829 NW2d 319 (2013)." *People v Cain*, unpublished order of the Court of Appeals, entered May 2, 2014 (Docket No. 314342). The Court remanded "for a new trial with a properly sworn jury." *Id*.

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[2] Bracketed "sic" in original.

[3] The text of the correct oath, which is provided in MCR 2.511(H)(1), is set forth in Part III(C) of this opinion. See also MCL 768.14.

The prosecutor then sought an appeal in this Court, and we granted leave to appeal on the following question:

> [W]hether the Court of Appeals erred in determining that the failure to properly swear the jury, even in the absence of a timely objection, is a structural error requiring a new trial. [*People v Cain*, 497 Mich 861 (2014).]

II. STANDARD OF REVIEW

Whether the failure to properly swear the jury, even in the absence of a timely objection, requires that the defendant be afforded a new trial is a question of law, and such questions are reviewed de novo. *People v Chenault*, 495 Mich 142, 159; 845 NW2d 731 (2014).

III. ANALYSIS

A. UNPRESERVED ERRORS

Defendant did not object to the trial court's failure to properly swear the jury. His claim on appeal and the Court of Appeals' decision to afford relief therefore implicate the general and longstanding rule in Michigan that "issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances." *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). The essential justification for this rule is fairness, both to litigants, who are best equipped to respond to alleged errors at the time they occur, and to the public, which must bear the cost of new trials that could have been avoided with a timely objection. See *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999) ("[A] contemporaneous objection provides the trial court 'an opportunity to correct the error, which could thereby obviate the necessity of further legal proceedings and

would be by far the best time to address a defendant's constitutional and nonconstitutional rights.' "), quoting *Grant*, 445 Mich at 551. As this Court recently explained in *People v Vaughn*, 491 Mich 642, 653-654; 821 NW2d 288 (2012): "This Court 'has long recognized the importance of preserving issues for appellate review.' As a result, '[t]his Court disfavors consideration of unpreserved claims of error,' even unpreserved claims of constitutional error." (Citations omitted; alteration in original.)

The United States Supreme Court has also long recognized the importance of preserving issues for appellate review. As it has explained:

> If an error is not properly preserved, appellate-court authority to remedy the error (by reversing the judgment, for example, or ordering a new trial) is strictly circumscribed. There is good reason for this; "anyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal."
>
> This limitation on appellate-court authority serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them. That court is ordinarily in the best position to determine the relevant facts and adjudicate the dispute. In the case of an actual or invited procedural error, the district court can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome. And of course the contemporaneous-objection rule prevents a litigant from " 'sandbagging' " the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor. [*Puckett v United States*, 556 US 129, 134; 129 S Ct 1423; 173 L Ed 2d 266 (2009) (citations omitted).]

This is why the United States Supreme Court and this Court adopted the plain-error test in *United States v*

Olano, 507 US 725, 735-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993), and *Carines*, 460 Mich at 763, respectively, and why *Vaughn*, 491 Mich at 655, held that "[a]lthough the violation of the right to a public trial is among the limited class of constitutional violations that are structural in nature," a defendant is still not entitled to relief unless he or she can satisfy the four requirements set forth in *Carines*.

Appellate courts may grant relief for unpreserved errors if the proponent of the error can satisfy the "plain error" standard, which has four parts (the "*Carines* prongs"). The first three *Carines* prongs require establishing that (1) an error occurred, (2) the error was "plain"—i.e., clear or obvious, and (3) the error affected substantial rights—i.e., the outcome of the lower court proceedings was affected. *Carines*, 460 Mich at 763. If the first three elements are satisfied, the fourth *Carines* prong calls upon an appellate court to "exercise its discretion in deciding whether to reverse," and (4) relief is warranted only when the court determines that the plain, forfeited error resulted in the conviction of an actually innocent defendant or " ' "seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings". . . .' " *Id.* (citation omitted; first alteration in original). While "[m]eeting all four prongs is difficult, 'as it should be,' " *Puckett*, 556 US at 135, the plain-error test affords defendants sufficient protection because, as *Vaughn*, 491 Mich at 655 n 42, explained:

> [A]pplication of a plain-error analysis to unpreserved structural error does not deny that error "close consideration," . . . especially because the plain-error analysis . . . requires reviewing courts to consider carefully whether any forfeited error either resulted in the conviction of an

> actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. [Citations omitted.]

In the present case, the parties generally agree that the trial court's failure to properly swear the jury constitutes a plain error that satisfies the first and second *Carines* prongs.[4] The parties disagree, however, about the third and fourth *Carines* prongs. We need not

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[4] Whereas the prosecutor concedes that failure to properly swear the jury constituted plain error in that the juror's oath is plainly mandated under MCR 2.511(H)(1), defendant, as well as the dissent, couch defendant's claim in the Sixth Amendment right to a jury trial. We need not decide at this time whether the error here was limited to a violation of a court rule, as the prosecutor argues, or was a structural constitutional error, as defendant argues, because it is undisputed that since this is an unpreserved error, defendant must satisfy the plain-error standard of *Carines* in either event. See *Vaughn*, 491 Mich at 666-667 ("[E]ven if defendant can show that the error satisfied the first three *Carines* requirements, we 'must exercise . . . discretion' and only grant defendant a new trial if the error 'resulted in the conviction of an actually innocent defendant' or seriously affected the fairness, integrity, or public reputation of judicial proceedings. Although denial of the right to a public trial is a structural error, it is still subject to this requirement."), quoting *Carines*, 460 Mich at 763 (citation omitted); see also *Johnson v United States*, 520 US 461, 469; 117 S Ct 1544; 137 L Ed 2d 718 (1997) ("[W]e need not decide [whether the error is structural] because, even assuming that [it is], it does not meet the final requirement of [the plain-error test]."); *United States v Turrietta*, 696 F3d 972, 976 n 9 (CA 10, 2012) ("Whether an error can be properly characterized as 'structural' has nothing to do with plain error review . . . ."). Quoting *Carines*, 460 Mich at 774, defendant himself acknowledged in his brief in this Court that "it is ultimately unnecessary for this Court to parse the meaning of the words structural or non-structural, because for both types of error a Defendant must show that there was plain error . . . and '. . . the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.' " (Emphasis omitted.) This approach is consistent with the well-established principle that "we will not reach constitutional issues that are not necessary to resolve a case." *IBM v Dep't of Treasury*, 496 Mich 642, 662 n 67; 852 NW2d 865 (2014) (opinion by VIVIANO, J.) (quotation marks and citation omitted).

resolve the parties' dispute over the third *Carines* prong because, even assuming defendant has established that element, we are not persuaded that the trial court's failure to properly swear the jury seriously

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Although we need not reach the issue of whether the error here was a structural constitutional error, we would be remiss in light of the dissent's analysis not to point out the following:

(a) The United States Supreme Court has "found an error to be 'structural' . . . only in a very 'limited class of cases' "—complete denial of counsel, a biased trial judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and defective reasonable-doubt instructions. *Neder v United States*, 527 US 1, 8; 119 S Ct 1827; 144 L Ed 2d 35 (1999) (citations omitted).

(b) "No federal court in the history of American jurisprudence has held the constitutional guarantee of trial by jury to necessarily include trial by sworn jury." *Turrietta*, 696 F3d at 982.

(c) This Court has held that even *actual* juror misconduct, such as lying about one's qualifications to serve as a juror, is not structural constitutional error, *People v Miller*, 482 Mich 540, 556; 759 NW2d 850 (2008), and at least one court has held that there is "no reason to treat a failure to administer the oath to the jury as more fundamental in nature—and thus 'structural'—than the jurors' *actual* performance of their duties in conformance with that oath, or the jurors' eligibility or competence to be jurors," *State v Vogh*, 179 Or App 585, 596; 41 P3d 585 (2002) (emphasis added).

(d) The dissent's repeatedly expressed characterization of the oath as being literally "indispensable" is incompatible with its own recognition that a defendant deprived of this right is not entitled to relief unless the plain-error test is satisfied.

(e) The dissent's theory that "the structural nature of the error presumptively establishes the fourth prong" is inconsistent with this Court's recent holding in *Vaughn*, 491 Mich at 654, 667, that even with regards to a structural error, "a defendant is not entitled to relief unless he can establish . . . that the error . . . seriously affected the fairness, integrity, or public reputation of judicial proceedings" and that "[w]hile 'any error that is "structural" is likely to have *an* effect on the fairness, integrity or public reputation of judicial proceedings,' the plain-error analysis requires us to 'consider whether an error "*seriously*" affected those factors.' " Quoting *Barrows v United States*, 15 A3d 673, 679-680 (DC, 2011).

affected the fairness, integrity, or public reputation of the judicial proceedings in this case and defendant does not even argue that he is actually innocent.

B. FOURTH *CARINES* PRONG

The fourth *Carines* prong embodies the general rule that an appellate court will not correct errors that a party failed to raise below. Reversal is required only in the most serious cases, those in which the error contributed to the conviction of an actually innocent person or otherwise undermined the fairness and integrity of the process to such a degree that an appellate court cannot countenance that error. See *Olano*, 507 US at 736 ("[T]he discretion conferred by [the fourth prong of the plain-error standard] should be employed in those circumstances in which a miscarriage of justice would otherwise result.") (quotation marks and citation omitted).

A recent example of this Court's application of the fourth *Carines* prong can be found in *Vaughn*. In *Vaughn*, this Court addressed an unpreserved claim that the trial court violated the defendant's Sixth Amendment right to a public trial when it closed the courtroom before jury voir dire. Agreeing with the defendant that his claim satisfied the first three prongs of the *Carines* test, we nonetheless concluded that reversal was not appropriate under the fourth *Carines* prong because the underlying purposes of the public-trial guarantee were alternatively maintained. *Vaughn*, 491 Mich at 664-669. These goals, at least in the context of jury voir dire, included "ensuring a fair trial" and "reminding the prosecution and court of their responsibility to the accused and the importance of their functions[.]" *Id*. at 667. With these goals in mind, this Court reviewed the transcript of the pro-

ceedings and concluded "that both parties engaged in a vigorous voir dire process, that there were no objections to either party's peremptory challenges of potential jurors, and that each party expressed satisfaction with the ultimate jury chosen." *Id*. at 668. We also observed that the presence of the jury venire, which was derived from and representative of the public, helped to ensure that the proceedings were subject to a substantial degree of continued public review. *Id*. From our intensive review of the record, we could not conclude that the erroneous closure "seriously affected the fairness, integrity, or public reputation of judicial proceedings," *id*. at 668-669, and therefore declined to grant relief.[5] (Quotation marks and citation omitted.)

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[5] That is emphatically not to say that we viewed the Sixth Amendment right to a public trial as "meaningless" in *Vaughn*, just as we are in no way suggesting in the present case, contrary to the dissent's contention, that the right to a properly sworn jury is a "meaningless" right that can be "easily . . . dispensed with." Each is a critical right that serves a critical function within our criminal justice system. However, not *every* violation of *every* such right must result in an automatic reversal of a defendant's conviction. See *People v Beach*, 429 Mich 450, 491; 418 NW2d 861 (1988) ("We require a fair trial, not a perfect trial."); *People v France*, 436 Mich 138, 142, 161; 461 NW2d 621 (1990) (noting that this Court abolished the "strict rule requiring reversal of a conviction in the event of communication with a deliberating jury outside the courtroom and the presence of counsel" because the "rule of automatic reversal does not serve the best interests of justice and, in many instances, it may very well serve to defeat justice"). Contrary to the dissent's contention, we give considerable "meaning" to the oath by requiring that it be given, by recognizing that if it is not given a material error has occurred, and by assessing the need to reverse because of the error by comparing the purposes served by the oath with the alternative means by which those purposes have been furthered. We further give "meaning" to the oath by our recognition that alternative means of furthering the purposes of the oath are *imperfect* alternatives that require careful judicial review and analysis. That is, we give "meaning" to the oath by recognizing that it constitutes the ideal and by comparing any alternative means of conduct with that ideal.

As evidenced by *Vaughn*, the fourth *Carines* prong is meant to be applied on a case-specific and fact-intensive basis. See also *Puckett*, 556 US at 142 ("[A] *per se* approach to plain-error review is flawed.") (quotation marks and citation omitted). The operative inquiry is whether the trial court's error of failing to properly swear the jury *in the particular case* "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Carines*, 460 Mich at 774. It is to that inquiry that we now turn.

C. APPLICATION

Consistently with *Vaughn*, we must first discern the purposes and goals of the juror's oath. The language of the juror's oath reads:

> "Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God." [MCR 2.511(H)(1). See also MCL 768.14.]

The oath imposes on the jurors three duties: (1) to "justly decide the questions submitted," (2) to "render a true verdict," and (3) to do these things "only on the evidence introduced and in accordance with the instructions of the court." Of course, the oath is more than a mere laundry list of juratorial duties. Instead,

> [t]he oath represents a solemn promise on the part of each juror to do his duty according to the dictates of the law to see that justice is done. This duty is not just a final duty to render a verdict in accordance with the law, but the duty to act in accordance with the law at all stages of trial. The oath is administered to insure that the jurors pay attention

> to the evidence, observe the credibility and demeanor of the witnesses and conduct themselves at all times as befits one holding such an important position. [*People v Pribble*, 72 Mich App 219, 224; 249 NW2d 363 (1976).]

Our review of the record in this case reveals that the error of failing to properly swear the jury did not undermine the proceedings with respect to the broader pursuits and values that the oath seeks to advance.

One of the primary purposes of the oath—to impart to the members of the jury their duties as jurors—was alternatively fulfilled in large part by the trial court's instructions prescribing the particulars of the jurors' duties. Immediately before the swearing of the oath, the trial court instructed the jurors, "I will now ask you to stand and swear to perform your duty to try the case justly and to reach a true verdict." Following the oath, the court instructed the jurors that it was their responsibility to decide the facts of the case solely on the basis of the evidence presented and the law as the court gave it to them, that they should not consider any other information regarding the trial that was not presented in the courtroom, that they should not discuss the case among themselves until deliberations begin, and that they should keep an open mind about the case, setting aside any bias and prejudice. The trial court also explained the concepts of the presumption of innocence and reasonable doubt, instructing the jurors to return a verdict of not guilty unless they unanimously decided that the prosecutor had proved each element of the offenses beyond a reasonable doubt. In addition, before giving the final instructions, the trial court told the jurors, "Remember that you have taken an oath to return a true and just verdict based only on the evidence and my instructions on the law." And during the final instructions, the judge reiterated the previously described

instructions, including that the jury was to decide the case on the basis of the evidence presented during the trial and the law as the court gave it to them, setting aside all bias and prejudice. These instructions encompassed, in even greater detail, duties equivalent to those prescribed in the oath.

We recognize that the value of the oath as a whole is probably greater than the sum of its individual parts. The juror's oath involves a conscious promise to adopt a particular mindset—to approach matters fairly and impartially—and its great virtue is the powerful symbolism and sense of duty it imbues the oath-taker with and casts on the proceedings. That virtue, however, was not lost in these proceedings. Each juror took a solemn oath to answer questions truthfully during voir dire, and each stated that he or she could be fair and impartial. In addition, before the start of the trial, the trial court told the jurors, "I will now ask you to stand and swear to perform your duty to try the case justly and to reach a true verdict." The jurors then stood and the court clerk asked, "You do solemnly swear or affirm that you will true answers make to such questions as may be put to you touching upon your qualifications to serve as jurors in the cause now pending before the Court?" to which the jurors collectively replied, "I do." Then, as discussed earlier, the trial court thoroughly explained to the jurors their duties and responsibilities. Finally, at the end of trial, the court reminded the jurors, "Remember that you have taken an oath to return a true and just verdict based only on the evidence and my instructions on the law." Although this was not a perfect substitute for the oath required by MCR 2.511(H)(1), we have no reason to believe that the jurors in this case as a result of these alternative efforts to

inculcate in them a proper sense of their obligations did not understand the dignity and solemnity of the proceedings.[6]

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[6] Although the oath that was administered in this case at the beginning of the trial was obviously an incorrect oath, it is noteworthy that MCR 2.511(H)(1) states:

> The jury must be sworn by the clerk *substantially* as follows:
>
> "Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God." [Emphasis added.]

In addition, MCL 768.14 states:

> The following oath shall be administered to the jurors for the trial of all criminal cases: "You shall well and truly try, and true deliverance make, between the people of this state and the prisoner at bar, whom you shall have in charge, according to the evidence and the laws of this state; so help you God."

Although we are in no way suggesting that the oath that was administered here was even "substantially" the oath required by MCR 2.511(H)(1) or the oath required by MCL 768.14, we would nevertheless be remiss not to note that the precise language of the oath set forth in MCR 2.511(H)(1) is not necessarily required. The dissent is correct that "[f]or as long as the institution we know as 'trial by jury' has existed, juries have been sworn." See 5 Kurland & Lerner, *The Founders' Constitution* (Chicago: University of Chicago Press, 1987), p 256 (" 'When the trial is called on, the jurors are to be sworn . . . .' "), quoting 4 Blackstone, Commentaries on the Laws of England, p *352; 1 Few, *In Defense of Trial by Jury* (American Jury Trial Foundation, 1993), p 25 ("The preamble to a statute in the 15th year of the reign of Henry VI recites that 'the trial of the life and death, lands and tenements, goods and chattels of every one of his subjects . . . touching matters of fact . . . is to be . . . made by the oaths . . . of 12 men duly summoned in his courts.") (citation omitted); *id*. at 102 ("[T]he first ordinance adopted by the Plymouth Colony in 1623 was one declaring, among other things, that 'all criminal facts' should be tried 'by the verdict of twelve honest men to be empaneled by authority, in the form of a jury upon their oaths.' ") (citation omitted); *id*. at 169 (stating that in 1774, the First

Our review of the record also shows that the trial court was particularly vigilant in attempting to ensure that the jury remained fair and impartial throughout the proceedings. When one of the codefendants decided to plead guilty, the trial court conducted voir dire of each juror to verify that the jurors would not be influenced by the codefendant's guilty plea, would retain an open mind, and could continue to be fair and impartial. In this regard, the reasoning of the United States Court of Appeals for the Tenth Circuit for declining to grant relief for a similar error is particularly persuasive:

> [A]ny threat to the integrity of the proceedings was mitigated by an otherwise fair and procedurally rigorous trial. The jury was fairly selected and clearly instructed, and the trial was open to the public and administered by an unbiased judge. Turrietta availed himself of his right to counsel and received an unfettered opportunity to put on evidence and make arguments in defense of his innocence.

Continental Congress adopted a resolution that stated "neither life, liberty nor property can be taken from the possessor, until twelve of his . . . countrymen . . . shall pass their sentence upon oath against him"). However, the dissent overlooks that the precise language of the oath used to swear the jury has never been a "fixed constant," as is evidenced by the fact that our own court rule, MCR 2.511(H)(1), and statute, MCL 768.14, contain differently worded oaths. Relatedly, we believe that the dissent incorrectly characterizes this case as a "failure to swear the jury" case or a case in which the "defendant [was] tried by an unsworn jury." Although the court clerk indisputably read the wrong oath to the jury, the jury was nevertheless sworn. They rose and solemnly swore to be truthful. Although the court rule and statute clearly required the jury to swear to something more than simply being truthful, we nevertheless believe that the dissent errs by giving no weight whatsoever to the imperfect oath-swearing process that did occur here. Although once again we acknowledge the substantial imperfections of the process, there was a very real oath-swearing that occurred, real in terms of both its substance and the dignity and solemnity of the process.

> Moreover, the record supports the government's contention that the jury understood the thrust of what the oath was designed to impart. The jurors were all sworn to tell the truth during voir dire and were on several occasions reminded by the court of their "sworn duty" to try the case truly and in accordance with the law. The admonition was reinforced over the course of the trial by a steady drumbeat of instructions stressing the importance of rendering a verdict in light of the burden of proof and based solely on the evidence presented. Between the instructions, the oath at voir dire, and the repeated references to the oath at trial, the jurors had plenty to remind them of the importance of their task. If . . . a juror was still unwilling to decide the case based on the law and evidence, it is doubtful the oath would have made a difference. [*Turrietta*, 696 F3d at 985.]

The same is true of the instant case. The record indicates that the jurors were conscious of the gravity of the task before them and the manner in which that task was to be carried out; the jurors each stated under oath that they could be fair and impartial, and the trial court thoroughly instructed them on the particulars of their duties. Just as with the constitutional right to a public trial in *Vaughn*, we require the oath for a reason; however, if the larger purposes served by requiring the oath in the first place are achieved by alternative means, the only reason for reversal would be a preference for an error-free trial, a preference only rarely achieved in the judicial annals. We rejected that concept in *Vaughn* by declining to grant relief for the defendant's deprivation of a public trial because the objectives served by that right were otherwise served, albeit imperfectly. In this case, the objectives served by the oath were also achieved by other means, albeit imperfectly. Therefore, we cannot say that the absence of the oath seriously affected the fairness, integrity, or

public reputation of the proceedings in this case.[7] Indeed, we believe that "it would be the *reversal* of a conviction such as this which would" " 'seriously affect[] the fairness, integrity and public reputation of judicial proceedings' " because " '[r]eversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.' " *Johnson*, 520 US at 470 (citations omitted; emphasis added).

The error of the Court of Appeals in arriving at the opposite conclusion stems from its failure to conduct a case-specific and fact-intensive inquiry under the fourth *Carines* prong. See *Puckett*, 556 US at 142. It does not suffice under this prong to simply state that an error "require[s] a new trial." In truth, this error stems from the *Allan* decision, which, after concluding that the failure to swear the jury satisfied the first three *Carines* prongs, did not take a case-specific approach to the fourth prong. Rather, *Allan* reasoned:

> [T]he trial court's failure to administer the oath to the jury seriously affected the fairness, integrity, and public reputation of the judicial proceedings. Because the trial court did not administer the oath to the jury, the jury did not undertake the solemn promise to act in accordance with

[7] As observed earlier, the dissent's contention that "the structural nature of the error presumptively establishes the fourth prong, shifting the burden to the prosecution to show that, in fact, the fairness, integrity, and public reputation of the proceeding were not seriously affected," is inconsistent with this Court's recent holding in *Vaughn*, 491 Mich at 654, that *even with regards to a structural error* "a defendant is not entitled to relief unless he can establish . . . that the error . . . seriously affected the fairness, integrity, or public reputation of judicial proceedings." Moreover, even under the dissent's "shifted burden" or "rebuttable presumption" approach, we believe that the prosecutor has shown that the fairness, integrity, and public reputation of the proceedings were not seriously affected and therefore that defendant is not entitled to relief.

> the law at all stages of defendant's trial. The trial court's failure to administer the oath to the jury in this case affected the integrity of the proceedings because it resulted in an invalid verdict under Michigan law. The absence of the oath deprived defendant of a means to ensure that the jury would decide the case honestly in accordance with the law and on the basis of the evidence. Administration of the oath was necessary to protect defendant's fundamental right to a trial by an impartial jury. [*Allan*, 299 Mich App at 218 (citations omitted).]

The problem with *Allan*'s analysis is that it could apply to *every* case in which the jury is improperly sworn. In *Allan*, and in this case as well, the Court should have engaged in a fact-intensive and case-specific inquiry under the fourth *Carines* prong to assess whether, in light of any "countervailing factors" on the record, *Puckett*, 556 US at 143, leaving the error unremedied would constitute a miscarriage of justice, i.e., whether the fairness, integrity, or public reputation of the proceedings was seriously affected.

IV. CONCLUSION

The failure to provide the correct oath was an error, but not one that would result in manifest injustice if left unremedied here. We do nothing to diminish the value of the juror's oath to say that its absence *in this case* did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. It is but one component—as important and as symbolic as it may be—in a larger process of fair and impartial adjudication. Because the record before us indicates that defendant was actually ensured a fair and impartial jury, we conclude that his constitutional rights were upheld and reversal is not warranted. We therefore vacate the Court of Appeals' order and reinstate defendant's convictions and sentences. We remand this

case to the Court of Appeals for consideration of defendant's remaining claims on appeal. Finally, we caution the trial court in this case, as well as other trial courts in this state, to take particular care that the error that occurred in this case be avoided in the future.

YOUNG, C.J., and KELLY, ZAHRA, and BERNSTEIN, JJ., concurred with MARKMAN, J.

VIVIANO, J. (*dissenting*).

> [H]owever *convenient* [intrusions on the right to trial by jury] may appear at first . . . let it be again remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.
>
> —Sir William Blackstone[1]

The issue in this case is whether the juror's oath, which for centuries has been thought of as the very essence of the jury, may be dispensed with as nothing more than a hollow incantation. There are few, if any, social customs more fundamental to a well-ordered society than the act of swearing an oath. Oaths are invoked in the most solemn occasions in civic life, including when citizens are called to sit in judgment of their peers. Today, the Court holds that the failure to administer the juror's oath does not seriously affect the fairness, integrity, or public reputation of this criminal case. I cannot agree with this conclusion because it

[1] 4 Blackstone, Commentaries on the Laws of England, p *350.

renders meaningless the requirement—in existence since the very origin of the jury trial—that those who judge another person's guilt or innocence do so under the solemn obligation and sanction of an oath or affirmation. The juror's oath plays an essential role in every criminal trial, one that cannot so easily be dispensed with by identifying trial features present in every criminal case, as the Court does today. For that reason, I respectfully dissent.

I. THE PLAIN ERROR STANDARD

Because defendant did not preserve his claim that the trial court failed to swear the jury, this issue is reviewed under the plain error standard.[2] Under this standard, appellate courts may grant relief if the person asserting the error can satisfy four elements (the *Carines* prongs): (1) an error occurred; (2) the error is "plain," that is, clear or obvious; and (3) the plain error affected substantial rights, that is, affected the outcome of the lower court proceedings.[3] If these three elements are satisfied, the fourth element calls on an appellate court to "exercise its discretion in deciding whether to reverse."[4] Relief is only warranted when the court determines that the plain, forfeited error resulted in the conviction of an actually innocent defendant or "seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings . . . ."[5]

As discussed below, I would hold that the failure to swear the jury amounted to a literal deprivation of

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[2] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[3] *Id*.

[4] *Id*.

[5] *Id*. (quotation marks and citation omitted; first alteration in original).

defendant's Sixth Amendment right to a jury trial.[6] I would also hold that this error was plain. Finally, I would hold that an unsworn jury constitutes a structural error that is not amenable to the prejudice inquiry under the third *Carines* prong. These three premises establish that the failure to swear the jury has a fundamental and serious effect on the integrity of the proceedings; the features of the trial record that the majority cites to conclude otherwise do not mitigate the fundamental unfairness that results when a defendant is tried by an unsworn jury.

II. THE SIXTH AMENDMENT GUARANTEES A SWORN JURY

The first question—one that the majority does not address—is whether the trial court committed an error in failing to properly swear the jury. The prosecution concedes that the trial court erred by failing to give the oath required by court rule and statute.[7] However, the basis of defendant's argument is that the trial court's error was constitutional in nature, as evidenced by his citation of the Court of Appeals' decision in *People v Allan*[8] and his contention that the error in this case was structural. In *Allan*,[9] the Court of Appeals relied

[6] The majority's reference to the constitutional avoidance doctrine to justify skipping over the first three prongs of the plain error test in this case is misplaced. *Ante* at 117 n 4. As explained below, the fact that an error is constitutional and structural has an undeniable effect on the analysis under the fourth *Carines* prong. This important nuance in the legal analysis is lost by avoiding the first three prongs simply because the ultimate result might be the same. More importantly, when the constitutional analysis would yield a different, more favorable result for the defendant, as I find it does in this case, the constitutional avoidance doctrine has no application.

[7] See MCR 2.511(H)(1); MCL 768.14.

[8] *People v Allan*, 299 Mich App 205; 829 NW2d 319 (2013).

[9] *Id*. at 211, 213-215.

on an earlier Court of Appeals case, *People v Pribble*, which held that "[t]he oath is designed to protect the fundamental right of trial by an impartial jury."[10] Neither *Pribble* nor *Allan* provided an extended constitutional analysis, but they present an important issue not yet squarely addressed by this Court or the United States Supreme Court: whether the juror's oath is constitutionally required as part of the Sixth Amendment's guarantee to a trial by jury.[11]

The language of the Sixth Amendment reads, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."[12] In interpreting the constitutional phrase "trial by jury," the guiding principle is "to give the text the meaning it was understood to have at the time of its adoption by the people."[13] The language of the Constitution is the primary indicator of that understanding.[14] When interpreting the Constitution, we presume that "its words and phrases were used in their normal and ordinary as distinguished from technical

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[10] *People v Pribble*, 72 Mich App 219, 224; 249 NW2d 363 (1976).

[11] In the one United States Supreme Court decision that even remotely dealt with the issue of unsworn jurors, *Baldwin v Kansas*, 129 US 52, 56; 9 S Ct 193; 32 L Ed 640 (1889), the Court found that "no Federal question is presented . . . of which this court can take jurisdiction" because the defendant had failed to properly preserve the claim of error at trial, as required by a federal statute in effect at that time.

[12] US Const, Am VI; see also *Duncan v Louisiana*, 391 US 145; 88 S Ct 1444; 20 L Ed 2d 491(1968) (incorporating the Sixth Amendment right to jury trial against the states under the Fourteenth Amendment); see also Const 1963, art 1, § 20.

[13] *Boumediene v Bush*, 553 US 723, 843; 128 S Ct 2229; 171 L Ed 2d 41 (2008) (Scalia, J., dissenting), citing *Crawford v Washington*, 541 US 36, 54; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

[14] See, e.g., *Gibbons v Ogden*, 22 US (9 Wheat) 1, 188; 6 L Ed 23 (1824) ("[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.").

meaning."[15] Our interpretation of the constitutional text "is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history."[16] This is especially so for the right to trial by jury because it is a basic fact of our constitutional heritage that the ratification of the Sixth Amendment marked the preservation of a long-cherished institution born of English common law.[17]

For as long as the institution we know as "trial by jury" has existed, juries have been sworn. Oaths were already a deeply embedded custom in civic society when the jury trial emerged as the accepted mode of criminal trial.[18] When that happened, "[the oath] became an integral part of the jury trial and by the earliest records both jurors and witnesses were sworn."[19] Indeed, from the inception of the jury trial, "[i]t was the power of the oath which decided the case . . . ."[20] By the time Sir William Blackstone wrote

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[15] *Dist of Columbia v Heller*, 554 US 570, 576; 128 S Ct 2783; 171 L Ed 2d 637 (2008) (quotation marks and citation omitted).

[16] *Smith v Alabama*, 124 US 465, 478; 8 S Ct 564; 31 L Ed 508 (1888).

[17] *Apprendi v New Jersey*, 530 US 466, 477; 120 S Ct 2348; 147 L Ed 2d 435 (2000) ("[T]he historical foundation for our recognition of [the constitutional protections of the Sixth Amendment] extends down centuries into the common law."); *Gannett Co, Inc v DePasquale*, 443 US 368, 385; 99 S Ct 2898; 61 L Ed 2d 608 (1979) ("The common-law right to a jury trial . . . is explicitly embodied in the Sixth . . . Amendment[].").

[18] Silving, *The Oath: I*, 68 Yale L J 1329, 1330 (1959) ("The familiar oath of the present-day courtroom has been traced to a pre-religious, indeed, pre-animistic period of culture."); see also, generally, White, *Oaths in Judicial Proceedings and Their Effect upon the Competency of Witnesses*, 51 Am L Reg 373 (1903).

[19] *Oaths in Judicial Proceedings*, 51 Am L Reg at 386.

[20] *The Oath: I*, 68 Yale L J at 1365; see also Thayer, *"Law and Fact" in Jury Trials*, 4 Harv L Rev 147, 156-157 (1890) (describing the emergence of trial by jury and stating that "it was the jury's oath, or rather their verdict, that 'tried' the case").

his Commentaries on the Laws of England in the mid-eighteenth century, the role of the oath had become so firmly ensconced in the concept of the jury that the body known as "the jury" did not exist until its members swore an oath:

> When a sufficient number of persons impaneled, or *talesmen*, appear, they are then separately sworn, well and truly to try the issue between the parties, and a true verdict to give according to the evidence, *and hence they are denominated the jury,* jurata *and jurors*, [*namely*] juratores.[21]

The essence of the jury is, and always has been, the swearing of the oath.[22] This basic historical fact finds compelling support in the etymological roots of the word "jury," which can be traced back to the French words "*juré*" and "*jurée*" and the Latin word "*jurare*," which mean "sworn," "oath," and "to swear," respectively.[23] The English ancestor of our "jury" was called

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[21] 3 Blackstone, p *365 (emphasis added; first italics in original).

[22] *The Oath: I*, 68 Yale L J at 1361 ("Even that distinctive English feature—the jury trial—grew out of Germanic oath practices."); 1 Pollock & Maitland, *The History of English Law* (2d ed) (Cambridge: Oxford University Press, 1968), bk I, ch VI, p 138 ("The essence of the jury . . . seems to be this: a body of neighbors is summoned by some public officer *to give upon oath* a true answer to some question.") (emphasis added); Forsythe, *History of Trial by Jury* (2d ed) (Jersey City: Frederick D. Linn & Company, 1875), pp 6-7 ("One important feature of the institution is by no means peculiar to it. I mean the fact that it is a sworn tribunal—that its members decide under the solemn sanction of an oath.").

[23] *The Oxford Dictionary of English Etymology* (1974), p 500; *Cassell's Latin Dictionary* (1968), pp 331, 846 (rendering it as "*iurare*"); 1 *Heath's Standard French and English Dictionary: French—English* (London: D.C. Heath & Company, 1963), p 478. And the more distant etymological associates of "jury" include "*jurat*," which means "[a] person under oath," 9 *The Anglo-American Encyclopedia and Dictionary* (New York: J. A. Hill & Company, 1904), p 2417, and "*juratory*," which means "comprising an oath," Samuel Johnson, *A Dictionary of the English Language* (1785).

"the *jurata*,"[24] which itself was defined as "[a] jury of twelve men *sworn*."[25] Furthermore, at the time our Constitution was written, "jury" was defined as "a company of men, as twenty-four, or twelve, *sworn* to deliver a truth upon such evidence as shall be delivered them touching the matter in question."[26] Nearly every definition of "jury" since then includes reference to swearing an oath.[27] In other words, the oath was, and has always been, a defining criterion of "jury."[28] In

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[24] Thayer, *The Jury and Its Development*, 5 Harv L Rev 249, 259 (1892).

[25] 2 *Bouvier's Law Dictionary* (Rawle's rev, 1897), p 56 (emphasis added).

[26] Samuel Johnson, *A Dictionary of the English Language* (1785) (emphasis added); see also Bailey, *An Universal Etymological English Dictionary* (20th ed, 1763) (defining "jury" as "[in *Common Law*] a Company of twenty-four or twelve Men, *sworn* to inquire of the Matter of Fact, and declare the Truth upon such evidence as shall be given to them, relating to the Matter of Fact") (bracketing in original; emphasis added); Potts, *A Compendious Law Dictionary* (1803), p 406 (defining "jury" as "a certain number of persons *sworn* to enquire of and try some matter of fact, and to declare the truth upon such evidence as shall be laid before them") (emphasis added).

[27] See, e.g., *Random House Webster's College Dictionary* (2001) (defining "jury" as "a group of persons *sworn* to render a verdict or true answer on a question or questions submitted to them, esp. such a group selected by law and *sworn* to examine the evidence in a case and render a verdict to a court") (emphasis added); *The Oxford Dictionary of English Etymology* (1974) ("[A] company of men *sworn* to give a verdict.") (emphasis added); *Black's Law Dictionary* (4th ed) ("A certain number of men, selected according to law, and *sworn* (*jurati*) to inquire of certain matters of fact, and declare the truth upon evidence to be laid before them."); *Funk and Wagnalls Practical Standard Dictionary of the English Language* (Chicago: J. G. Ferguson & Associates, 1945), p 628 ("A body of persons (usually twelve) legally qualified and summoned to serve on a judicial tribunal, *there sworn* to try well and truly a cause and give a true verdict according to the evidence.") (emphasis added).

[28] Indeed, oaths are so integral to the concept of a jury that, in common parlance, one who refuses to take a required oath is deemed a "nonjuror." See *Merriam-Webster's Collegiate Dictionary* (2014).

light of this deep etymological pedigree, it seems quite implausible that the Framers, who lived in a time in which society placed great emphasis on oaths,[29] intended anything other than a sworn jury when they drafted the Sixth Amendment. The term "jury" in the Sixth Amendment naturally referred to a "sworn" jury; adding the descriptor "sworn" would have seemed redundant.

That the Framers understood the word "jury" to necessarily include a requirement that the decision-making body swear an oath finds support in a contextual reading of the Constitution, particularly the provision granting the Senate the power to try all impeachments.[30] An early version of Article I, § 3 simply authorized the Senate to try all impeachments.[31] However, it was later revised to explicitly state that "every member shall be on oath[.]"[32] Elucidating the oath requirement in his Commentaries on the Constitution, Justice Joseph Story wrote:

> [T]he Senate, when sitting as a court of impeachment, 'shall be on oath or affirmation'; a provision which, as it appeals to the conscience and integrity of the members by the same sanctions which apply to judges and jurors who sit in other trials, will commend itself to all persons who deem the highest trusts, rights, and duties worthy of the same protection and security, at least, as those of the humblest order. It would, indeed, be a monstrous anomaly,

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[29] See Amar, *Sixth Amendment First Principles*, 84 Geo L J 641, 694 (1996) (stating that in the Framers' world, "great weight was placed on oaths"). Indeed, the very first statute enacted by Congress assembled under the Constitution was titled, "An Act to regulate the Time and Manner of administering certain Oaths." 1 Cong Ch 1; 1 Stat 23.

[30] See US Const, art I, § 3, cl 6.

[31] 2 Farrand, *The Records of the Federal Convention of 1787* (1937 rev ed) (New Haven: Yale University Press, 1966), p 497.

[32] See *id*. at 552-553.

> that the highest officers might be convicted of the worst crimes without any sanction being interposed against the exercise of the most vindictive passions, *while the humblest individual has a right to demand an oath of fidelity from those who are his peers and his triors*.[33]

This passage is striking for two reasons. First, Story's early account of the content of the Constitution sheds light on the common understanding of the constitutional right to jury trial at the time, namely that the accused "has a right to demand an oath of fidelity from those who are his peers and his triors."[34] Second, the fact that our Framers took care to ensure that senators swore an oath before serving in a juratorial capacity is strong textual evidence that the concept of jury trial enshrined in the Constitution necessarily presupposed a *sworn* jury. Whereas the absence of any mention of an "oath" in the Sixth Amendment is, of course, explained by the fact that it is inherent in the concept and definition of "jury," the same cannot be said for senators sitting as a court of impeachment; hence, the express inclusion of the oath requirement during the drafting process.

Finally, it bears mentioning that numerous courts have similarly concluded that the oath is part of the constitutional guarantee of trial by jury.[35] In fact,

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[33] 1 Story, Commentaries on the Constitution of the United States (4th ed) (Boston: Little, Brown, & Company, 1873), p 549 (originally published in 1833) (emphasis added).

[34] *Id*.

[35] See, e.g., *State v Barone*, 329 Or 210, 226; 986 P2d 5 (1999) ("The jury oath is designed to vindicate a defendant's fundamental constitutional rights to a fair trial before an impartial jury."); *State v Godfrey*, 136 Ariz 471, 473; 666 P2d 1080 (Ariz App, 1983) ("[T]he juror's oath is an essential element of the constitutional guarantee to a trial by an 'impartial' jury."); *Steele v State*, 446 NE2d 353, 354 (Ind App, 1983) ("Most importantly the oath serves as a safeguard of a criminal defendant's fundamental constitutional right to trial by an impartial

"[w]ith a remarkable degree of consensus, courts across the nation agree that swearing the jury is an integral, essential, fundamental component of a fair trial."[36] The majority relies on *United States v Turrietta*[37] for the proposition that no federal court has expressly recognized the Sixth Amendment right to a sworn jury, but its myopic citation ignores the entirety of the *Turrietta* court's constitutional analysis.[38] I need not reproduce *Turrietta*'s constitutional discussion here, but its summary of the constitutional analysis will suffice to show that it supports my conclusion:

> In short, the oath is bound up with some of the great principles giving rise to the very concept of a jury trial. With its appeal to divine judgment and its enduring impression on the conscience of the juror, the oath has 'moved seamlessly' from medieval modes of decisionmaking into the modern courtroom. Its history, together with certain common sense assumptions about the way it works in practice, reveals a strong relationship to the jury's reliability as a fact finder. Whether the relationship is strong enough to afford the oath constitutional stature is a question we leave unanswered . . . .[39]

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jury."); *Commonwealth v Banmiller,* 393 Pa 496, 497; 143 A2d 56 (1958) (swearing of the jury is "fundamental in nature, and implicit in trial by jury"); *Howard v State*, 80 Tex Crim 588, 592; 192 SW 770 (1917) ("[The defendant tried by an unsworn jury] was deprived of a constitutional as well as a statutory right."); *Slaughter v State*, 100 Ga 323, 330; 28 SE 159 (1897) ("[A] conviction by an unsworn jury is a mere nullity . . . ."); see also 47 Am Jur 2d, Jury, § 192, pp 803-804; 50A CJS, Juries, § 520, p 689.

[36] *State v Arellano*, 1998-NMSC-026, ¶ 41; 125 NM 709, 718; 965 P2d 293 (1998) (McKinnon, J., dissenting) (citing numerous examples).

[37] *United States v Turrietta*, 396 F3d 972, 982 (CA 10, 2012).

[38] See *id*. at 978-981.

[39] *Id*. at 981 (citation omitted). *Turrietta* was ultimately decided on grounds distinguishable from the present case. The panel held that even if it was a constitutional error, it was not "plain" under the governing authority at the time. *Id*. at 983. Here, however, the error was plain in

My constitutional analysis—rooted in history, original meaning, and a contextual reading of the constitutional text—is entirely consistent with that of federal and state courts that have historically recognized, implicitly and explicitly, the critical role the oath plays in trial by jury.[40]

"Whatever else it may mean in addition, the defendant's constitutional right [to trial by jury] means, always and everywhere, at least what it explicitly says: the [right to be tried by a 'jury']."[41] And a jury is not a jury until it is sworn. Indeed, to separate the oath from "jury" in the Sixth Amendment would be to disembowel all historical pedigree, etymological heritage, and common law meaning from the word "jury."[42] For these

light of the Court of Appeals' holding in *Pribble*. The *Turrietta* court also declined to grant relief under the fourth plain error prong because defense counsel had admitted that he knew about the error and waited until an unfavorable verdict to bring it to the court's attention. *Id*. at 973-974. That was textbook "sandbagging," which, as *Turrietta* observed, imperils the integrity of the judicial system just the same as the error itself. *Id*. at 985. There is no such evidence in this case.

[40] See cases cited in note 35 of this opinion; *Turrietta*, 696 F3d at 978-981; *United States v Martin*, 740 F2d 1352, 1358-1359 (CA 6, 1984) (questioning whether swearing of prospective jurors en masse was "consistent with the dignity and effectiveness which should attend federal court trials" and stating that "the defendant should be accorded the assurance that the jurors have been sworn to try his case by observing them sworn") (quotation marks and citation omitted).

[41] See *Maryland v Craig*, 497 US 836, 862; 110 S Ct 3157; 111 L Ed 2d 666 (1990) (Scalia, J., dissenting) (discussing the Sixth Amendment right of confrontation).

[42] Of course, not every question of constitutional interpretation will fall squarely within the text of a particular provision. Oftentimes, a court will be called on to apply a constitutional phrase, like "trial by jury," to factual situations approaching the outer bounds of the language's plain meaning. For instance, in *Williams v Florida*, 399 US 78; 90 S Ct 1893; 26 L Ed 2d 446 (1970), the Supreme Court addressed whether the Sixth Amendment guaranteed a 12-person jury. After concluding that the text, as informed by its common law heritage, was

reasons, I would hold that the Sixth Amendment

insufficient to answer the question, see *id*. at 89 (the 12-person size "appears to have been a historical accident"), the Court examined "the function that the particular feature performs and its relation to the purposes of the jury trial," *id*. at 99-100. However, unlike jury size—whose origins "rest on little more than mystical or superstitious insights" and which fluctuated over time, see *id*. at 87-88—the juror's oath represents a fixed constant in the development of the jury trial to the point that it inheres in the very word "jury." When an error constitutes a literal deprivation of a constitutional right, it is generally unnecessary to "abstract[] from the right to its purposes . . . ." *Craig*, 497 US at 862 (Scalia, J., dissenting). The genetic relationship between the oath and the jury distinguishes it from the size of the jury and *Williams*'s functional approach.

Even if *Williams*'s functional approach governed, I would have no difficulty concluding that the oath serves an indispensable function in service of the greater purposes of the constitutional right to a jury trial. To fulfill their role, jurors must "have the duty" to deliberate. *Apodaca v Oregon*, 406 US 404, 410-411; 92 S Ct 1628; 32 L Ed 2d 184 (1972) (stating that the purpose of the jury trial is fulfilled "as long as [the jury] consists of a group of laymen representative of a cross section of the community *who have the duty* and the opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant's guilt") (emphasis added). And the oath imposes that duty. Without it, those acting as jurors serve without solemn obligation or sanction, and the essential purpose of the jury trial is left unfulfilled. 2 Story, Commentaries, p 541 (stating that the core function of trial by jury cannot be achieved but "by the firm and impartial verdict of a jury sworn to do right, and guided solely by legal evidence and a sense of duty"). Moreover, the oath's directive to conscientiously deliberate and examine the evidence impartially counters the threats of complacency and overzealousness that are more apt to be found in a single, professional arbiter or prosecutor, the two evils the jury was intended to ward off. See *Williams*, 399 US at 100 (the purpose of the jury is "to prevent oppression by the Government" by providing a defendant "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge") (quotations omitted). Finally, the oath serves as the very benchmark for determining whether a defendant was afforded an impartial jury, as guaranteed by the Sixth Amendment. See *Wainwright v Witt*, 469 US 412, 423; 105 S Ct 844; 83 L Ed 2d 841 (1985) (stating that an impartial jury consists of nothing more than "jurors who will conscientiously apply the law and find the facts"). In sum, under the *Williams* functional approach, the oath serves an indispensable role in the constitutional right to a jury trial.

necessarily guarantees the right to a sworn jury and that the trial court's failure to properly swear the jury deprived defendant of this constitutional protection.

III. THE CONSTITUTIONAL VIOLATION WAS "PLAIN"

Having established that the error of failing to swear the jury was of constitutional magnitude, I turn now to assess under the second *Carines* prong whether the error was "plain, i.e., clear or obvious."[43] Nearly 40 years ago, in *Pribble*, the Court of Appeals held, "The oath is designed to protect the fundamental right of trial by an impartial jury."[44] Although it was unaccompanied by any of the relevant constitutional analysis above, *Pribble*'s holding that failure to swear the jury signals a constitutional deprivation was nonetheless binding precedent on the trial court at the time of defendant's trial. Therefore, the constitutional error was "plain, i.e., clear or obvious," and the second *Carines* prong is satisfied in this case.[45]

IV. THE THIRD *CARINES* PRONG AND FAILURE TO SWEAR THE JURY AS A STRUCTURAL ERROR

The third prong of the plain error standard requires a defendant to establish that the plain error affected his or her substantial rights, which typically means that it affected the outcome of the lower court proceedings.[46] However, the United States Supreme Court has noted that "certain errors, termed 'structural errors,' might 'affec[t] substantial rights' regardless of their

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[43] *Carines*, 460 Mich at 763.

[44] *Pribble*, 72 Mich App at 224.

[45] See *United States v DeChristopher*, 695 F3d 1082, 1091 (CA 10, 2012) (stating that an error is plain if there is binding circuit precedent on point); *Carines*, 460 Mich at 763.

[46] *Carines*, 460 Mich at 763.

actual impact on an appellant's trial."[47] Structural error—originally a concept of the harmless error standard, applicable to *preserved* claims of error—is a particular type of constitutional error that is not amenable to harmless error analysis.[48] The concept of structural error is highly relevant under the third prong of the *Carines* plain error standard because the harmless error standard and third *Carines* prong are both functionally "the same kind of inquiry."[49] Because both inquiries examine the effect of the error on the verdict reached in a particular case, it stands to reason that structural errors are likewise not amenable to analysis under the third *Carines* prong.[50] Defendant argues that failure to swear the jury is a structural error satisfying the third *Carines* prong. I agree.

Structural errors comprise a small subset of constitutional errors that "affec[t] the framework within which the trial proceeds," rather than "simply an error

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[47] *United States v Marcus*, 560 US 258, 263; 130 S Ct 2159; 176 L Ed 2d 1012 (2010) (alteration in original); see also *People v Vaughn*, 491 Mich 642, 666; 821 NW2d 288 (2012) ("[O]ur caselaw suggests that a plain structural error satisfies the third *Carines* prong."), citing *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000) ("Structural errors . . . are intrinsically harmful, without regard to their effect on the outcome . . . .").

[48] *Arizona v Fulminante*, 499 US 279, 309-310; 111 S Ct 1246; 113 L Ed 2d 302 (1991).

[49] *United States v Olano*, 507 US 725, 734; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

[50] Compare *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994) ("[T]he proper interpretation of the term 'prejudice' in the context of issue preservation for plain error may be equated with the longstanding state precedent of outcome determination."), with *Neder v United States*, 527 US 1, 7; 119 S Ct 1827; 144 L Ed 2d 35 (1999) ("Errors of this type [structural errors] are so intrinsically harmful as to require automatic reversal (*i.e.*, 'affect substantial rights') without regard to their effect on the outcome.").

in the trial process itself."[51] Whether an error is "structural" is a function of "the difficulty of assessing the effect of the error."[52] Whereas structural errors are framework-affecting errors whose consequences are "necessarily unquantifiable and indeterminate," "trial errors" happen during the presentation of the case and can be "quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt."[53] Structural errors "infect the entire trial process" and "necessarily render a trial fundamentally unfair."[54] They "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . .' "[55]

The number of constitutional errors labeled "structural" is quite limited.[56] However, I have little difficulty fitting the failure to properly swear the jury into the constellation of structural errors. The oath is a foundational component of the "framework within which the trial proceeds."[57] It solemnizes the proceedings at the outset by calling on jurors to make an outward pronouncement that they "will justly decide" the case

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[51] *United States v Gonzalez-Lopez*, 548 US 140, 148; 126 S Ct 2557; 165 L Ed 2d 409 (2006) (quotation marks and citation omitted) (alteration in original).

[52] *Id*. at 149 n 4.

[53] *Id*. at 148, 150 (quotation marks and citations omitted) (alteration in original).

[54] *Neder*, 527 US at 8 (quotation marks and citations omitted).

[55] *Id*. at 8-9, quoting *Rose v Clark*, 478 US 570, 577-578; 106 S Ct 3101; 92 L Ed 2d 460 (1986).

[56] *Johnson v United States*, 520 US 461, 468-469; 117 S Ct 1544; 137 L Ed 2d 718 (1997) (stating that "[w]e have found structural errors only in a very limited class of cases" and listing cases).

[57] *Gonzalez-Lopez*, 548 US at 148.

and "render a true verdict" under the sacred appeal to one's conscience and integrity that follows from swearing an oath.[58] Its influence pervades the entire proceedings, governing the jury's evaluation of evidence during trial and deliberations on the question of guilt after the close of proofs. Further, although its historical pedigree as "a 'natural and universal custom' " is evidence of its undeniable influence on people's conduct,[59] it is difficult, if not impossible, to assess as a general matter what tangible effect the absence of the oath has on verdicts. The influence of the oath on information-processing and judgment functions at a psychological level. Thus, any generalized statements regarding its tangible effect on jurors' decision-making process and verdict would be purely speculative.[60]

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[58] MCR 2.511(H)(1).

[59] Milhizer, *So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America*, 70 Ohio St L J 1, 4 (2009) (citation omitted); see also Farid, *Oath and Affirmation in the Court: Thoughts on the Power of a Sworn Promise*, 40 New Eng L Rev 555, 557 (2006) ("[T]hat the oath implicates the motivations it does, that it is in fact so compelling, is indicative of its distinctive stature in our legal system. Nothing, it seems, is as effective in helping to ascertain the truth in the courtroom.").

[60] See *Gonzalez-Lopez*, 548 US at 150 ("Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe."). Though this does not appear to have deterred scholars from researching this concept. See St. Eve, Burns & Zuckerman, *More From the #Jury Box: The Latest on Juries and Social Media*, 12 Duke L & Tech Rev 64, 89-90 (2014) ("It is thus not surprising that many jurors in the informal survey referenced their oaths as the reason they did not communicate about the case on social media. Staying true to their oath was personal—a source of 'pride' for one, a 'civic duty' for another, and a matter of 'respect' for several others.") (citation omitted). In any event, in so far as this information could generally be available in evidentiary form from the jurors themselves, the law precludes such inquiries. *People v Budzyn*,

The right to a sworn jury—the jury guaranteed by the Constitution—is a " 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function."[61] As the Supreme Court stated in *Sullivan v Louisiana*, "The right to trial by jury reflects . . . 'a profound judgment about the way in which law should be enforced and justice administered.' The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.' "[62] Because the oath is woven into the very fabric of the trial and defies any attempt at quantifying the consequences of its absence as it relates to the jury's verdict, it is the quintessential structural error.[63]

This Court has stated that our caselaw "suggests" that structural errors satisfy the third *Carines* prong.[64] In my view, however, logic *dictates* that they should. If the third *Carines* prong is functionally "the same kind of inquiry" as harmless error analysis,[65] it stands to reason that errors that defy harmless error analysis are likewise not amenable to the prejudice inquiry required under the third *Carines* prong. In fact, the United States Supreme Court has described structural errors as those that "affect substantial rights"—the

456 Mich 77, 91; 566 NW2d 229 (1997) (stating that jurors may not impeach their own verdict by subsequent allegations of misconduct relating to the jury's deliberative process).

[61] *Sullivan v Louisiana*, 508 US 275, 281; 113 S Ct 2078; 124 L Ed 2d 182 (1993), quoting *Rose*, 478 US at 577 (alteration in original).

[62] *Sullivan*, 508 US at 281-282 (citation omitted).

[63] See *Gonzalez-Lopez*, 548 US at 150.

[64] *Vaughn*, 491 Mich at 666 ("Accordingly, our caselaw suggests that a plain structural error satisfies the third *Carines* prong.").

[65] *Olano*, 507 US at 734.

very standard under the third *Carines* prong.[66] I would make explicit what is "suggested" in our previous cases and hold that structural errors, like the failure to swear the jury in this case, satisfy the third prong without an additional showing of outcome-determinative prejudice.

V. THE FOURTH *CARINES* PRONG AND SERIOUS EFFECT ON THE FAIRNESS, INTEGRITY, OR PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS

I come now to where the majority began its analysis: the fourth *Carines* prong. Once a defendant has established that a "forfeited error is 'plain' and 'affect[s] substantial rights,' " an appellate court has discretionary authority to correct the error, but is under no obligation to do so.[67] Because relief on plain error review is in the discretion of the reviewing court, a defendant bears the burden of persuading the court that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings."[68]

This area of the law is not a model of clarity, and little has been said on how exactly a defendant goes about carrying his or her burden under the fourth

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[66] See *Neder*, 527 US at 7 ("Errors of this type [structural errors] are so intrinsically harmful as to require automatic reversal (*i.e.*, 'affect substantial rights') without regard to their effect on the outcome."); *Marcus*, 560 US at 263.

[67] *Olano*, 507 US at 735 (alteration in original).

[68] *United States v Vonn*, 535 US 55, 63; 122 S Ct 1043; 152 L Ed 2d 90 (2002) (quotation marks and citations omitted) (alteration in original); see also *Vaughn*, 491 Mich at 666. Contrary to the majority, there is nothing "incompatible" with holding that the juror's oath is an indispensable feature of the right to trial by jury and requiring a defendant to show plain error. *Ante* at 117 n 4. The majority's assertion conflates two distinct stages in the appellate decision-making process: determining whether an error occurred and determining whether the error warrants relief.

prong, especially when the error is structural.[69] Nevertheless, a basic unarticulated framework can be gleaned from the existing caselaw that, if adopted by a majority of the Court, would provide some order to the analysis in this area of the law.

A. STRUCTURAL ERRORS AND THE FOURTH *CARINES* PRONG

It is undisputed that "a plain error affecting substantial rights does not, *without more*, satisfy the [fourth *Carines* prong], for otherwise the discretion afforded by [the plain error test] would be illusory."[70] What this means in a typical case involving a garden-variety trial error is that a defendant will have to show more than simply that there is a reasonable probability that the forfeited error affected the outcome of the trial under the third *Carines* prong. He or she must also make the case for why the court should overlook the preservation requirement and grant relief. That requires the defendant to show that the error resulted in a wrongful conviction or seriously affected the fairness, integrity, or public reputation of the proceedings.

In the context of structural errors, however, the analysis under the third *Carines* prong is different. Structural errors satisfy the third prong because the type of inquiry that the third prong calls for is simply

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[69] I am not the first to recognize that this area of the law is in need of some clarity. See *Marcus*, 560 US at 270-271 (Stevens, J., dissenting) ("This Court's ever more intensive efforts to rationalize plain-error review may have been born of a worthy instinct. But they have trapped the appellate courts in an analytic maze that, I have increasingly come to believe, is more liable to frustrate than to facilitate sound decision-making."); *United States v Robinson*, 485 US 25, 36; 108 S Ct 864; 99 L Ed 2d 23 (1988) (Blackmun, J., concurring in part and dissenting in part) (observing the "confusion reflected in the Court of Appeals' application of the plain-error standard").

[70] *Olano*, 507 US at 737 (emphasis added).

not possible when dealing with structural errors. But structural errors are structural, not just because their effect on the result is indeterminate, but also because they "necessarily render a trial fundamentally unfair"[71] and, by definition, mean that the " 'criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . .' "[72] As a result, there is substantial overlap between the characteristics of structural errors (i.e., they "necessarily render a trial fundamentally unfair") and the standard under the fourth *Carines* prong ("serious effect on the fairness, integrity, or public reputation of the proceedings").[73] As a matter of transitive logic, the fact that the defendant has proved that a particular error is structural should also be sufficient to make the presumptive case that the fairness, integrity, or public reputation of the proceedings has been seriously affected. In short, structural errors carry with them *Olano*'s something "more" that is required to establish the fourth prong.[74]

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[71] *Neder*, 527 US at 8 (quotation marks and citation omitted).

[72] *Id*. at 8-9, quoting *Rose*, 478 US at 577-578; see also *United States v Dominguez Benitez*, 542 US 74, 81; 124 S Ct 2333; 159 L Ed 2d 157 (2004) (characterizing structural errors as those that "undermin[e] the fairness of a criminal proceeding as a whole").

[73] See Berger, *Moving Toward Law: Refocusing the Federal Courts' Plain Error Doctrine in Criminal Cases*, 67 U Miami L Rev 521, 544 (2013) ("[T]he third and fourth prongs of the Olano inquiry both require the same kind of judgment—an evaluation of whether the error had sufficiently serious consequences to merit reversal—but the fourth prong merely requires a higher level of seriousness."); Graham, *Abuse of Discretion, Reversible Error, Harmless Error, Plain Error, Structural Error; A New Paradigm for Criminal Cases*, 43 Crim L Bull, 955, 971 (2007) ("In short, prong three and prong four are, in spite of the protestations in *Olano* to the contrary, in practice coterminous.").

[74] *Olano*, 507 US at 737 ("[A] plain error affecting substantial rights does not, *without more*, satisfy the [fourth prong], for otherwise the discretion afforded by [the plain error test] would be illusory.") (emphasis added).

This recognition of how structural error analysis relates to the fourth *Carines* prong yields an approach to unpreserved structural errors that clarifies and better harmonizes the caselaw in this area, both in theory and in practice.[75] In theory, the existence of a structural error—whose effect on the trial is unquantifiable and indeterminate—is incompatible with the requirement that a defendant identify specific facts on the record showing that the error seriously affected the fairness, integrity, or public reputation of the proceedings. The only way to resolve this apparent incongruity is to recognize that a structural error provides a rebuttable presumption that the fairness of the proceedings was seriously affected, while still allowing the prosecution to identify aspects of the trial record that show that the fairness, integrity, or public reputation of the proceedings were, in fact, not seriously affected despite the structural error. This framework recognizes the undeniable effect a structural error has on the inquiry under the fourth *Carines* prong while still retaining the fact-specific, discretionary characteristics of that final prong.[76] It also recognizes the reality that in our

[75] It is also creates some symmetry with the hierarchy of how we treat preserved errors. In that realm, we require the defendant to prove harmfulness unless it is a constitutional claim, in which case we require the prosecution to establish harmlessness. See *Carines*, 460 Mich at 774. And when it is structural constitutional error, we grant automatic reversal. *Duncan*, 462 Mich at 51. If my thesis is correct, a similar hierarchy exists for unpreserved errors, requiring the proponent of an error to establish that relief is warranted under the fourth *Carines* prong for all errors except constitutional, structural errors. In those cases, the structural nature of the error presumptively establishes the fourth prong, shifting the burden to the prosecution to show that, in fact, the fairness, integrity, and public reputation of the proceeding were not seriously affected.

[76] It is also consistent with the observations made by the United States Court of Appeals for the Ninth Circuit that "structural error is particularly likely to satisfy *Olano's* fourth prong." *United States v*

adversarial system it is the prosecution that must offer parts of the record as mitigating the damage caused by a structural error, as occurred in this case.

In practice, this formulation of the fourth prong analysis is nothing new. Rather, I believe it accurately describes how courts have been applying the plain error standard to structural errors all along. In cases in which a court *affirms* a conviction despite a structural error, the court conducts a fact-intensive, case-specific inquiry to conclude that the error did *not* seriously affect the fairness, integrity, and public reputation. Most notably, this is how the Court decided *People v Vaughn*.[77] In *Vaughn*, the Court acknowledged that the closure of the courtroom constituted structural error, but proceeded to examine the record to identify several aspects of the proceedings that indicated that the fairness, integrity, and public reputation of the proceedings were not, in fact, seriously affected.[78] Likewise, in *Johnson v United States*, the Supreme Court addressed the failure to instruct on an element of a charged offense and the defendant's argument that the error was structural.[79] After assum-

Recio, 371 F3d 1093, 1103 n 7 (CA 9, 2004); see also *United States v Rodriguez*, 406 F3d 1261, 1266 (CA 11, 2005) (Carnes, J., concurring in denial of rehearing en banc) ("So far as can be discovered, no court has ever actually held that an error is structural but fails to meet the fourth prong of the plain error test.").

[77] *Vaughn*, 491 Mich 642.

[78] *Id*. at 668-669. The majority is wrong to claim that my approach to plain error review of structural errors is inconsistent with *Vaughn*. *Ante* at 117 n 4. After recognizing the presence of a structural error, *Vaughn* proceeded to identify features of the trial proceedings showing that despite the structural error, the fairness, integrity, and public reputation of the proceedings were not seriously affected. *Vaughn*, 491 Mich at 668-669. This is entirely consistent with the framework set forth in this opinion.

[79] *Johnson*, 520 US at 467-468.

ing that the third prong was satisfied, the Court reviewed the record before concluding that the evidence pertaining to the disputed element was overwhelming and, therefore, that the fairness, integrity, and public reputation of the proceedings were not seriously affected.[80]

These cases are entirely consistent with the approach laid out in this opinion, which presumes that the fairness of the trial proceedings is seriously affected, but allows the prosecution to identify elements in the record that mitigate or rebut the notion—inherent in the very occurrence of a structural error—that the error seriously affected the fairness, integrity, or public reputation of the proceedings.

On the other hand, when courts *reverse* on the basis of an unpreserved structural error, they rarely, if ever, discuss additional facts on the record independently of the structural error analysis to establish that the fairness and integrity of the proceedings were seriously affected. Instead, the courts simply reiterate the same basic points made during the structural error analysis. The Court of Appeals decision at the center of this case, *People v Allan*,[81] is a prime example. In explaining why the structural error of failing to swear the jury satisfied the fourth *Carines* prong, the *Allan* panel reasoned:

> [T]he trial court's failure to administer the oath to the jury seriously affected the fairness, integrity, and public reputation of the judicial proceedings. Because the trial court did not administer the oath to the jury, the jury did not undertake the solemn promise to act in accordance with the law at all stages of defendant's trial. The trial court's

[80] *Id*. at 470; see also *United States v Cotton*, 535 US 625, 632-633; 122 S Ct 1781; 152 L Ed 2d 860 (2002) (employing same method).

[81] *Allan*, 299 Mich App 205.

> failure to administer the oath to the jury in this case affected the integrity of the proceedings because it resulted in an invalid verdict under Michigan law. The absence of the oath deprived defendant of a means to ensure that the jury would decide the case honestly in accordance with the law and on the basis of the evidence. Administration of the oath was necessary to protect defendant's fundamental right to a trial by an impartial jury.[82]

Allan is not alone. For instance, in *United States v Floresca*, the United States Court of Appeals for the Fourth Circuit approached the fourth prong analysis by stating:

> To begin with, we note that we must once again leave unfulfilled the desire, born of reflex and not of contemplation, to inject a prejudice component into our analysis. Such a consideration may be appropriate and weigh in a defendant's favor in a case where he is required to demonstrate actual prejudice in order to satisfy the third prong—and succeeds in doing so. However, in a case like Floresca's, where the error amounts to a structural defect that renders irrelevant, *ab initio,* the question of prejudice, logic requires us to instead focus on the nature of the error itself.[83]

The court in *Floresca* ultimately exercised its discretion to reverse the defendant's convictions, and in doing so never identified any additional, specific facts on the record establishing the fourth prong. Instead, reasoning in the abstract about the effect the structural error has on proceedings generally, the panel simply concluded: "We do not hesitate to say that convicting a defendant of an unindicted crime affects the fairness, integrity, and public reputation of federal

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[82] *Id*. at 218 (citations omitted).

[83] *United States v Floresca*, 38 F3d 706, 713 (CA 4, 1994).

judicial proceedings in a manner most serious."[84]

Allan and cases like it illustrate one simple fact: structural errors, by their nature, seriously affect the fairness and integrity of the proceedings. It may not be so in every case, which is why courts must examine the record for "countervailing factors" to assess whether anything mitigates the serious unfairness typically brought on by a structural error.[85] But when review of the record turns up nothing, the end result of the analysis is simply a reiteration of the structural error analysis.[86]

To be clear, the foregoing does not mean that structural errors *automatically*, *necessarily*, or *always* satisfy the fourth *Carines* prong.[87] This Court has been

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[84] *Id*. at 714. For other examples of the *Allan* approach, see *United States v Ramirez-Castillo*, 748 F3d 205, 217 (CA 4, 2014) ("In the instant case, we will exercise our discretion to notice the plain error because failure to do so would seriously affect the fairness, integrity, or public reputation of the judiciary. The Sixth Amendment's jury trial guarantee, which includes, 'as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of "guilty," ' is fundamental. *Sullivan*, 508 U.S. at 277, 113 S.Ct. 2078."); *Recio*, 371 F3d at 1103.

[85] See *Puckett v United States*, 556 US 129, 142-143; 129 S Ct 1423; 173 L Ed 2d 266 (2009) ("It is true enough that when the Government reneges on a plea deal, the integrity of the system may be called into question, but there may well be countervailing factors in particular cases.").

[86] See, e.g., *Recio*, 371 F3d at 1103 ("As noted above, a finding by this court that there is sufficient evidence for a rational jury to conclude that the appellants joined the conspiracy post-seizure would deny appellants their right to have a jury decide this question. Having carefully reviewed the record, we also cannot say that the evidence against Jimenez Recio and Lopez-Meza was 'overwhelming.' The fourth *Olano* prong is satisfied and we exercise our discretion to remand for a new trial.") (citations omitted).

[87] Because unpreserved structural errors do not automatically require reversal, nothing in this distillation does violence to the interest of issue preservation. Cf. *Rahn v Hawkins*, 464 F3d 813, 820 (CA 8, 2006) ("[W]e

clear that they do not.[88] But it is another question altogether how a defendant goes about satisfying the initial burden of persuading the court that the fairness and integrity of the proceedings have been seriously affected. Nothing in law or logic dictates that we must treat the third and fourth *Carines* prongs as separate silos. In fact, it betrays the plain error analysis to disregard the preliminary conclusion that an error is structural when assessing whether it seriously affected the fairness, integrity, or public reputation of the proceedings. Because, by definition, structural errors "necessarily render a trial fundamentally unfair,"[89] common sense dictates that by establishing a structural error, a defendant makes a presumptive case for serious unfairness and lack of integrity in the proceedings.

But the case is just that: presumptive. The prosecution then has the opportunity, as it always has, to identify parts of the record showing that, in fact, the fairness, integrity, and public reputation of the proceedings were not seriously affected. In some cases, the court will find instances in the record that mitigate the

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do not wish to create incentives for parties to delay pointing out manifest errors to a district court. Were we to reverse, parties would have an incentive to 'sandbag' a trial court, knowing that they could obtain a new trial if things did not go their way on the merits."). This articulation of the plain error standard does not tolerate, let alone encourage, sandbagging, nor does it eliminate any incentive to object to structural errors. The prosecution is free to direct the court's attention to "harboring error," a fact that will invariably sound the death knell for a defendant's case for reversal. Moreover, courts will still independently assess the record to determine whether or not the structural error, in fact, seriously affected the fairness integrity or public reputation of the proceedings in a given case. Thus, defendants forfeit errors at their peril.

[88] *Vaughn*, 491 Mich at 666-667 ("Although denial of the right to a public trial is a structural error, it is still subject to this requirement.").

[89] *Neder*, 527 US at 8 (quotation marks and citation omitted).

unfairness and unreliability that presumptively flow from a structural error—after all, not all structural errors are created equal, and even the same structural error can be committed in a variety of different ways. In others, however, the record will turn up nothing of tangible benefit. But this does not mean that the fairness and integrity of the proceeding were not seriously affected—after all, that characteristic is inherent in the very nature of structural error. In that case, defendant will have satisfied the burden under the fourth *Carines* prong by proving the existence of a structural error.

B. APPLICATION OF THE FOURTH *CARINES* PRONG

The foregoing is entirely consistent with the basic mode of analysis in the majority opinion today. Agreeing with the points made by the prosecution on appeal, the majority identifies several aspects of the trial record that, in its view, show that the underlying purposes of the juror's oath were otherwise satisfied and, therefore, that the absence of the oath did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings in this case. By approaching the question from the negative to conclude that relief is not warranted, it is perfectly consistent with the approach I have outlined above.

I also agree with the majority that our decision in *Vaughn* is instructive, though I believe it provides weak support for the majority's conclusion in this case. In *Vaughn*, the Court relied on three countervailing considerations to hold that the fourth *Carines* prong was not satisfied: the closure of the courtroom was temporary, it was not complete in that the venire members were present, and both sides expressed sat-

isfaction with the end result of voir dire.[90] None of these considerations is present in this case. The error in this case infected the entire trial, from its inception through jury deliberations. Thus, unlike the structural error in *Vaughn*, focusing on the duration and extent of the error in this case provides no support for the conclusion that it did not seriously affect the fairness, integrity, or public reputation of the proceedings. Also, unlike in *Vaughn*, defendant has challenged the end result, i.e., the jury's verdict, on multiple grounds. In short, this case features none of the countervailing factors that the Court in *Vaughn* relied on to hold that the fairness, integrity, and public reputation of the proceedings were not seriously affected.

Moreover, I disagree with the majority that the aspects of the record it identifies are sufficient to show that the fairness, integrity, and public reputation of the proceedings were not seriously affected. The majority holds that one of the primary purposes of the oath—to convey to the jury members their responsibility as jurors—was satisfied by the trial court's preliminary instructions. The majority's reliance on the trial court's instructions is misplaced and actually serves to illustrate just how fundamental the oath is to the fairness and integrity of the proceedings. The instructions are meaningful substitutes only if we presume that jurors follow their instructions. The law does make such a presumption, but only because jurors have taken an oath to do so.[91] When the oath is not given, like in this case, that presumption cannot obtain. The trial court's

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[90] *Vaughn*, 491 Mich at 667.

[91] *United States v Powell*, 469 US 57, 66; 105 S Ct 471; 83 L Ed 2d 461 (1984) ("Jurors, of course, take an oath to follow the law as charged, and they are expected to follow it."); *United States v Padilla*, 639 F3d 892, 897 (CA 9, 2011) ("The significance of the sworn jury is well established. When a jury is sworn, it is entrusted with the obligation to apply the law,

instructions here prove nothing because their efficacy is based on an oath that was never taken.

The other trial feature that, according to the majority, compensated for the oath's absence was the fact that the potential jurors stated under oath during voir dire that they could be fair and impartial. Again, I agree with the majority's general method of assessing the record. But having previously determined that the error in this case was structural, I start from the premise that the absence of the juror's oath rendered the proceedings fundamentally unfair. From this perspective, I disagree that statements given under oath regarding a juror's ability to be fair and impartial provide sufficient support for the conclusion that the fairness, integrity, or public reputation of the proceedings were not seriously affected in this case.

Promising to be fair and impartial is only one component of the juror's oath. The juror's oath also calls on prospective jurors to render a "true verdict" and to decide the case based solely on the evidence introduced at trial and the law as it is given to them by the trial court.[92] Indeed, the trier of fact guaranteed by the Constitution is one "capable and willing to decide the case solely on the evidence before it."[93] Although the trial court and the attorneys discussed these concepts during voir dire, my review of the record shows that only three of the jurors who ultimately deliberated over defendant's guilt were asked and answered questions about whether they could consider only the evidence presented in court and the law as it was given

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and we in turn presume that juries follow instructions given to them throughout the course of the trial.").

[92] MCR 2.511(H)(1).

[93] *McDonough Power Equip, Inc v Greenwood*, 464 US 548, 554; 104 S Ct 845; 78 L Ed 2d 663 (1984) (quotation marks and citation omitted).

to them by the court. The remaining nine jurors gave no indication of their willingness and ability to decide the case based solely on the evidence and law as it was given to them. Thus, a review of the record for evidence that the jurors were willing and able to assume each obligation of the juror's oath—a consideration I agree is relevant to whether the fairness, integrity, or public reputation of the proceedings was seriously affected—shows that it was lacking in this case.

Admittedly, the inquiry under the fourth *Carines* prong is difficult. But where I differ from the majority is in my assessment of the record as it relates to the negative consequences flowing from the structural error in this case. The right to a sworn jury is a " 'basic protectio[n]' . . . without which a criminal trial cannot reliably serve its function[.]"[94] As it relates to the fourth prong analysis, the oath shapes the fairness, integrity, and public reputation of the proceedings in two significant ways. First, it enhances the fairness of the proceedings by assuring the defendant that his or her fate will be decided by jurors who, on their consciences, will decide the case fairly in accordance with the law and evidence. Likewise, it enhances the integrity and reputation of the proceedings by assuring the public that jurors will follow and apply the law as it is given to them, even if they harbor personal disagreements with the law generally. The oath's complete absence diminishes the fairness, integrity, and public reputation of the proceedings. Unless there are other indicia on the record to show that these assurances were otherwise made, reversal is required under the fourth *Carines* prong because failure to swear the jury, as a structural error, renders the proceedings fundamentally unfair.[95]

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[94] *Sullivan*, 508 US at 281, quoting *Rose*, 478 US at 577.

[95] *Neder*, 527 US at 8.

Lacking in this case is a sufficient indication on the record that the jury was, from the perspective of the defendant and the public, a reliable vehicle by which to judge defendant's guilt or innocence. I agree with the majority that the record in a given case could, nonetheless, contain evidence that the jurors, in fact, undertook and followed the obligations that would be imposed by the oath. However, statements by jurors touching on only one aspect of the juror's oath, though given under oath, are insufficient to show that the failure to swear the jury did not seriously affect the fairness, integrity, or public reputation of the proceedings.

Nor is it sufficient to say, "Although the court clerk indisputably read the wrong oath to the jury, the jury was nevertheless sworn."[96] The oath given in this case—the voir dire oath—is an "assertory oath" that called on the jurors to "attest[] to some factual matter" (i.e., their qualifications as jurors).[97] The oath that was omitted—the juror's oath—is, by contrast, a "promissory oath" that obliges the swearer to "observe a specified course of conduct in the future" (i.e., to decide the case fairly and in accordance with the law and evidence).[98] I disagree that the jury members in this case were "sworn" in any meaningful sense pertaining to their duties as jurors because the oath they took did not invoke any of the promises contained in the juror's oath. A jury becomes a jury when its members take the *juror's oath*—not just any old oath.[99] A criminal defendant has the right to assurance that those selected to

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[96] *Ante* at 124 n 6.

[97] See *Black's Law Dictionary* (9th ed), p 1176.

[98] *Id*.

[99] For example, we would not say that the jurors were "sworn" if the they took the bailiff's oath, MCL 768.16, the interpreter's oath, MCL 393.506(1), or the presidential oath of office, US Const, art II, § 1, cl 8.

decide his or her fate fairly in accordance with the law and evidence will carry out *that task* under the solemn obligation of an oath.

In this case, a majority of defendant's jury did not otherwise expressly assume the solemn obligations imposed by the juror's oath. Without this additional support in the record, I am persuaded that the trial court's failure to administer the juror's oath, which deprived defendant of the jury guaranteed to him by the Constitution, seriously affected the fairness, integrity, and public reputation of the proceedings in this case. I would therefore hold that reversal is warranted under the fourth *Carines* prong.

VI. CONCLUSION

Nothing in this opinion is intended to, or should, diminish the hard work and dedication of those who served as jurors in this case, and who, by all outward appearances, conducted themselves in an appropriate manner throughout the trial. Rather, the origin of this error lies with the trial judge, who failed to perform one of the more routine tasks required in the conduct of a trial. Nor do I take lightly the social costs to the victims' families and others involved in the trial or the public expense associated with a new trial. However, I cannot ignore the cost to society of diminishing the importance of the juror's oath and the harmful consequences that will follow from the subtle undermining of the right trial by jury reflected in today's majority opinion. "Formal requirements are often scorned when they stand in the way of expediency. This Court, however, has an obligation to take a longer view."[100]

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[100] *Neder*, 527 US at 40 (Scalia, J., concurring in part and dissenting in part).

Appellate courts may no longer be "impregnable citadels of technicality,"[101] but swearing the jury is no technicality; it goes to the heart of trial by jury and is a key component to a fundamentally fair trial. For that reason, I respectfully dissent.

MCCORMACK, J., concurred with VIVIANO, J.

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[101] Traynor, *The Riddle of Harmless Error* (Columbus: Ohio State University Press, 1970), p 14 (quotation marks and citation omitted).

PEOPLE v STEVENS

Docket No. 149380. Argued on application for leave to appeal March 11, 2015. Decided July 23, 2015.

Adam B. Stevens was convicted of second-degree murder, MCL 750.317, and second-degree child abuse, MCL 750.136b(3), following a jury trial in the Jackson Circuit Court, John G. McBain, J. The charges stemmed from the death of defendant's three-month-old son, Kian Stevens. The prosecution alleged that defendant caused Kian's death by either shaking him or slamming him against an object. Defendant alleged that he tripped and fell while holding Kian, and that as he fell, he lost control of Kian, who fell to the floor. Defendant denied shaking or slamming Kian. Defendant appealed his convictions and sentences. In an unpublished opinion per curiam, the Court of Appeals, METER, P.J., and RIORDAN, J. (SERVITTO, J., dissenting), affirmed. Defendant sought leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 497 Mich 898 (2014).

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

A judge's conduct pierces the veil of judicial impartiality 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. In evaluating the totality of the circumstances, the reviewing court should inquire into a variety of factors including, but not limited to, the nature of the trial judge's conduct, the tone and demeanor of the 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, either at the time of an inappropriate occurrence or at the end of trial. When the issue is preserved and a reviewing court determines that the trial judge's conduct pierced the veil of judicial impartiality, the court may not apply harmless-error review. Rather, the judgment must be reversed and the case remanded for a new trial. In this case, defendant challenged the judge's questioning of himself and his

expert witness, to which defense counsel objected vigorously at trial. The judge's questions implied partiality, were argumentative, invaded the role of the prosecutor, and did not clarify testimony or elicit additional relevant information. The judge's response to objections reflected an erroneous belief that his power to question witnesses had no limitations. The judge's tone and demeanor also weighed in favor of holding that the judge improperly created the appearance of bias against defendant. The words used by the judge and the sequence of his questions projected incredulity, bias, and hostility. The complexity of the issues presented during trial did not warrant the extent of the judicial intervention that occurred, and the questioning targeted defendant's case. Although the judge gave a general curative instruction at the end of the trial, the instruction did not overcome the appearance of bias the judge exhibited against the defense throughout the trial. 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 defendant, piercing the judicial veil and depriving defendant of his right to a fair trial.

Reversed and remanded for a new trial before a different judge.

TRIAL — DETERMINING WHETHER JUDICIAL CONDUCT PIERCED THE VEIL OF JUDICIAL IMPARTIALITY — REMEDY.

A judge's conduct pierces the veil of judicial impartiality 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; in evaluating the totality of the circumstances, the reviewing court should inquire into a variety of factors including, but not limited to, the nature of the trial judge's conduct, the tone and demeanor of the 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, either at the time of an inappropriate occurrence or at the end of trial; when the issue is preserved and a reviewing court determines that the trial judge's conduct pierced the veil of judicial impartiality, the court may not apply harmless-error review; rather, the judgment must be reversed and the case remanded for a new trial.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jerard M. Jarzynka*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

Daniel D. Bremer for defendant.

BERNSTEIN, J. This case requires us to address the appropriate standard for determining when a trial judge's conduct in front of a jury has deprived a party of a fair and impartial trial, and whether that standard was met in this case.

A trial judge's conduct deprives a party of a fair trial if the conduct pierces the veil of judicial impartiality. 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. In evaluating the totality of the circumstances, the reviewing court should inquire into a variety of factors including, but not limited to, the nature of the trial judge's conduct, the tone and demeanor of the 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, either at the time of an inappropriate occurrence or at the end of trial. When the issue is preserved and a reviewing court determines that the trial judge's conduct pierced the veil of judicial impartiality, the court may not apply harmless-error review. Rather, the judgment must be reversed and the case remanded for a new trial.

In this case, the trial judge's conduct with respect to defendant's expert witness pierced the veil of judicial

impartiality, depriving defendant of the right to a fair trial. As a result, the judgment of the Court of Appeals is reversed and the case is remanded for a new trial before a different judge.

I. FACTS AND PROCEDURAL HISTORY

On August 19, 2010, three-month-old Kian Stevens died. Defendant, Kian's father, was eventually charged with first-degree felony murder, MCL 750.316(1)(b), and first-degree child abuse, MCL 750.136b(2), in connection with Kian's death. A jury trial was held over the course of eight days. The prosecution's theory was that defendant caused Kian's death either by shaking him or by slamming him against an object. Kian's mother, Crystal Anderson, testified that defendant had been living with her for about a year when Kian died. On August 19, at around 12:30 a.m., Anderson was awakened by the sound of Kian crying. Upon entering the living room, she found defendant holding Kian upside down. Soon after, the child stopped breathing. While Anderson called 911, defendant performed CPR. Kian was placed on life support at a local hospital and then flown to Mott Children's Hospital. At Mott, Kian was declared brain dead, having suffered hemorrhaging to the brain. Dr. Bethany Mohr, the director of the child protection team at Mott, testified for the prosecution as an expert in pediatric child abuse. Mohr opined that Kian's injuries suggested that Kian had suffered head trauma caused by physical abuse. Dr. Jeffrey Jentzen, a medical examiner who performed the autopsy on Kian, testified for the prosecution as an expert in forensic pathology. He testified that Kian died from abusive head trauma and that the cause of death was homicide. Jentzen was also called as a rebuttal witness.

Defendant testified on his own behalf. Defendant stated that, on the morning in question, he had gotten out of bed to get a drink of water when he noticed Kian moving around in his bassinet. When he picked Kian up to comfort him, defendant tripped on a toy truck lying on the floor and fell forward. As defendant fell, he lost control of Kian, who fell to the floor. Defendant denied shaking or slamming Kian. Defendant admitted that he did not tell Anderson until several weeks after the incident that he had dropped Kian. Defendant further testified that, during an interview with police detectives, he denied dropping Kian because he felt intimidated.

Dr. Mark Shuman, an associate medical examiner for Miami-Dade County in Florida, testified for the defense as an expert in forensic pathology. Shuman testified that it was possible that Kian died from injuries sustained in a short fall[1] from defendant's arms to the floor. Shuman stated that he did not believe a baby could die from being shaken vigorously, but also testified that forensic pathologists were generally divided on the issue. Shuman noted that even if shaking could cause death, Kian did not show signs of any neck injury, trauma that would be present if vigorous shaking had occurred. However, Shuman acknowledged that the cause of death could be homicide if one believed certain testimony offered by the prosecution's witnesses.

Ultimately, defendant was acquitted of the first-degree charges but was convicted of two lesser charges: second-degree murder, MCL 750.317, and second-degree child abuse, MCL 750.136b(3). The trial judge sentenced defendant to concurrent prison

[1] During trial, the term "short fall" was generally used to refer to a child's fall from a height of 4 feet or less.

terms of 25 to 50 years for the murder conviction and 32 to 48 months for the child abuse conviction.

On appeal, defendant argued that he was denied a fair trial because the trial judge, through his questioning of defendant and defendant's expert, demonstrated partiality in front of the jury. In a split opinion, the Court of Appeals rejected this claim and affirmed the convictions. The majority held that "[c]laims of judicial misconduct are reviewed to determine whether the trial court's comments or conduct evidenced partiality that could have influenced the jury to a party's detriment." *People v Stevens*, unpublished opinion per curiam of the Court of Appeals, issued April 10, 2014 (Docket No. 309481), p 3, citing *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). The majority stated that, while a judge may ask questions of witnesses, certain questions could indicate improper partiality:

> The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial. [*Id*., quoting *People v Conley*, 270 Mich App 301, 308; 715 NW2d 377 (2006) (quotation marks omitted).]

Applying this standard, the majority held that the trial judge's questions did not pierce the veil of judicial impartiality.

The dissent, however, applied a different standard and came to the opposite conclusion. The dissent stated that, to determine whether a judge's conduct pierced the veil of impartiality, a reviewing court must consider whether the conduct " '*may* well have unjustifiably aroused suspicion in the mind of the jury as to a

witness' credibility, . . . and whether partiality *quite possibly could* have influenced the jury to the detriment of defendant's case.' " *Stevens* (SERVITTO, J., dissenting), unpub op at 1, quoting *People v Sterling*, 154 Mich App 223, 228; 397 NW2d 182 (1986). The dissent determined that, on numerous occasions during the trial, the judge had inappropriately questioned defense witnesses, undermining the credibility of those witnesses and indicating judicial partiality. Consequently, the dissent concluded that the judge's conduct pierced the veil of impartiality, requiring reversal.

II. STANDARD OF REVIEW

The question whether judicial misconduct denied defendant a fair trial is a question of constitutional law that this Court reviews de novo. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006); *In re Susser Estate*, 254 Mich App 232, 236-237; 657 NW2d 147 (2002). As discussed in greater detail later in this opinion, once a reviewing court has concluded that judicial misconduct has denied the defendant a fair trial, a structural error has occurred and automatic reversal is required. *Arizona v Fulminante*, 499 US 279, 309; 111 S Ct 1246; 113 L Ed 2d 302 (1991).

III. APPROPRIATE STANDARD FOR DETERMINING JUDICIAL PARTIALITY

This Court has noted that "great care should be exercised that the court does not indicate its own opinion and does not lay undue stress upon particular features of a witness' testimony that might, in the eyes of the jury, tend to impeach [the witness]." *Simpson v Burton*, 328 Mich 557, 564; 44 NW2d 178 (1950). However, there is no clear line of precedent establishing the appropriate test in this state to determine

whether a trial judge's conduct pierced the veil of judicial impartiality. Indeed, the disagreement between the members of the Court of Appeals panel in this case illustrates the uncertainty that has arisen with respect to this issue. We take this opportunity to clarify and articulate the proper standard a reviewing court must apply.

A. PRIOR ARTICULATIONS OF THE STANDARD

The chain of cases cited by the Court of Appeals majority and dissent leads us back to *Simpson*. In that case, this Court stated that the judge's questions "in some instances *may well have* unjustifiably aroused suspicion in the mind of the jury as to defendant's credibility . . . ." *Id*. at 563-564 (emphasis added). Approximately seven years later, this Court articulated a similar standard: whether it "*may well have* created an atmosphere of prejudice which deprived defendant of a fair trial and contributed to his conviction." *People v Cole*, 349 Mich 175, 200; 84 NW2d 711 (1957) (emphasis added). Numerous cases have since adopted the "may well have" standard.[2]

Unfortunately, application of the standard set forth in *Simpson* and *Cole* has been inconsistent. In *People v Young*, 364 Mich 554, 558; 111 NW2d 870 (1961), this Court cited *Cole* for the proposition that we have "not hesitated to reverse for new trial when the trial judge's questions or comments were such as to place his *great influence* on one side or the other in relation to issues which our law leaves to jury verdict." (Emphasis

[2] See, e.g., *People v Davis*, 216 Mich App 47, 50-52; 549 NW2d 1 (1996); *Cheek*s, 216 Mich App at 480; *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 787 (1992); *Sterling*, 154 Mich App at 228; *People v Redfern*, 71 Mich App 452, 457; 248 NW2d 582 (1976); *People v Smith*, 64 Mich App 263, 267; 235 NW2d 754 (1975).

added.) In *People v Wilson*, 21 Mich App 36, 37; 174 NW2d 914 (1969), the Court of Appeals cited *Cole* in stating that the standard was "whether the trial judge's comments or questions were of such a nature as to *unduly influence* the jury and thereby deprive the appellant of his right to a fair and impartial trial." (Emphasis added.) Neither the phrase "great influence" nor the phrase "unduly influence" appears anywhere in *Cole*; *Cole* instead uses the "may well have" language.

B. NEW STANDARD

It appears that this early split explains the divide between the two formulations of the standard seen in the Court of Appeals' opinions in this case. Having reviewed how the different formulations of the test emerged, we now turn to the more difficult question of how to settle on a clear standard. Both the "unduly influence" standard and the "may well have . . . quite possibly could have" standard lack any substantive guidance in explaining what exactly a reviewing court must examine when determining whether error requiring reversal occurred. In order to provide clarity going forward, we thus propose a new articulation of the appropriate test, grounded in a criminal defendant's right to a fair and impartial jury trial. See *Cole*, 349 Mich at 200; *People v Bigge*, 297 Mich 58, 72; 297 NW 70 (1941) ("Once the door is open for allowing the opinion of the court to be impressed upon jurors that one charged with crime is guilty of the offense, the fundamental right of trial by jury is impaired."). A trial judge's conduct deprives a party of a fair trial if a trial judge's conduct pierces the veil of judicial impartiality. *Wilson*, 21 Mich App at 37-38 ("If an examination of the record reveals that the veil of judicial impartiality was

pierced by the trial judge, the case must be reversed."); *People v Bedsole*, 15 Mich App 459, 462; 166 NW2d 642 (1969) ("The veil of judicial impartiality should not have been pierced by the trial judge on this occasion."). 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.[3]

This inquiry requires a fact-specific analysis. A single inappropriate act does not necessarily give the appearance of advocacy or partiality, but a single instance of misconduct may be so egregious that it pierces the veil of impartiality. See, e.g., *Young*, 364 Mich at 559 (holding that the judge's colloquy with the defendant's medical expert improperly invaded the province of the jury on the crucial issue which was theirs to decide); *McMillan v Castro*, 405 F3d 405, 410 (CA 6, 2005) (stating that reviewing courts must consider "whether, with reference to a range of acceptable, though not necessarily model, judicial behavior, the [judge]'s conduct falls demonstrably outside this range so as to constitute hostility or bias."). Ultimately, the reviewing court should not evaluate errors standing

[3] Consistent with the principle that we do not apply harmless-error review to claims of judicial partiality, discussed later in this opinion, the reviewing court must determine whether the judge's conduct improperly influenced the jury without considering the weight of the evidence presented against the aggrieved party or whether the conduct *actually* contributed to the jury's verdict. Rather, in considering improper influence, the reviewing court must determine whether the judge's conduct was sufficiently severe and clear so as to create the appearance of bias against the aggrieved party. It is the existence of this appearance that is considered improper influence, and the nonexhaustive factors outlined within this opinion are targeted at determining whether the judge's conduct created an appearance of bias.

alone, but rather consider the cumulative effect of the errors. See *Cole*, 349 Mich at 199-200 (concluding that certain judicial comments "standing alone" did not constitute error, but "taken together" the errors deprived the defendant of a fair trial).

These errors must be considered within the context of a given case, i.e., the totality of the circumstances, to determine whether the judge demonstrated the appearance of advocacy or partiality on the whole. 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. See *Freudeman v Landing of Canton*, 702 F3d 318, 328 (CA 6, 2012), citing *McMillan*, 405 F3d at 409-410. This list of factors is not intended to be exhaustive. Reviewing courts may consider additional factors if they are relevant to the determination of partiality in a particular case. Moreover, the aggrieved party need not establish that each factor weighs in favor of the conclusion that the judge demonstrated the appearance of partiality for the reviewing court to hold that there is a reasonable likelihood that the judge's conduct improperly influenced the jury. The reviewing court must consider the relevance and weigh the significance of each factor under the totality of the circumstances of the case.

As an initial matter, a reviewing court should consider the nature or type of judicial conduct itself. Judicial misconduct may come in myriad forms, including belittling of counsel, inappropriate questioning of

witnesses, providing improper strategic advice to a particular side, biased commentary in front of the jury, or a variety of other inappropriate actions. See e.g., *Cole*, 349 Mich at 188-200 (noting that improper conduct consisted of the judge's heated cross-examination of a defense witness, giving advice to the prosecutor, and belittling defense counsel); *Young*, 364 Mich at 559 (noting that the judge allowed his disbelief of the defendant's medical expert to become evident to the jury); *People v Neal*, 290 Mich 123, 129; 287 NW 403 (1939) ("Pert remarks and quips from the bench have no place in the trial of a criminal case . . . ."); *Simpson*, 328 Mich at 563-564 (concluding that the judge's questions of the defendant were so "very many in number" that they overstepped the bounds of judicial impartiality); *Loranger v Jageman*, 169 Mich 84, 85-86; 134 NW 967 (1912) (holding that the trial judge inappropriately allowed his impression that the plaintiff had a meritorious case to affect his charge to the jury).

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).[4] This Court has stated that the central object of judicial questioning should be to clarify. See *Young*, 364 Mich at 558; *Simpson*, 328 Mich at 564. Therefore, it is appropriate for a judge to question witnesses to produce fuller and more exact testimony or elicit additional relevant information. *Simpson*, 328 Mich at 564;

[4] "The court may interrogate witnesses, whether called by itself or by a party." MRE 614(b).

Sterling, 154 Mich App at 228. Judicial questioning, nevertheless, has boundaries. The Michigan Code of Judicial Conduct states:

> A judge may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity, but the judge should bear in mind that undue interference, impatience, or participation in the examination of witnesses, or a severe attitude on the judge's part toward witnesses . . . may tend to prevent the proper presentation of the cause, or the ascertainment of truth in respect thereto. . . . In addressing counsel, litigants, or witnesses, the judge should avoid a controversial manner or tone. A judge should avoid interruptions of counsel in their arguments except to clarify their positions, and should not be tempted to the unnecessary display of learning or a premature judgment. [Code of Judicial Conduct, Canon 3(A)(8).]

It is inappropriate for a judge to exhibit disbelief of a witness, intentionally or unintentionally. *Young*, 364 Mich at 558-559. It is essential that the judge "not permit his own views on disputed issues of fact to become apparent to the jury." *Id*. at 558. See also *In re Parkside Housing Project*, 290 Mich 582, 598; 287 NW 571 (1939); *Loranger*, 169 Mich at 86.

Second, a reviewing court should consider the tone and demeanor the trial judge displayed in front of the jury. Because jurors look to the judge for guidance and instruction, they "are very prone to follow the slightest indication of bias or prejudice upon the part of the trial judge." *In re Parkside Housing Project*, 290 Mich at 600 (quotation marks and citation omitted). See also *Bigge*, 297 Mich at 70 ("It is well known that jurors in a criminal case may be impressed by any conclusion reached by the judge as to the guilt of the accused."). It is possible for a court to deprive a party of a fair trial without intending to do so if the manner in which the

judge conducts the case gives "a plain exhibition to the jury of his own opinions in respect to the parties . . . ." *Young*, 364 Mich at 559 (quotation marks and citation omitted). See also *Wheeler v Wallace*, 53 Mich 355, 357-358; 19 NW 33 (1884) ("It is, nevertheless, possible for a judge, however correct his motives, to be unconsciously so disturbed by circumstances that should not affect him, as to do and say, in the excitement of a trial, something, the effect of which he would not at the time realize, and thereby accomplish a mischief which was not designed."). Therefore, it is not necessary to impute to the judge any intentional bias; on the contrary, the initial assumption is that a trial judge designs to be impartial. See *Wheeler*, 53 Mich at 358. To ensure an appearance of impartiality, a judge should not only be mindful of the substance of his or her words, but also the manner in which they are said. See *Cole*, 349 Mich at 196-200; *Brown v Walter*, 62 F2d 798, 800 (CA 2, 1933) ("Justice does not depend upon legal dialectics so much as upon the atmosphere of the court room, and that in the end depends primarily upon the judge."). A judge should avoid questions that are intimidating, argumentative, or skeptical. See *People v Wilder*, 383 Mich 122, 124; 174 NW2d 562 (1970). Hostile questions from a judge are particularly inappropriate when the witnesses themselves have done nothing to deserve such heated inquiry. See *Cole*, 349 Mich at 199 ("The record [did] not disclose any action or tone of voice on the part of the witness which in anywise threatened the orderly conduct of the trial. It would seem that the trial judge could have dealt with these matters with less heat."). A judge must proceed with particular care when engaging with a criminal defendant. *Id*. at 196. 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, although the manner of judicial involvement remains at the center of the examination by a reviewing court. *McMillian*, 405 F3d at 410.

We recognize that appellate courts typically do not have the benefit of viewing a trial judge's tone and demeanor first hand. However, in certain circumstances, the very nature of the words used by the judge can exhibit hostility, bias, or incredulity. See *Cole*, 349 Mich at 197-200 (noting that several interjections by trial judge tended "to belittle defendant's lawyer in the presence of the jury" or exhibited "rather more emotion on the part of the trial judge than the records seem to warrant"). Additionally, as occurred in the instant case, an objection by trial counsel may specifically note the inappropriateness of the judge's demeanor in the courtroom, further aiding the appellate court in understanding the tenor of judicial involvement.

Third, a reviewing court should consider the scope of judicial intervention within the context of the length and complexity of the trial, or any given issue therein. *Freudeman*, 702 F3d at 328. In a long trial, or one with several complicated issues posed to the jury, for instance, it may be more appropriate for a judge to intervene a greater number of times than in a shorter or more straightforward trial. *McMillan*, 405 F3d at 410. Likewise, given the principle that a judge's questions may serve to clarify points that are obscure or confusing, *Simpson*, 328 Mich at 564, a judge's inquiries may be more appropriate when a witness testifies about a topic that is convoluted, technical, scientific, or otherwise difficult for a jury to understand.

Fourth, and in conjunction with the third factor, a reviewing court should consider the extent to which a judge's comments or questions were directed at one

side more than the other. *Freudeman*, 702 F3d at 328. Judicial partiality may be exhibited when an imbalance occurs with respect to either the frequency of the intervention or the manner of the conduct. See *Cole*, 349 Mich at 188-189 (finding judicial intervention unacceptable when the record contained 16 pages of both extensive and heated cross-examination by the trial judge of the defendant's witnesses, but no similar examination of the prosecution's witnesses). In *Young*, 364 Mich at 558-559, this Court noted that we have "not hesitated to reverse for new trial when the trial judge's questions or comments were such as to place his great influence on one side or the other in relation to issues which our law leaves to jury verdict."

Lastly, the presence or absence of a curative instruction is a factor in determining whether a court displayed the appearance of advocacy or partiality. The model jury instructions—both for civil and criminal trials—emphasize that a judge's comments, rulings, and questions do not constitute evidence and that the jury should not attempt to discern the judge's personal opinion while considering the case. See M Civ JI 2.04(2)(b) and (c); M Crim JI 2.4(1); M Crim JI 2.8. Additionally, during the course of a proceeding, a trial judge has the ability to issue a curative instruction immediately in response to conduct that could give rise to the appearance of bias. Because "[i]t is well established that jurors are presumed to follow their instructions," *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), a curative instruction will often ensure a fair trial despite minor or brief inappropriate conduct. Depending on the circumstances, an immediate curative instruction may further alleviate any appearance of advocacy or partiality by the judge. That said, in some instances judicial conduct may so overstep its bounds that no instruction can erase the appearance of

partiality. *In re Parkside Housing Project*, 290 Mich at 599-600 ("Although the trial judge repeatedly told the jury that he was present only in an advisory capacity, and that the determination of the verdict was solely in its hands, and in spite of a fair charge to the jury further emphasizing such statements at the conclusion of the hearing, we are of the opinion that the effect of his observations and conduct of the proceeding was too vitiating and prejudicial to defendants' rights to be thereby corrected.").

C. REMEDY

When the issue is preserved and a reviewing court determines that a judge has pierced the veil of judicial impartiality, a structural error has been established that requires reversing the judgment and remanding the case for a new trial. *Fulminante*, 499 US at 309-310 (recognizing the deprivation of the right to an impartial judge as a structural error and explaining that "[t]he entire conduct of the trial from beginning to end is obviously affected . . . by the presence on the bench of a judge who is not impartial"); *Rose v Clark*, 478 US 570, 577; 106 S Ct 3101; 92 L Ed 2d 460 (1986) ("Despite the strong interests that support the harmless-error doctrine, . . . some constitutional errors [including adjudication by a biased judge] require reversal without regard to the evidence in the particular case."); *Chapman v California*, 386 US 18, 23 & n 8; 87 S Ct 824; 17 L Ed 2d 705 (1967), citing *Tumey v Ohio*, 273 US 510; 47 S Ct 437; 71 L Ed 749 (1927); *People v Anderson (After Remand)*, 446 Mich 392, 404-405; 521 NW2d 538 (1994) (recognizing the deprivation of the right to an impartial judge as a structural error). Judicial bias creates a "structural defect[] in the constitution of the trial mechanism, which def[ies]

analysis by 'harmless-error' standards." *Fulminante*, 499 US at 309-310 (stating further that judicial partiality is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself"); *Rose*, 478 US at 578 ("Harmless-error analysis . . . presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury."). The right to an impartial judge is so fundamental that " 'without [this] basic protection[], a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.' " *Fulminante*, 499 US at 310, quoting *Rose*, 478 US at 577-578.[5] Such structural error requires reversal without regard to the evidence in a particular case. *Chapman*, 386 US at 23 & n 8, citing *Tumey*, 273 US 510; *Wallace v Bell*, 387 F Supp 2d 728, 738 (ED Mich, 2005) ("Certainly, the trial record confirms the state court's finding that the prosecution's case was strong; but once the court determined that the trial judge's actions exhibited bias, reversal and a new trial is the only permissible consequence."). Accordingly, judicial partiality can never be held to be harmless and, therefore, is never subject to harmless-error review. *Fulminante*, 499 US at 309-310, citing *Tumey*, 273 US 510. The conviction must be reversed "even if no particular prejudice is shown and even if the defendant was clearly guilty." *Chapman*, 386 US at 43 (Stewart, J., concurring). To this extent, we overrule *People v Weathersby*, 204 Mich App 98; 514 NW2d 493

[5] The same is true of judicial bias that infects a civil proceeding. *Marshall v Jerrico, Inc*, 446 US 238, 242; 100 S Ct 1610; 64 L Ed 2d 182 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.").

(1994), and all other cases applying harmless-error analysis to questions of judicial partiality.

In this case, as detailed in Part IV of this opinion, defense counsel objected on multiple occasions to the judicial questioning of defendant's expert witness. We therefore conclude that the issue is preserved and harmless-error review is inapplicable.[6]

IV. APPLICATION

Having clarified the appropriate standard by which to review a claim of judicial partiality, we now apply that standard to the facts of this case. We review the trial judge's conduct according to the five factors delineated in our standard, taking care to note that consideration of additional factors may be necessary and appropriate in other cases.

A. NATURE OF THE JUDICIAL INTERVENTION

We first consider the nature of the judicial conduct. Defendant argues that the trial judge's questioning of defense witnesses demonstrated partiality.

In particular, defendant challenges the trial judge's repeated questioning of defendant's expert, Dr.

[6] The Court of Appeals majority concluded that defendant "failed to preserve all, but one, of his claims" and therefore applied plain-error review to the judicial questioning of defendant's expert. *Stevens* (opinion of the Court), unpub op at 2-5. The Court of Appeals dissent, however, detailed several instances in which defense counsel objected to the judge's questioning of the expert and also noted that further objection "would have been futile," given that the trial judge clearly indicated to counsel that he considered all the court's questions appropriate. *Stevens* (SERVITTO, J., dissenting), unpub op at 2-7. After reviewing the record, we agree with the dissent that defense counsel objected repeatedly and comprehensively to the judge's questioning of defendant's expert, and therefore find the issue preserved and plain-error review inapplicable.

Shuman, to which defense counsel objected vigorously at trial. Early in his direct examination, Shuman testified, "I think you heard testimony that the brain sloshes around. The brain doesn't slosh around. It would be like trying to scramble an egg by shaking it." The judge then stepped in:

> *The Court*: Would you be surprised if I told you that an expert didn't testify in this case that [an] infant's brain was sloshing around like an egg?
>
> [*Dr. Shuman*]: I saw Dr. Mohr's testimony, she said the brain sloshed around.
>
> *The Court*: Okay, so you think because one pediatrician said that . . . that's just your opinion, correct?
>
> [*Dr. Shuman*]: I'm just trying to educate the jury on that's not how it works.
>
> *The Court*: Okay. And now, you would agree with me that other pathologists might have very different views than your[s] . . . correct?

This conduct is problematic for several reasons. First, the judge undermined Shuman's testimony by suggesting that another witness offered contradictory testimony. Second, in emphasizing that Shuman's testimony was only his opinion and contrasting it with the opinion of other pathologists, the judge undermined the substance of Shuman's testimony as well as his overall credibility. Third, the phrase "you would agree with me" implies that the judge had his own opinion on whom to credit. In this way, the judge laid "undue stress upon particular features of a witness' testimony that might, in the eyes of the jury, tend to impeach him." *Simpson*, 328 Mich at 564.

Almost immediately following this exchange, the judge questioned why Shuman had traveled a great distance to testify for defendant:

The Court: I have another question for you. Have you ever traveled so far to testify?

[*Dr. Shuman*]: Yes.

The Court: Okay, how often and how far did you go?

[*Dr. Shuman*]: Well, I've testified in --

Defense counsel then asked to approach, but the judge denied the request, to which counsel responded:

Well, your Honor, just for the record I believe that that particular question is inappropriate. I -- it's clear that this is a court appointed medical examiner. The fact that he traveled from Florida to Michigan has absolutely no bearing in this case.

We agree with defense counsel that this question was inappropriate. The inquiry insinuated that Shuman had traveled unusually far just to testify for defendant, arousing suspicion about his motives or why defendant could not procure a local expert to substantiate his defense.

Moreover, just thereafter, the judge targeted Shuman's qualifications:

The Court: But, Dr. Shuman, as I understand it, you're an assistant pathologist, correct, you're not -- not the pathologist at Dade County are you?

Defense counsel objected, noting that the court had already endorsed Shuman as an expert. The judge replied, "Mr. Kirkpatrick, if I have a question I can ask a question, all right?" The judge continued:

The Court: Okay, and all things being equal do you think a head pathologist is more qualified to testify by way of experience or do you think an assistant pathologist is more qualified to testify by way of experience?

[*Dr. Shuman*]: I -- I wouldn't make that determination based on just being a head versus an assistant.

> *The Court*: Okay. All things being equal, would you agree with me that at -- that generally head pathologists reach the top of their profession because they have the most experience or the least experience?
>
> [*Dr. Shuman*]: Well no, no. I mean, it it -- I know pathologists that are head pathologists that have less experience than I do.
>
> *The Court*: Okay, does your head pathologist of Dade County have more or less experience than you do?
>
> [*Dr. Shuman*]: He has more.
>
> *The Court*: He has what?
>
> [*Dr. Shuman*]: He has more but I've trained pathologists who are head pathologists in other areas.

Nothing about this inquiry clarifies unclear testimony or aids the jury in understanding complex or additional pertinent information. Rather, the judge *again* interjected himself into direct examination and engaged in pointed cross-examination that targeted the witness's credentials, thereby invading the prosecutor's role. The questions were intimidating and argumentative, so much so that the witness was put on the defensive to vouch for his own qualifications. Especially given that the judge had already endorsed Shuman as an expert, extensive questioning about Shuman's motives and qualifications fell outside the bounds of permissive judicial conduct. See *Cole*, 349 Mich at 199-200. Furthermore, the judge's response to defense counsel's objection seemed to reflect an erroneous belief that his power to question had no limitations.

Finally, the trial judge questioned Shuman about the basis for his medical conclusions in this case. During direct examination, the judge asked Shuman if it was critical to look at all the investigative reports when performing an autopsy. Then, during cross-

examination, after Shuman stated that he had not viewed the reports in this particular case, the judge interrupted the prosecutor:

> Why didn't you do that in this case then? Why didn't you ask to get the police reports or talk to Detective Boulter? If that was important in that short fall case . . . why didn't you do it in this one?[7]

In doing so, the judge again improperly invaded the prosecutor's role. See *Cole*, 349 Mich at 196. The questions suggested that Shuman was not thorough in his analysis and therefore his conclusions should not be trusted. It is also notable that the judge intervened in the middle of the prosecution's line of cross-examination, challenging the witness himself rather than allowing the prosecutor to do so. Thus, on numerous occasions, the trial judge intervened in a manner that exceeded the scope of permissive judicial questioning. As a result, this factor weighs in favor of finding it reasonably likely that the judge improperly influenced the jury by creating the appearance of advocacy or partiality against defendant.

Defendant also takes issue with judicial questioning that occurred during the direct examination of defendant himself. While the judge's questioning of defendant's expert alone was sufficient to pierce the veil, we note that the judge's hostile questioning of defendant contributed to the overall appearance of advocacy or partiality. Immediately after defendant testified that he tripped over the toy truck, the judge intervened:

> *The Court*: Okay. Why did you pick this alleged truck up and not put it in the toy box, as I recall your testimony,

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[7] The judge later added, "I mean, is it any -- when you're going to rule out any suspicious death isn't looking at the police reports a critical part of determining the forensic aspect of pathology?"

was somewhere in the -- in the bedroom, you said you took it?

* * *

The Court: . . . [W]hat happened to the truck that you allegedly tripped and lost your balance on?

[*Defendant*]: I -- I left it there. I didn't move it.

The Court: So you left it on the floor. Would it have been there when Detective Boulter came in and did a physical inspection?

[*Defendant*]: I believe so, unless it was cleaned up beforehand, I don't know.

We note that this interjection occurred early in defense counsel's direct examination of defendant, before counsel could thoroughly develop the testimony and before the prosecutor had the opportunity to challenge the validity of defendant's version of events. Instead, the judge himself intervened and quickly seemed to question defendant's explanation. While the use of the words "alleged" and "allegedly" can be interpreted in multiple ways,[8] the context of the judge's question—and especially the fact that the judge never used these words in his interaction with any other witnesses—suggests the judge's disbelief in the defendant's testimony. These questions did not clarify a confusing point or elicit additional relevant information. Rather, the questions inappropriately exhibited disbelief of the defendant. See *Young*, 364 Mich at 558. The fact that the judge intervened in this manner before the prosecutor's cross-examination is even fur-

[8] For instance, a judge who consistently uses the word "allegedly" when referring at trial to a contested fact question, regardless of which witness is testifying, may not be exhibiting bias but instead may be deferring to the judgment of the fact-finder in resolving that question. As always, the proper interpretation depends on the context of the interactions.

ther indication that the judge improperly invaded the prosecutor's role. See *id*. Even if this exchange, on its own and in a different context, would not raise questions of impartiality, this exchange provides further support for defendant's claim of judicial bias.

B. TONE AND DEMEANOR

We also consider the tone and demeanor the judge displayed in front of the jury. It will often be the case that analysis under this factor will dovetail with analysis of the nature and type of judicial conduct; the manner in which the judge's inquiry is made will affect how the jury perceives the conduct. To the extent that it is appropriate, these factors may be considered together.

As noted earlier, in several instances the very words and sequence of questions employed by this judge projected incredulity, bias, and hostility. For example, the judge's use of the phrase "that's just your opinion" when questioning Shuman obviously indicated the judge's personal disbelief of the witness and encouraged the jury to disregard Shuman's professional opinion. When questioning Shuman about why he had not reviewed the police reports, the judge asked three questions in immediate succession without giving the witness the chance to respond, indicating aggression and antagonism. Additionally, at several points, the judge engaged in prosecutorial cross-examination of Shuman, further highlighting the biased nature of the intervention. An objection by defense counsel made outside of the presence of the jury further elucidates the atmosphere pervading the courtroom:

> Your Honor, with all due respect, I'd like to make a record. This is my expert witness and I take exception and object. I understand the Court has the ability to ask

> questions of an expert but I believe it is objectionable and I believe that it crosses the line when it appears as though the Judge, who is the impartial overseer of this trial, is cross-examining my expert as if you are the prosecuting attorney. Because that sends a message to the jurors to immediately disregard what he's saying.
>
> And I'm getting that feel, your Honor, and if I'm getting that feel I believe the jury's getting that feel. You're aggressively asking him questions, you are downgrading the fact that he's got to travel across this country, you're insinuating to the jury that he's coming -- we couldn't find somebody in Detroit or Flint, we got to bring somebody all the way from Florida, you're destroying his credibility in front of the jury before they even have an opportunity to hear him fully testify. And I take -- and I object to it. I think it's improper.

This objection highlights the judge's inappropriate manner. Additionally, the judge unquestionably displayed hostility toward defense counsel when he responded to another objection with, "Mr. Kirkpatrick, if I have a question I can ask a question, all right?" Finally, the judge's use of the words "alleged" and "allegedly" when questioning defendant clearly indicated that the judge doubted defendant's testimony. While evidence of the judge's tone and demeanor may not be on the record in many claims of judicial bias, when it does appear, it provides further information to determine whether a defendant is entitled to a new trial. There is such evidence in this case. Therefore, this factor also weighs in favor of holding that the judge improperly created an appearance of bias against defendant.

C. SCOPE OF THE CONDUCT IN LIGHT OF THE TRIAL'S COMPLEXITY

Next, we consider the scope of the judicial conduct in the context of the length and complexity of the trial, as

well as the complexity of the issues therein. This was an eight-day murder and child-abuse trial involving testimony from several medical experts. Despite the presence of multiple expert witnesses, a review of the record confirms that the complexity of the issues presented did not warrant the extent of the judicial intervention that occurred.[9] The testimony from the medical experts did conflict over whether Kian's injuries pointed toward homicide as the cause of death or instead could support defendant's claim that he accidentally dropped Kian. However, both counsel fully developed the differing expert viewpoints in clear, understandable fashion. It was well within the capacity of the jurors to weigh the relatively straightforward testimony to determine the cause of death without judicial intervention. Therefore, the information presented in this trial did not warrant the degree to which the trial judge intervened.

D. DIRECTION OF INTERVENTION

In tandem with assessing the judge's conduct in light of the trial's length and complexity, it is also important to consider whether this intervention was directed toward a particular party, so as to distinguish excessive but ultimately neutral questioning from *biased* judicial questioning. A review of the record here indicates that the judge's questioning was directed against the defendant and in favor of the prosecution. First, we note that the questions were imbalanced in number: the judge questioned defendant's witnesses far more extensively than the prosecution's witnesses.[10] Furthermore, when the judge did ask ques-

[9] As acknowledged by the prosecutor in his closing argument, "This is not a difficult case as far as [the] evidence . . . ."

[10] In addition to Anderson, Dr. Mohr, and Dr. Jentzen, the prosecution called two police detectives, two public safety officers, an expert on

tions of a prosecution witness, the inquiry often appeared to be designed to further weaken defendant's case. For instance, the judge asked several questions of Anderson related to past incidents of domestic violence with defendant. The judge then asked the prosecution's expert on domestic violence, "[W]hy is it sometimes difficult for women to extricate [themselves] or leave situations, even potentially when their children could be at risk?" Thus, the judge seemed to be using two of the prosecution's witnesses in tandem to tarnish defendant in the eyes of the jury. Likewise, when the prosecution called Dr. Jentzen as a rebuttal witness, the judge asked:

> Okay, Doctor, as forensic pathologist, and I guess an anatomical one as well, why is it important [i]f a death is either suspicious or suspected to be a homicide, why is it important to you that you review the police reports and have access to the detective and access, as an example, to any supplemental breaking reports in the investigation?

The judge also asked Jentzen to reiterate that he was a head medical examiner, not an assistant. Following immediately on the heels of the judge's criticism of Shuman, these questions used Jentzen's rebuttal testimony to further undermine Shuman's credibility. Thus, even when questioning the prosecution's witnesses, the judge in fact adversely targeted defendant's case. In contrast to the aggressive, undermining judicial examination of defendant and Shuman, no prosecutorial witness was subject to such hostile intervention. In other words, not only was judicial questioning imbalanced in number but also in style. Accordingly,

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domestic violence, Anderson's step-mother, and defendant's ex-girlfriend. Of several witnesses, the judge did not ask any questions at all. Of the two officers, the judge asked a few clarifying questions about the timing of an interview and the process of making a police report.

this factor also weighs in favor of holding that the judge pierced the veil of judicial impartiality.

E. CURATIVE INSTRUCTIONS

Finally, we consider the presence or absence of curative instructions. At the close of trial, the judge provided the jury with general curative instructions to the effect that his questions and comments were not evidence, any judicial intervention was not meant to reflect a personal opinion, and the jury could only decide the case on the basis of the evidence. Because "jurors are presumed to follow their instructions," *Graves*, 458 Mich at 486, the presence of a curative instruction does tend to cut against a finding of judicial bias. Despite this presumption, however, we note that a single, general instruction may not alleviate substantial judicial bias when judicial questioning of one party is excessive and imbalanced, as it was here. See *In re Parkside Housing Project*, 290 Mich at 599-600; *Bigge*, 297 Mich at 70-72. Although the presence of a proper curative instruction weighs against the conclusion that the judge's conduct pierced the veil and deprived defendant of a fair trial, the totality-of-the-circumstances test requires that this factor be considered alongside the others.

V. CONCLUSION

In this case involving a preserved claim of structural error, considering the totality of the circumstances, we conclude that it is reasonably likely that the judge's conduct with respect to defendant's expert witness improperly influenced the jury by creating the appearance of advocacy or partiality against defendant.[11] The

[11] Because we decide this case on the grounds of judicial partiality, we decline to address the other issues raised by defendant on appeal.

nature of the judicial conduct, the judge's tone and demeanor, and the direction of the judge's questions in light of the trial's complexity all indicate that the judge exhibited judicial bias in the presence of the jury. Although the judge gave a curative instruction to the jury, this instruction was not enough to overcome the bias the judge exhibited against the defense throughout the trial. Consequently, we reverse the judgment of the Court of Appeals and remand for a new trial before a different judge.

YOUNG, C.J., and MARKMAN, KELLY, ZAHRA, MCCORMACK, and VIVIANO, JJ., concurred with BERNSTEIN, J.

PEOPLE v HARTWICK

PEOPLE v TUTTLE

Docket Nos. 148444 and 148971. Argued January 15, 2015 (Calendar Nos. 5 and 6). Decided July 27, 2015.

Richard Lee Hartwick was charged in the Oakland Circuit Court with manufacturing marijuana and possessing it with the intent to deliver it. Hartwick was a registered qualifying patient under the Michigan Medical Marihuana Act (MMMA). He served as his own primary caregiver and the primary caregiver for five other registered qualifying patients to whom he was properly connected under the MMMA. The police, acting on a tip, confronted Hartwick and later conducted a consent search of his home where the police discovered a disputed number of marijuana plants and approximately 3.69 ounces of marijuana. Hartwick moved to dismiss the charges, claiming immunity under § 4 of the MMMA, MCL 333.26424, and the affirmative defense under § 8 of the MMMA, MCL 333.26428. In the alternative, Hartwick sought permission to present a § 8 defense at trial. The court, Colleen A. O'Brien, J., denied the motions. The Court of Appeals denied Hartwick's delayed application for leave to appeal. The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted. 493 Mich 950 (2013). The Court of Appeals, SAAD, P.J., and SAWYER, J. (JANSEN, J., concurring), affirmed the trial court. 303 Mich App 247 (2013). The Supreme Court granted leave to appeal in Docket No. 148444. 496 Mich 851 (2014).

Robert Tuttle was charged in the Oakland Circuit Court with three counts of delivering marijuana, one count of manufacturing marijuana, one count of possessing marijuana with the intent to deliver it, and two counts of possession of a firearm during the commission of a felony. Tuttle was a registered qualifying patient under the MMMA who served as his own primary caregiver. It was unclear whether he was properly connected as the primary caregiver to one or two other registered qualifying patients. Tuttle was arrested for selling marijuana on three occasions to an individual with whom Tuttle was not properly connected under the MMMA. Tuttle claimed immu-

nity under § 4 and the affirmative defense under § 8 of the MMMA. The court, Michael D. Warren, Jr., J., rejected both claims and denied Tuttle's request to present a § 8 defense at trial. According to the court, immunity was not appropriate because Tuttle's illegal conduct—selling marijuana to an individual outside the protection of the MMMA—tainted Tuttle's conduct with regard to the other charges. The court denied Tuttle use of the affirmative defense in § 8 because Tuttle failed to present prima facie evidence of each element of the defense. The Court of Appeals denied Tuttle's application for leave to appeal. In lieu of granting Tuttle's application for leave to appeal, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 493 Mich 950 (2013). The Court of Appeals, SAAD, P.J., and SAWYER, J. (JANSEN, J., concurring), affirmed the trial court. 304 Mich App 72 (2014). The Supreme Court granted leave to appeal in Docket No. 148971. 496 Mich 851 (2014).

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

The availability of immunity under § 4 of the MMMA is a question of law to be decided before trial, and a defendant has the burden of proving by a preponderance of the evidence his or her entitlement to immunity. Immunity must be claimed for each charged offense, and the burden of proving immunity is separate and distinct for each offense. Conduct that is noncompliant with the MMMA with respect to one charged offense does not automatically rebut the presumption of medical use with respect to conduct relating to any other charged offenses. Rather, noncompliant conduct involved in one charged offense can negate otherwise compliant conduct involved in a separate charged offense if there is a nexus between the noncompliant and the otherwise compliant conduct. Raising an affirmative defense under § 8 of the MMMA requires a caregiver to present prima facie evidence of each element of the defense for him- or herself and for each registered qualifying patient to which the caregiver is connected. Having established a prima facie case, the defendant has the burden of proving each element by a preponderance of the evidence. A valid registry identification card does not create any presumption for purposes of § 8.

1. The lower courts erred by denying Hartwick § 4 immunity without properly making the factual determinations required by § 4. The Court of Appeals failed to recognize that the trial court did not make proper factual determinations on the elements of § 4, specifically, the number of plants Hartwick possessed. In

addition, the trial court and the Court of Appeals erred by concluding that Hartwick should have known his registered qualifying patients' debilitating conditions, the amount of marijuana they needed, and the identities of their physicians. Section 4 does not require that knowledge. To establish immunity under § 4 of the MMMA, the defendant must prove four elements by a preponderance of the evidence: (1) the defendant possessed a valid registry identification card; (2) the defendant complied with the requisite volume limitations in § 4(a) and § 4(b); (3) the defendant kept any marijuana plants in an enclosed, locked facility; and (4) the defendant was engaged in the medical use of marijuana. Under the MMMA, a defendant is presumed to be engaged in the medical use of marijuana if the defendant possesses a valid registry identification card and is not in violation of the volume limitations. The presumption is rebuttable by evidence that a defendant's conduct was not for the purpose of alleviating a qualifying patient's debilitating medical condition or its symptoms. If a presumption of medical use has been rebutted, the defendant may still prove by a preponderance of the evidence that the defendant's conduct was in furtherance of the administration of marijuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition under MCL 333.26423(f). The written certification necessary to obtain a registry identification card is not similar to a pharmaceutical prescription and satisfies none of the elements of a § 8 defense. *People v Hartwick* had to be remanded to the trial court for an evidentiary hearing to determine the number of plants in Hartwick's possession and whether Hartwick was entitled to § 4 immunity.

2. The Court of Appeals properly held that Hartwick was not entitled to raise the affirmative defense under § 8 because he failed to present prima facie evidence of each element of the defense. A primary caregiver must provide prima facie evidence of all § 8(a) elements for him- or herself and for the registered qualifying patients to which he or she is connected under the MMMA. Specifically, Hartwick failed to provide evidence of a bona fide physician-patient relationship for himself, as a patient, and his connected patients, he failed to provide evidence that a physician conducted a full assessment of his and his patients' medical histories and current medical conditions, and he failed to show that a physician determined that he and his patients had debilitating medical conditions that would likely benefit from the medical use of marijuana. Hartwick further failed to present prima facie evidence that the amount of marijuana he possessed

was not more than was reasonably necessary to ensure its uninterrupted availability for the treatment of his and his patients' debilitating medical conditions. Finally, Hartwick failed to present prima facie evidence that he and his patients were engaged in the use of marijuana for a medical purpose.

3. The Court of Appeals erred by concluding that Tuttle's unprotected conduct with the unconnected individual tainted what might otherwise be protected conduct on which additional separate charges were based. A defendant must raise the claim of § 4 immunity to each charged offense, the trial court must decide as a matter of law before trial whether to grant the defendant's motion for immunity, and the defendant must prove immunity by a preponderance of the evidence each time immunity is raised. The defendant's burden of proving entitlement to immunity is separate and distinct for each charged offense. MMMA-compliant conduct is not automatically tainted by the defendant's improper conduct related to a different charged offense unless there is a nexus between the improper conduct and the otherwise proper conduct. *People v Tuttle* had to be remanded to the trial court for an evidentiary hearing to determine whether there was a nexus between the charges based on Tuttle's improper conduct and the charges based on Tuttle's otherwise proper conduct, in addition to other factual findings.

4. The Court of Appeals properly held that Tuttle could not claim the affirmative defense under § 8 because he failed to establish prima facie evidence of at least one of the elements of the defense for each of his possibly connected patients. Specifically, Tuttle failed to provide evidence of the actual amount of marijuana needed to treat his patients; the evidence showed only the actual amount of marijuana each patient obtained from Tuttle. In addition, Tuttle failed to show that one patient had undergone a full medical assessment in the course of a bona fide physician-patient relationship.

Hartwick affirmed in part, reversed in part, and remanded to the trial court for an evidentiary hearing to determine Hartwick's entitlement to § 4 immunity.

Tuttle affirmed in part, reversed in part, and remanded to the trial court for an evidentiary hearing to determine Tuttle's entitlement to § 4 immunity.

1. CONTROLLED SUBSTANCES — MICHIGAN MEDICAL MARIHUANA ACT — SECTION 4 IMMUNITY.

The availability of immunity under § 4 of the Michigan Medical Marihuana Act (MMMA), MCL 333.26424, is a question of law to

be determined by the trial court before trial; whether a defendant is entitled to immunity requires the trial court to make findings of fact with regard to each element of immunity under the MMMA; specifically, § 4 immunity requires proof by a preponderance of the evidence that a defendant (1) possessed a valid registry identification card, (2) complied with the requisite volume limitations of § 4(a) and § 4(b), (3) kept any marijuana plants in an enclosed, locked facility, and (4) was engaged in the medical use of marijuana.

2. CONTROLLED SUBSTANCES — MICHIGAN MEDICAL MARIHUANA ACT — SECTION 4 STATUTORY PRESUMPTION — MEDICAL USE.

A defendant is statutorily presumed under MCL 333.26424(d) to be engaged in the medical use of marijuana for purposes of § 4 of the Michigan Medical Marihuana Act, MCL 333.26424, if the defendant possesses a valid registry identification card and is not in violation of the volume limitations in § 4(a) or § 4(b); the statutory presumption of medical use is rebuttable by evidence that a defendant's conduct was not for the purpose of alleviating a qualifying patient's debilitating medical condition or its symptoms; a defendant's unprotected conduct with respect to one charged offense does not necessarily rebut the statutory presumption of medical use for another charged offense. If the presumption has been rebutted, a defendant may present evidence to show that the defendant was, in fact, engaged in the medical use of marijuana under MCL 333.26423(f).

3. CONTROLLED SUBSTANCES — MICHIGAN MEDICAL MARIHUANA ACT — SECTION 4 IMMUNITY — SEPARATE CHARGED OFFENSES.

A defendant claiming § 4 immunity under the Michigan Medical Marihuana Act, MCL 333.26424, must raise the claim against each charged offense, the trial court must decide as a matter of law before trial whether to grant the defendant's motion for immunity with regard to each charged offense, and the defendant must prove immunity by a preponderance of the evidence each time immunity is raised; the defendant's burden of proving entitlement to immunity is separate and distinct for each charged offense.

4. CONTROLLED SUBSTANCES — MICHIGAN MEDICAL MARIHUANA ACT — SECTION 8 AFFIRMATIVE DEFENSE — PRIMA FACIE EVIDENCE.

A primary caregiver must provide prima facie evidence of all three elements in § 8(a) of the Michigan Medical Marihuana Act, MCL 333.26428(a), for him- or herself, *and* for the patients to whom he or she provides marijuana, in order to assert the § 8 defense; if the § 8 defense is submitted to the fact-finder, the defendant must prove these elements by a preponderance of the evidence.

5. CONTROLLED SUBSTANCES — MICHIGAN MEDICAL MARIHUANA ACT — SECTION 8 AFFIRMATIVE DEFENSE — PRIMA FACIE EVIDENCE.

For § 8(a)(1), of the Michigan Medical Marihuana Act, MCL 333.26428(a)(2), a primary caregiver must present prima facie evidence that each of his or her patients has a bona fide physician-patient relationship with a physician who has completed a full assessment of the patient's medical history and current medical condition and who has formed a professional opinion that the patient has a debilitating medical condition that would likely benefit from the medical use of marijuana; a primary caregiver must also prove these elements for him- or herself if the primary caregiver is also a patient.

6. CONTROLLED SUBSTANCES — MICHIGAN MEDICAL MARIHUANA ACT — SECTION 8 AFFIRMATIVE DEFENSE — PRIMA FACIE EVIDENCE.

For § 8(a)(2), of the Michigan Medical Marihuana Act, MCL 333.26428(a)(2), a primary caregiver may reasonably rely on the amount of marijuana his or her patient states is needed to treat the patient's debilitating medical condition; the primary caregiver must present prima facie evidence regarding the amount of usable marijuana needed to treat his or her patients' debilitating medical conditions, how many marijuana plants the primary caregiver needs to grow, and how much usable marijuana the primary caregiver needs to possess, in order ensure "uninterrupted availability" for the caregiver's patients.

7. CONTROLLED SUBSTANCES — MICHIGAN MEDICAL MARIHUANA ACT — SECTION 8 AFFIRMATIVE DEFENSE — PRIMA FACIE EVIDENCE.

For § 8(a)(3), of the Michigan Medical Marihuana Act, MCL 333.26428(a)(3), a primary caregiver must present prima facie evidence that his or her own use of marijuana was for a medical purpose and any patients' use of marijuana was for a medical purpose.

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Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division

Chief, and *Tanya L. Nava*, Assistant Prosecuting Attorney, for the people in *Tuttle*.

Frederick J. Miller and *Nancy E. Miller* for Richard Lee Hartwick.

Daniel J. M. Schouman, PLC (by *Daniel J. M. Schouman*), for Robert Tuttle.

Amici Curiae:

Daniel W. Grow, PLLC (by *Daniel W. Grow*), for Cannabis Patients United in *Hartwick*.

Komorn Law, PLLC (by *Michael A. Komorn*), for the Michigan Medical Marijuana Association in *Hartwick* and *Tuttle*.

Cannabis Attorneys of Michigan (by *Denise A. Pollicella*, *Ashlee N. Rudnick*, and *Brandon Gardner*) in *Tuttle*.

ZAHRA, J. In 2008, the voters of Michigan passed into law a ballot initiative[1] now codified as the Michigan Medical Marihuana[2] Act (MMMA), MCL 333.26421 *et seq*. Unlike the procedures for the editing and drafting of bills proposed through the Legislature, the electorate—those who enacted this law at the ballot

[1] Under Article 2, § 9 of the 1963 Michigan Constitution, "[t]he people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative . . . ." A voter initiative may be invoked by a relatively small number of registered voters. "To invoke the initiative . . . , petitions signed by a number of registered electors, not less than eight percent . . . of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required." Const 1963, art 2, § 9.

[2] The MMMA uses the variant "marihuana." Throughout this opinion, we use the vernacular "marijuana" unless quoting from the statute.

box—need not review the proposed law for content, meaning, readability, or consistency.[3]

This lack of scrutiny in the lawmaking process is significant because initiatives such as the MMMA cannot be modified "except by a[nother] vote of the electors" or by a three-fourths vote of each chamber of the Legislature.[4] This constraint on Legislative power suggests that there can be matters of public policy so important to the people that they cannot be left in the hands of the elected legislators. But this constitutionally protected reservation of power by the people comes with a cost. The lack of procedural scrutiny in the initiative process leaves the process susceptible to the creation of inconsistent or unclear laws that may be difficult to interpret and harmonize. The MMMA is

[3] Members of the Legislature generally request that the Legislative Council, a bipartisan, bicameral body of legislators established in Article 4, § 15 of the 1963 Constitution of Michigan, see that bills to be proposed in their respective chambers are drafted. See Const 1963, art 4, § 15; MCL 4.1103; MCL 4.1105. The council oversees the Legislative Service Bureau. MCL 4.1105. The bureau has a director and staff, and maintains a legislative reference library containing material that may be of use in connection with drafting and editing proposed legislation. MCL 4.1106; MCL 4.1107. At the request of the members of the Legislature, the bureau drafts "bills and resolutions or amendments to, or substitutes for, bills and resolutions; draft[s] conference committee reports; and examine[s], check[s], and compare[s] pending bills with other pending bills and existing laws to avoid so far as possible contrary or conflicting provisions." MCL 4.1108(a). In sum, the Legislature has a staff of experienced attorneys who work with the various legislators to develop and revise any manner of laws. After a bill is drafted and supported, the chambers of the Legislature may refer it to conference committees for additional review by legislators and the public. The Governor also has an opportunity to review bills before signing them into law. This extensive drafting process works to clarify language, limit confusion and mistakes, and in a general sense, ensure that enacted laws have a modicum of readability and consistency.

[4] See Const 1963, art 2, § 9.

such a law. While the MMMA has been the law in Michigan for just under seven years, this Court has been called on to give meaning to the MMMA in nine different cases.[5] The many inconsistencies in the law have caused confusion for medical marijuana caregivers and patients, law enforcement, attorneys, and judges, and have consumed valuable public and private resources to interpret and apply it. This confusion mainly stems from the immunity, MCL 333.26424 (§ 4), and the affirmative defense, MCL 333.26428 (§ 8), provisions of the MMMA. We granted leave in *People v Hartwick*[6] and *People v Tuttle*[7] to once again consider

[5] The Court previously interpreted the MMMA in the following cases: *People v Mazur*, 497 Mich 302; 854 NW2d 719 (2015); *Ter Beek v City of Wyoming*, 495 Mich 1; 846 NW2d 531 (2014); *People v Green*, 494 Mich 865 (2013); *People v Koon*, 494 Mich 1; 832 NW2d 724 (2013); *State v McQueen*, 493 Mich 135; 828 NW2d 644 (2013); *People v Bylsma*, 493 Mich 17; 825 NW2d 543 (2012); *People v Kolanek*, 491 Mich 382; 817 NW2d 528 (2012). This term, the Court granted leave in *People v Hartwick*, 496 Mich 851 (2014), and *People v Tuttle*, 496 Mich 851 (2014).

[6] In *Hartwick*, we directed the parties to address the following questions:

> (1) whether a defendant's entitlement to immunity under § 4 of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., is a question of law for the trial court to decide; (2) whether factual disputes regarding § 4 immunity are to be resolved by the trial court; (3) if so, whether the trial court's finding of fact becomes an established fact that cannot be appealed; (4) whether a defendant's possession of a valid registry identification card establishes any presumption for purposes of § 4 or § 8; (5) if not, what is a defendant's evidentiary burden to establish immunity under § 4 or an affirmative defense under § 8; (6) what role, if any, do the verification and confidentiality provisions in § 6 of the act play in establishing entitlement to immunity under § 4 or an affirmative defense under § 8; and (7) whether the Court of Appeals erred in characterizing a qualifying patient's physician as issuing a prescription for, or prescribing, marijuana. [*Hartwick*, 496 Mich at 851.]

[7] In *Tuttle*, we directed the parties to address the following questions:

the meaning and application of these two very important sections of the MMMA.[8]

For the reasons fully explained in this opinion regarding § 4, we hold:

(1) entitlement to § 4 immunity is a question of law to be decided by the trial court before trial;

(2) the trial court must resolve factual disputes relating to § 4 immunity, and such factual findings are reviewed on appeal for clear error;

(3) the trial court's legal determinations under the MMMA are reviewed de novo on appeal;

(4) a defendant may claim immunity under § 4 for each charged offense if the defendant shows by a preponderance of the evidence that, at the time of the charged offense, the defendant

(i) possessed a valid registry identification card,

(ii) complied with the requisite volume limitations of § 4(a) and § 4(b),

(iii) stored any marijuana plants in an enclosed, locked facility, and

(iv) was engaged in the medical use of marijuana;

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(1) whether a registered qualifying patient under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., who makes unlawful sales of marijuana to another patient to whom he is not connected through the registration process, taints all aspects of his marijuana-related conduct, even that which is otherwise permitted under the act; (2) whether a defendant's possession of a valid registry identification card establishes any presumption for purposes of § 4 or § 8; (3) if not, what is a defendant's evidentiary burden to establish immunity under § 4 or an affirmative defense under § 8; and (4) what role, if any, do the verification and confidentiality provisions in § 6 of the act play in establishing entitlement to immunity under § 4 or an affirmative defense under § 8. [*Tuttle*, 496 Mich at 851-852.]

[8] The same panel of the Court of Appeals presided over *People v Hartwick* and *People v Tuttle*.

(5) the burden of proving § 4 immunity is separate and distinct for each charged offense;

(6) a marijuana transaction by a registered qualifying patient or a registered primary caregiver that is not in conformity with the MMMA does not per se taint all aspects of the registered qualifying patient's or registered primary caregiver's marijuana-related conduct;

(7) a defendant is entitled to a presumption under § 4(d) that he or she was engaged in the medical use of marijuana if the defendant has shown by a preponderance of the evidence that, at the time of the charged offense, the defendant

(i) possessed a valid registry identification card, and

(ii) complied with the requisite volume limitations of § 4(a) and § 4(b);[9]

(8) the prosecution may rebut the § 4(d) presumption that the defendant was engaged in the medical use of marijuana by presenting evidence that the defendant's conduct was not for the purpose of alleviating the registered qualifying patient's debilitating medical condition;

(9) non-MMMA-compliant conduct may rebut the § 4(d) presumption of medical use for otherwise MMMA-compliant conduct if a nexus exists between the non-MMMA-compliant conduct and the otherwise MMMA-compliant conduct;

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[9] A valid registry identification card is a prerequisite to establish immunity under § 4. But possession of a valid registry identification card, alone, does not establish any presumption for the purpose of § 4. Further, the verification and confidentiality provisions in § 6(c) and § 6(h), MCL 333.26426(c) and (h), do not establish that a defendant has engaged in the medical use of marijuana, or complied with the requisite volume and storage limitations of § 4.

(10) if the prosecution rebuts the § 4(d) presumption of the medical use of marijuana, the defendant may still establish, on a charge-by-charge basis, that the conduct underlying a particular charge was for the medical use of marijuana; and

(11) the trial court must ultimately weigh the evidence to determine if the defendant has met the requisite burden of proof as to all elements of § 4 immunity.

Regarding § 8, we hold:

(1) a defendant must present prima facie evidence of each element of § 8(a) in order to be entitled to present a § 8 affirmative defense to a fact-finder;

(2) if the defendant meets this burden, then the defendant must prove each element of § 8(a) by a preponderance of the evidence; and

(3) a valid registry identification card does not establish any presumption under § 8.[10]

For the reasons stated in this opinion, and in accordance with the conclusions of law described above, we affirm in part and reverse in part the November 19, 2013 judgment of the Court of Appeals in *People v*

[10] A valid registry identification card is prima facie evidence that a physician has determined the registered qualifying patient has a debilitating medical condition and will likely benefit from the medical use of marijuana to treat the debilitating medical condition. In addition, a valid registry identification card issued after April 1, 2013, the effective date of 2012 PA 512, is also prima facie evidence that a physician has conducted a full, in-person assessment of the registered qualifying patient. We reach this conclusion because § 6(c) requires the state to verify all the information contained in an application for a registry identification card; therefore, a valid registry identification card is prima facie evidence of anything contained in the application. This prima facie evidence satisfies two elements of § 8(a)(1), but does not satisfy the last element requiring prima facie evidence of a bona fide physician-patient relationship.

Hartwick.[11] We further remand *Hartwick* to the trial court for an evidentiary hearing regarding Hartwick's entitlement to immunity under § 4. In *People v Tuttle*, we affirm in part and reverse in part the January 30, 2014 judgment of the Court of Appeals.[12] We also remand *Tuttle* to the trial court for an evidentiary hearing regarding Tuttle's entitlement to immunity under § 4.

I. STATEMENT OF FACTS

A. *PEOPLE v HARTWICK*

In late 2011, police officers in Oakland County received a tip regarding a marijuana growing operation at Hartwick's home. Law enforcement officers confronted Hartwick, who admitted growing marijuana, but stated he was in compliance with the MMMA. After consenting to a search of his home, Hartwick led the police officers to a bedroom containing dozens of marijuana plants in varying sizes.[13] The police officers also found a total of 104.6 grams (approximately 3.69 ounces) of usable marijuana in the home.

The Oakland County Prosecutor charged Hartwick with manufacturing 20 to 200 marijuana plants and possession with intent to deliver marijuana. Hartwick moved to dismiss those charges based on both the immunity (§ 4) and the affirmative defense (§ 8)

[11] *People v Hartwick*, 303 Mich App 247; 842 NW2d 545 (2013).

[12] *People v Tuttle*, 304 Mich App 72; 850 NW2d 484 (2014).

[13] Hartwick alleges that 71 plants were found, while the police allege he possessed 77 plants. *Hartwick*, 303 Mich App at 253-254, 259-260. Additionally, while this issue was not appealed, we note that Hartwick testified the door to the bedroom was locked before he unlocked it for the police, while the police allege that it was unlocked when they arrived.

provided in the MMMA. The trial court held an evidentiary hearing at which Hartwick was the only witness. Hartwick testified that he was a medical marijuana patient and his own caregiver,[14] and a connected[15] primary caregiver to five registered qualifying patients. He submitted into evidence the registry identification cards for himself and the five connected qualifying patients. Hartwick could not identify the debilitating conditions suffered by two of the qualifying patients statutorily connected to him. Further, Hartwick could not identify the certifying physician for any of the five connected qualifying patients.

The trial court concluded that Hartwick was not entitled to § 4 immunity. The court reasoned that Hartwick did not comply with the requirements of the MMMA because he did not know if the patients connected to him even had debilitating medical conditions.[16]

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[14] We do not use the terms "patient" and "caregiver" in the traditional sense associated with a patient/medical provider relationship. Rather, we use these terms because they are used in the MMMA. Under the MMMA, a medical marijuana user, or "patient," may elect to either manufacture marijuana for personal medical use or have someone else manufacture and supply marijuana to him or her. Such a supplier is known under the MMMA as a "primary caregiver." We refer to the qualifying patient as being his or her "own caregiver" when the patient has not designated a primary caregiver. We use the terms "patient" and "caregiver" throughout this opinion simply to track the language of the MMMA and not to suggest that someone asserting a defense or immunity under the MMMA is a "patient" or "caregiver" as those terms are generally understood. Whether one is a "patient" or "caregiver" under the MMMA, as opposed to a supplier or user of illegal marijuana, is a question to be resolved on a case-by-case basis.

[15] When a qualifying patient elects a primary caregiver, a registry identification card is also issued to the primary caregiver. When a qualifying patient has properly designated a primary caregiver under the MMMA, the primary caregiver is said to be "connected" to that particular qualifying patient.

[16] An individual claiming § 4 immunity must comply with the requirement that marijuana be only for a medical use.

The trial court similarly denied Hartwick's motion to dismiss under § 8 and his motion in the alternative to present a § 8 affirmative defense to the jury. The court determined that Hartwick failed to present "testimony regarding a 'bona fide physician-patient relationship or a likelihood of receiving therapeutic or palliative benefit from the medical use of marijuana,' or any testimony on whether defendant possessed no more marijuana than reasonably necessary for medical use."[17] Thus, Hartwick failed to establish his entitlement to a § 8 affirmative defense.

The Court of Appeals affirmed the trial court, rejecting Hartwick's contention "that his possession of a registry identification card automatically immunizes him from prosecution under § 4 and grants him a complete defense under § 8."[18] The Court of Appeals focused on the "primary purpose" of the MMMA, "which is to ensure that any marijuana production and use permitted by the statute is medical in nature and only for treating a patient's debilitating medical condition."[19]

B. *PEOPLE v TUTTLE*

Tuttle was a registered qualifying patient and his own caregiver. He was also connected as a registered primary caregiver to at least one other registered qualifying patient.[20] On three separate occasions in

[17] *Hartwick*, 303 Mich App at 255.

[18] *Id*. at 251.

[19] *Id*.

[20] At all relevant times, Tuttle was connected as a registered primary caregiver for Michael Batke. Additionally, Tuttle was at some point connected as a primary caregiver to Frank Colon. It is unclear whether Colon remained connected to Tuttle at the time of Tuttle's offenses in this case. Colon may have renewed his MMMA card and listed himself as his own caregiver. Notwithstanding this possible inconsistency, Colon

early 2012, Tuttle sold marijuana to William Lalonde even though Tuttle was not formally connected to Lalonde under the MMMA. In addition to arresting Tuttle for providing marijuana to Lalonde, the Oakland County Sheriff's Office searched Tuttle's home where they found 33 marijuana plants, 38 grams of marijuana (approximately 1.34 ounces), and several weapons locked in a gun safe. Tuttle was subsequently charged with multiple counts related to the possession, delivery, and manufacture of marijuana, as well as possession of a firearm during the commission of a felony.[21]

Tuttle attempted to invoke the immunity provided under § 4 for Counts IV through VII relating to possession of the marijuana in his home. Tuttle argued that he possessed a valid registry identification card and complied with the volume and storage limitations of § 4(a) and § 4(b). The prosecution argued that Tuttle did not comply with the requirements of § 4 because Tuttle provided marijuana to Lalonde outside the parameters of the MMMA. According to the prosecution, these transactions (for which Tuttle was charged in Counts I through III) tainted all of Tuttle's marijuana-related activity. The trial court agreed and denied Tuttle's motion under § 4 for immunity and dismissal of the charges.

Tuttle then raised the § 8 affirmative defense to Counts I through III. At an evidentiary hearing, Tuttle presented his registry identification card and the registry identification cards belonging to two allegedly connected qualifying patients: Michael Batke and Frank Colon. Lalonde, Batke, and Colon testified at the hearing.

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testified in the lower court that Tuttle supplied him with marijuana for his personal medical use. See page 208 of this opinion.

[21] Counts I through III relate to Tuttle's provision of marijuana to Lalonde. Counts IV through VII relate to the marijuana found in Tuttle's home.

Lalonde testified that he was a registered qualifying patient who met Tuttle through an internet site that purported to match medical marijuana patients with caregivers. Lalonde also testified that he told Tuttle he used marijuana to treat chronic pain. Batke testified that he was a registered qualifying patient and that Tuttle was properly connected to him under the MMMA as a registered primary caregiver. Batke also testified that he would call Tuttle every time he needed marijuana, and Tuttle provided Batke with approximately two ounces of marijuana a month. Lastly, Colon testified that he was a medical marijuana patient, that he had a debilitating medical condition,[22] and that he utilized Tuttle as a primary caregiver. Colon stated he requested between one and two ounces of marijuana a week from Tuttle.

After the evidentiary hearing, the trial court determined that Tuttle did not present prima facie evidence for each element of § 8(a). Specifically, the trial court determined that Tuttle failed to present any evidence that the medical marijuana users to whom Tuttle was connected had physicians who "completed a full assessment of each patient's medical history and current medical condition" as required by § 8(a)(1).[23] The court also concluded that Tuttle failed to establish a question of fact regarding whether the quantity of marijuana he possessed was reasonable under § 8(a)(2).[24] The Court of Appeals affirmed the trial court and additionally concluded that Tuttle had not presented prima facie

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[22] The physician's statement indicates that Colon's debilitating medical condition was shoulder and lower back pain.

[23] *Tuttle*, 304 Mich App at 79.

[24] The trial court did find the testimony of Lalonde, Batke, and Colon credible as to their need for the medical use of marijuana to treat a debilitating medical condition under § 8(a)(3).

evidence as to Tuttle's own medical use of marijuana under § 8(a)(3).

Regarding § 4 immunity, the Court of Appeals concluded that providing marijuana to Lalonde tainted all of Tuttle's marijuana-related conduct thereby negating Tuttle's ability to invoke § 4 immunity for any charge. Regarding the affirmative defense available under § 8, the Court of Appeals concluded that Tuttle's registry identification card did not establish prima facie evidence of the required elements of § 8. The court also concluded that the testimony of Tuttle's patients was equally deficient in presenting prima facie evidence of those elements.

II. ANALYSIS

The possession, manufacture, and delivery of marijuana are punishable criminal offenses under Michigan law.[25] Under the MMMA, though, "[t]he medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of th[e] act."[26] The MMMA grants to persons in compliance with its provisions either immunity from, or an affirmative defense to, those marijuana-related violations of state law. In the cases before us, we must resolve questions surrounding the § 4 grant of immunity and the § 8 affirmative defense.

A. STANDARD OF REVIEW

We review questions of statutory interpretation de novo.[27] The MMMA was passed into law by initiative. We must therefore determine the intent of the elector-

[25] See *Kolanek*, 491 Mich at 394 n 24.

[26] MCL 333.26427(a).

[27] *Kolanek*, 491 Mich at 393.

ate in approving the MMMA, rather than the intent of the Legislature.[28] Our interpretation is ultimately drawn from the plain language of the statute, which provides "the most reliable evidence" of the electors' intent.[29] But as with other initiatives, we place "special emphasis on the duty of judicial restraint."[30] Particularly, we make no judgment as to the wisdom of the medical use of marijuana in Michigan. This state's electors have made that determination for us. To that end, we do not attempt to limit or extend the statute's words. We merely bring them meaning derived from the plain language of the statute.

B. SECTION 4 IMMUNITY

Section 4 grants broad immunity from criminal prosecution and civil penalties to "qualifying patient[s]"[31] and "primary caregiver[s]."[32] Subsection (a) specifically grants immunity to qualifying patients and states in relevant part:

> (a) A qualifying patient who has been issued and

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[28] *McQueen*, 493 Mich at 147 (" '[T]he intent of the electors governs' the interpretation of voter-initiated statutes, just as the intent of the Legislature governs the interpretation of legislatively enacted statutes.") (citation omitted).

[29] *Id*.

[30] *Schmidt v Dep't of Ed*, 441 Mich 236, 241-242; 490 NW2d 584 (1992).

[31] The MMMA defines "qualifying patient" or "patient" as "a person who has been diagnosed by a physician as having a debilitating medical condition." MCL 333.26423(i).

[32] The MMMA defines "primary caregiver" or "caregiver" as "a person who is at least 21 years old and who has agreed to assist with a patient's medical use of marihuana and who has not been convicted of any felony within the past 10 years and has never been convicted of a felony involving illegal drugs or a felony that is an assaultive crime . . . ." MCL 333.26423(h).

> possesses a registry identification card[33] shall not be subject to arrest, prosecution, or penalty in any manner . . . for the medical use[34] of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified . . . a primary caregiver . . . , 12 marihuana plants kept in an enclosed, locked facility.[35]

A registered qualifying patient, therefore, may possess up to 2.5 ounces of usable marijuana.[36] Additionally, a registered qualifying patient may possess up to 12 marijuana plants, kept in an enclosed, locked facility, unless that patient specified a primary caregiver during the state registration process.[37] Section 4 immunity also requires that the registered qualifying patient was engaged in the medical use of marijuana.

Similarly, § 4(b) provides immunity to registered primary caregivers. It states, in relevant part:

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[33] The MMMA defines "registry identification card" as "a document issued by the department that identifies a person as a registered qualifying patient or registered primary caregiver." MCL 333.26423(j). The "department" is the "department of licensing and regulatory affairs." MCL 333.26423(c).

[34] "Medical use" is defined as "the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." MCL 333.26423(f).

[35] MCL 333.26424(a).

[36] "Usable marihuana" is defined as "the dried leaves and flowers of the marihuana plant, and any mixture or preparation thereof, but does not include the seeds, stalks, and roots of the plant." MCL 333.26423(k).

[37] When a patient does not specify a primary caregiver through the state registration process, the patient is typically considered his or her own caregiver. When no primary caregiver is properly identified under the law, the patient has legal authority to possess up to 12 marijuana plants.

> (b) A primary caregiver who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner . . . for assisting a qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act. . . . This subsection applies only if the primary caregiver possesses an amount of marihuana that does not exceed:
>
> (1) 2.5 ounces of usable marihuana for each qualifying patient to whom he or she is connected through the department's registration process; and
>
> (2) for each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility; and
>
> (3) any incidental amount of seeds, stalks, and unusable roots.

A primary caregiver, therefore, may only possess up to 2.5 ounces of usable marijuana and 12 marijuana plants in an enclosed, locked facility for each registered qualifying patient who has specified the primary caregiver during the state registration process. Similar to § 4(a), this section only applies if the primary caregiver is assisting a qualifying patient with the medical use of marijuana.

1. PROCEDURAL ASPECTS OF § 4

We begin our analysis of the procedural aspects of § 4 with the rather unremarkable proposition that entitlement to immunity under § 4 is a question of law. Immunity is a unique creature in the law and is distinguishable from other traditional criminal defenses. A successful claim of immunity excuses an alleged offender for engaging in otherwise illegal conduct, regardless of the sufficiency of proofs in the

underlying case. This is consistent with the way claims of immunity are handled in other areas of law.[38] Moreover, the parties agree that § 4 immunity should be determined as a matter of law. There is no indication that the voters who enacted the MMMA intended to treat § 4 immunity differently than other claims of immunity.

Our decision in *Kolanek* supports this conclusion. There we explained that § 4 " 'grants qualifying patient[s]' who hold 'registry identification card[s]' broad immunity *from* criminal prosecution, civil penalties, and disciplinary actions."[39] A registered qualifying patient, however, "who do[es] not qualify for immunity under § 4, as well as unregistered persons, are entitled to assert *in* a criminal prosecution the affirmative defense . . . under § 8 . . . ."[40] By contrasting the broad grant of immunity in § 4 "*from* prosecution" with the affirmative defense in § 8 "*in* a criminal prosecution," we implied that the decision regarding entitlement to immunity must be made before trial. By its very nature, immunity must be decided by the trial court as a matter of law, and in pretrial proceedings, in order to establish immunity *from* prosecution.

Deciding these questions of law necessarily involves resolving factual disputes. To determine whether a defendant is entitled to the § 4 grant of immunity, the trial court must make factual determinations, including whether the defendant has a valid registry identi-

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[38] *Morden v Grand Traverse Co*, 275 Mich App 325, 340; 738 NW2d 278 (2007) ("Whether a defendant is entitled to qualified immunity is a question of law . . . ."); *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011) ("[T]he determination regarding the applicability of governmental immunity and a statutory exception to governmental immunity is a question of law . . . .").

[39] *Kolanek*, 491 Mich at 394-395 (emphasis added).

[40] *Id*. at 415 (emphasis added).

fication card and whether he or she complied with the volume, storage, and medical use limitations. The expediency of having the trial court resolve factual questions surrounding § 4 underscores the purpose of granting immunity *from* prosecution.

Other matters routinely conducted in pretrial contexts, such as entrapment hearings, call for the trial court to act as both the finder of fact and arbiter of law.[41] Like entrapment, § 4 immunity "is not a defense that negates an essential element of the charged crime. Instead, it presents facts that are collateral to the crime that justify barring the defendant's prosecution."[42] We therefore conclude that the trial court must resolve factual disputes for the purpose of determining § 4 immunity.

Of course, the trial court's determinations are not without review. Questions of law are reviewed de novo by appellate courts.[43] A trial court's factual findings are subject to appellate review under the clearly erroneous standard:

> Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.[44]

We find no reason, nor have the parties offered any reason, to deviate from this model of appellate review. Therefore, we conclude that specific factual findings

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[41] See *People v Julliet*, 439 Mich 34, 61; 475 NW2d 786 (1991) (opinion by BRICKLEY, J.) (entrapment determined by trial court); *People v Jones*, 301 Mich App 566, 575-576; 837 NW2d 7 (2013) (discussing similarities between § 4 immunity hearings and entrapment hearings).

[42] *Julliet*, 439 Mich at 52 (opinion by BRICKLEY, J.).

[43] See *People v Keller*, 479 Mich 467, 473-474; 739 NW2d 505 (2007).

[44] MCR 2.613(C).

made by the trial court in a § 4 immunity hearing are reviewed under the clearly erroneous standard, and questions of law surrounding the grant or denial of § 4 immunity are reviewed de novo. Further, the trial court's ultimate grant or denial of immunity is fact-dependent and is reviewed for clear error.[45]

2. SUBSTANTIVE ASPECTS OF § 4

Section 4 provides a broad grant of immunity from criminal prosecution and civil penalties to registered qualifying patients and connected primary caregivers. As we have stated, the statute leaves much to be desired regarding the proper implementation of this grant of immunity. When addressing this question, we must consider (a) the evidentiary burden required to establish immunity and the presumption of medical use under § 4; (b) the elements required to establish immunity and the presumption of medical use; and (c) what evidence may properly rebut a presumption of medical use.

a. BURDEN OF PROOF

The MMMA is silent regarding the burden of proof necessary for a defendant to be entitled to immunity under § 4. When statutes are silent as to the burden of proof, "we are free to assign it as we see fit, as long as we do not transgress the constitutional requirement that we not place on the defendant the burden of persuasion to negate an element of the crime."[46]

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[45] See *People v Johnson*, 466 Mich 491, 497; 647 NW2d 480 (2002), citing *People v Jamieson*, 436 Mich 61, 80; 461 NW2d 884 (1990) (opinion by BRICKLEY, J.).

[46] *People v Mezy*, 453 Mich 269, 283; 551 NW2d 389 (1996), citing *Patterson v New York*, 432 US 197; 97 S Ct 2319; 53 L Ed 2d 281 (1977).

Assigning the burden of proof involves two distinct legal concepts. The first, the burden of production, requires a party to produce some evidence of that party's propositions of fact.[47] The second, the burden of persuasion, requires a party to convince the trier of fact that those propositions of fact are true.[48] The prosecution has the burden of proving every element of a charged crime beyond a reasonable doubt.[49] This rule of law exists in part to ensure that "there is a presumption of innocence in favor of the accused . . . and its enforcement lies at the foundation of the administration of our criminal law."[50] To place the burden on a criminal defendant to negate a specific element of a crime would clearly run afoul of this axiomatic, elementary, and undoubted principle of law.[51]

A defendant invoking § 4 immunity, however, does so without regard to any presumption of innocence. The defendant does not dispute any element of the underlying charge when claiming immunity. Indeed, the defendant may even admit to otherwise unlawful conduct and yet still be entitled to § 4 immunity. When

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[47] See McCormick, Evidence (7th ed), § 336, pp 644-645.

[48] *Id*. Some courts have conflated the burden of proof with the burden of persuasion or the burden of production. See *Director, Office of Workers' Comp Programs v Greenwich Collieries*, 512 US 267, 272-276; 114 S Ct 2251; 129 L Ed 2d 221 (1994) (referring to the "burden of proof" as the "burden of persuasion"). But these are different concepts. The burden of proof, which may also be generally referred to as a party's evidentiary burden, refers both to a party's burden to provide actual evidence of alleged facts and a party's burden to persuade the trier of fact as to the veracity of those facts.

[49] See *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998) ("[T]he prosecution must carry the burden of proving every element beyond a reasonable doubt . . . .").

[50] *Coffin v United States*, 156 US 432, 453; 15 S Ct 394; 39 L Ed 481 (1895).

[51] *Id*.

claiming § 4 immunity, the defendant places himself in an offensive position, affirmatively arguing entitlement to § 4 immunity without regard to his or her underlying guilt or innocence of the crime charged. In *People v D'Angelo*, we determined that the accusatorial nature of a defendant's request for a defense of entrapment, without regard to his or her guilt or innocence of the underlying criminal charge, required the burden of proof by a preponderance of the evidence to be allocated to the defendant.[52] The accusatorial nature of an entrapment defense and the offensive nature of immunity are similar because in both the defendant posits an affirmative argument, rather than defending a particular charge. We now follow this well-established rule of criminal procedure and assign to the defendant the burden of proving § 4 immunity by a preponderance of the evidence.

b. ELEMENTS REQUIRED TO ESTABLISH IMMUNITY

A defendant may claim entitlement to immunity for any or all charged offenses. Once a claim of immunity is made, the trial court must conduct an evidentiary hearing to factually determine whether, for each claim of immunity, the defendant has proved each element required for immunity. These elements consist of whether, at the time of the charged offense, the defendant:

(1) was issued and possessed a valid registry identification card,

(2) complied with the requisite volume limitations of § 4(a) and § 4(b),

(3) stored any marijuana plants in an enclosed, locked facility, and

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[52] *People v D'Angelo*, 401 Mich 167, 180, 183; 257 NW2d 655 (1977).

(4) was engaged in the medical use of marijuana.[53]

The court must examine the first element of immunity—possession of a valid registry identification card—on a charge-by-charge basis. In most cases, satisfying the first element will be an all-or-nothing proposition. A qualifying patient or primary caregiver who does not have a valid registry identification card is not entitled to immunity because the first element required for immunity cannot be satisfied. Conversely, a qualifying patient or primary caregiver satisfies the first element of immunity if he or she possessed a valid registry identification card at all times relevant to the charged offenses. In some cases, there may be a gap between a qualifying patient's or a primary caregiver's earliest conduct underlying the charged offenses and his or her most recent conduct. A court must pay special attention to whether the effective date or expiration date of a registry identification card occurred within this gap and determine whether the conduct occurred when the patient or caregiver possessed a valid registry identification card. A qualifying patient or primary caregiver can only satisfy the first element of immunity for any charge if all conduct underlying that charge occurred during a time when the qualifying patient or primary caregiver possessed a valid registry identification card.

Generally, the second and third elements of immunity are also all-or-nothing propositions. The second element—the volume limitations of § 4(a) and § 4(b)—requires that the qualifying patient or primary caregiver be in possession of no more than a specified amount of usable marijuana and a specified number of marijuana plants. When a primary caregiver is con-

[53] MCL 333.26424(a) and (b).

nected with one or more qualifying patients, the amount of usable marijuana and the number of plants is calculated in the aggregate—2.5 ounces of usable marijuana and 12 marijuana plants for each qualifying patient, including the caregiver if he or she is also a registered qualifying patient acting as his or her own caregiver.[54] When a qualifying patient cultivates his or her own marijuana for medical use and is not connected with a caregiver, the patient is limited to 2.5 ounces of usable marijuana and 12 marijuana plants. A qualifying patient or primary caregiver in possession of more marijuana than allowed under § 4(a) and § 4(b) at the time of the charged offense cannot satisfy the second element of immunity.

The third element of § 4 immunity requires all marijuana plants possessed by a qualifying patient or primary caregiver to be kept in an enclosed, locked facility. Thus, a qualifying patient or primary caregiver whose marijuana plants are not kept in an enclosed, locked facility at the time of the charged offense cannot satisfy the third element and cannot receive immunity for the charged offense.

The fourth element conditions immunity on the "medical use" of marijuana, as defined in § 3(f). Unlike elements two and three, the fourth element does not depend on the defendant's aggregate conduct. Instead, this element depends on whether the conduct

[54] For example, a registered qualifying patient who is his or her own caregiver and the caregiver to five other qualifying patients is allowed to possess up to 72 marijuana plants and up to 15 ounces of usable marijuana. If that individual actually possessed 73 marijuana plants or 16 ounces of usable marijuana and was charged with multiple marijuana-related offenses, the individual could not satisfy the second element of immunity under § 4 for any of the charged offenses because the individual possessed marijuana in excess of the volume limitations in § 4(a) and § 4(b).

forming the basis of each particular criminal charge involved "the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition."[55] Whether a qualifying patient or primary caregiver was engaged in the medical use of marijuana must be determined on a charge-by-charge basis.

While the qualifying patient or primary caregiver retains the burden of proving this fourth and last element of immunity, § 4(d) of the MMMA creates a rebuttable presumption of medical use when the qualifying patient or primary caregiver satisfies certain requirements.

> (d) There shall be a presumption that a qualifying patient or primary caregiver is engaged in the medical use of marihuana in accordance with this act if the qualifying patient or primary caregiver:
>
> (1) is in possession of a registry identification card; and
>
> (2) is in possession of an amount of marihuana that does not exceed the amount allowed under this act. The presumption [that one is engaged in the medical use of marihuana] may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act.[56]

The requirements necessary to establish the presumption of medical use mirror the first two elements required to establish immunity. Therefore, a qualifying

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[55] MCL 333.26423(f).

[56] MCL 333.26424(d).

patient or primary caregiver is entitled to the presumption of medical use in § 4(d) simply by establishing the first two elements of § 4 immunity.[57]

In sum, a qualifying patient seeking to assert the protections of § 4 must prove four elements by a preponderance of the evidence. A qualifying patient must prove that, at the time of the charged offense, he or she (1) possessed a valid registry identification card; (2) possessed no more marijuana than allowed under § 4(a); (3) stored any marijuana plants in an enclosed, locked facility; and (4) was engaged in the medical use of marijuana. If the qualifying patient establishes the first and second elements, then a presumption exists that the qualifying patient was engaged in the medical use of marijuana, thereby establishing the fourth element.

Similarly, a primary caregiver seeking to assert the protections of § 4 must prove four elements by a preponderance of the evidence. A primary caregiver must prove that, at the time of the charged offense, he or she (1) possessed a valid registry identification card; (2) possessed no more marijuana than allowed under § 4(b); (3) stored any marijuana plants in an enclosed, locked facility; and (4) was assisting connected qualifying patients with the medical use of marijuana. If the primary caregiver establishes the first and second elements, then a presumption exists that the primary caregiver was engaged in the medical use of marijuana, thereby establishing the fourth element.

c. REBUTTING THE PRESUMPTION

The presumption of the medical use of marijuana is a powerful tool for a defendant in asserting § 4 immunity. But this presumption is rebuttable:

[57] These elements are (1) possessing a valid registry identification card, and (2) complying with the volume limitations of § 4(a) and § 4(b).

> The presumption [that one is engaged in the medical use of marihuana] may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act.[58]

According to § 4(d)(2), the presumption of the medical use of marijuana may be rebutted by examining "conduct related to marihuana . . . ." While the statute does not specifically state whose marijuana-related conduct may be used, when read in context it is clear that it refers to the defendant's conduct. Stated differently, in § 4(d), only the defendant's conduct may be considered to rebut the presumption of the medical use of marijuana. This interpretation is consistent with the purpose of § 4, which is to provide immunity from prosecution to a defendant who abides by certain restrictions.

For this reason, we hold that the prosecution may not rebut a primary caregiver's presumption of medical use by introducing evidence of conduct unrelated to the primary caregiver,[59] such as evidence that a connected qualifying patient does not actually have a debilitating medical condition or evidence that a connected qualifying patient used marijuana for nonmedical purposes. Similarly, the prosecution may not rebut a qualifying patient's presumption of medical use by introducing evidence that the connected primary caregiver used the qualifying patient's marijuana for nonmedical purposes.[60]

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[58] MCL 333.26424(d)(2).

[59] We recognize that "conduct" may be misfeasance as well as nonfeasance. Nothing in our holding should be interpreted to shield a primary caregiver who has actual knowledge that the marijuana provided to a qualifying patient is being used in a manner not permitted under the MMMA.

[60] The MMMA requires the state to verify all information contained in an application for a registry identification card and to keep confidential

We must also determine whether one or more transactions that are outside the scope of the MMMA may rebut the presumption of medical use for otherwise-compliant MMMA conduct. As noted § 4(d)(2) provides the prosecution with the ability to rebut this presumption.[61]

In *Tuttle*, the Court of Appeals held that a noncompliant marijuana transaction negates a defendant's ability to claim § 4 immunity as to the defendant's entire marijuana-related conduct. The court determined that "§ 4 does not allow [a] defendant to decouple . . . illicit actions involving marijuana from . . . other[wise MMMA-compliant] marijuana-related activities . . . ."[62] The court concluded that illicit marijuana-related conduct rebuts the § 4(d) presumption of medical use for otherwise MMMA-compliant conduct.[63]

The prosecution agrees with the Court of Appeals, arguing that if a primary caregiver has provided marijuana to an unconnected individual, the presumption of medical use has been rebutted for all of the primary caregiver's marijuana-related conduct, including con-

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the list of registry identification cards issued, except to verify the validity of such cards to law enforcement. Hartwick and Tuttle both argue that because of the verification and confidentiality requirements, the issuance of a registry identification card establishes either immunity under § 4 or, at least, a presumption of the medical use of marijuana under § 4(d). As we have already concluded, a registry identification card is only one requirement for establishing immunity under § 4. The verification and confidentiality provisions do not establish that a defendant has engaged in the medical use of marijuana or abided by the requisite volume and storage limitations of § 4(a) and § (4)(b). Simply put, a registry identification card, alone, does not establish § 4 immunity or a presumption of the medical use of marijuana under § 4(d).

[61] MCL 333.26424(d)(2).

[62] *Tuttle*, 304 Mich App at 84.

[63] *Id*.

duct that otherwise complies with § 4. Therefore, according to the prosecution, any unprotected marijuana-related conduct rebuts a defendant's presumption of medical use for all of the defendant's marijuana-related conduct, regardless of its relevance to the charged offense.

Tuttle argues that unprotected marijuana-related conduct may only rebut the presumption as to otherwise protected conduct if a nexus exists between the unprotected conduct and the protected conduct. In *Tuttle*, Counts I through III relate to unprotected transfers of marijuana from Tuttle to an unconnected patient. Tuttle agrees that this conduct is not protected and that there is no § 4 immunity with regard to that conduct. Counts IV through VII, however, relate to the marijuana being manufactured in Tuttle's home. Tuttle argues that the conduct in Counts I through III does not necessarily affect the conduct underlying Counts IV through VII.

Tuttle specifically stresses that § 4(d)(2) provides that the presumption of medical use "may" be rebutted. Tuttle relies on the word "may" for the proposition that the trial court in its fact-finding capacity may either reject or accept evidence presented by the prosecution. Therefore, Tuttle claims, the trial court is not obligated to accept evidence of an unrelated and unprotected transaction to rebut the presumption of medical use for an otherwise protected transaction.

It is clear, as Tuttle concedes, that conduct violating the MMMA directly rebuts the presumption of medical use when a defendant's charges are based on that specific conduct (such as the illicit conduct on which Counts I through III against Tuttle are based). It is not clear, however, that conduct violating the MMMA would also rebut the presumption of medical use related to other charges against the defendant when the illicit

conduct does not form the basis of charges (such as the otherwise MMMA-compliant conduct on which Counts IV through VII against Tuttle are based). While the statutory language is neither compelling nor expressly direct, we nonetheless conclude that the statutory text lends support for Tuttle's proposition.

Use of the permissive "may," in conjunction with the trial court's general gatekeeping responsibility to admit only relevant evidence,[64] leads us to conclude that to rebut the presumption of medical use the prosecution's rebuttal evidence must be relevant, such that the illicit conduct would allow the fact-finder to conclude that the otherwise MMMA-compliant conduct was not for the medical use of marijuana. In other words, the illicit conduct and the otherwise MMMA-compliant conduct must have a nexus to one another in order to rebut the § 4(d) presumption. This is consistent with the conclusions that the fourth element of immunity—medical use—is dependent only on the conduct forming the basis for each particular criminal charge and that immunity is claimed and generally proved on a charge-by-charge basis.

Further, Tuttle's view not only has statutory support, but also comports with how generally a presumption should be rebutted. Only relevant evidence that allows the fact-finder to conclude that the underlying conduct was not for "medical use" may rebut the § 4(d) presumption. A wholly unrelated transaction—i.e., a transaction with no nexus, and therefore no relevance, to the conduct resulting in the charged offense—does not assist the fact-finder in determining whether the defendant actually was engaged in the medical use of marijuana during the charged offense. Conduct unre-

[64] See MRE 401 and MRE 402.

lated to the charged offense is irrelevant and does not rebut the presumption of medical use.

Therefore, under § 4(d)(2), the prosecution may rebut the presumption of medical use for each claim of immunity. Improper conduct related to one charged offense may not be imputed to another charged offense unless the prosecution can establish a nexus between the improper conduct and the otherwise MMMA-compliant conduct. The trial court must ultimately determine whether a defendant has established by a preponderance of the evidence that he or she was engaged in the medical use of marijuana. The defendant may do so by establishing this powerful presumption of medical use. If the presumption of medical use has been rebutted, however, the defendant may still prove through other evidence that, with regard to the underlying conduct that resulted in the charged offense and for which the defendant claims immunity, the defendant was engaged in the medical use of marijuana, as defined in § 3(f).

C. SECTION 8 DEFENSE

Section 8(a) of the MMMA provides any patient or primary caregiver—regardless of registration with the state—with the ability to assert an affirmative defense to a marijuana-related offense. The affirmative defense "shall be presumed valid where the evidence shows":

> (1) A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or

> debilitating medical condition or symptoms of the patient's serious or debilitating medical condition;
>
> (2) The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and
>
> (3) The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.[65]

In *Kolanek*, we determined that if a defendant establishes these elements and no question of fact exists regarding these elements, then the defendant is entitled to dismissal of the criminal charges.[66] We also clarified that if questions of fact exist, then "dismissal of the charges is not appropriate and the defense must be submitted to the jury."[67] Additionally, if a defendant has not presented prima facie evidence of each element of § 8 by "present[ing] evidence from which a reasonable jury could conclude that the defendant satisfied the elements of the § 8 affirmative defense, . . . then the circuit court must deny the motion to dismiss the charges," and "the defendant is not permitted to present the § 8 defense to the jury."[68]

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[65] MCL 333.26428(a)(1) to (3).

[66] *Kolanek*, 491 Mich at 416.

[67] *Id*.

[68] *Id*.

A defendant seeking to assert the MMMA's statutory affirmative defense must present prima facie evidence for each element of § 8(a).[69] Overcoming this initial hurdle of presenting prima facie evidence of each element is not an easy task. The elements of § 8 are clearly more onerous than the elements of § 4. The statutory scheme of the MMMA is designed to benefit those who properly register and are meticulous in their adherence to the law. Presumably, a properly registered defendant facing criminal charges would invoke immunity under § 4. However, a § 8 defense may be pursued by any defendant, regardless of registration status. With this background, we consider each element of the § 8 affirmative defense.

1. SECTION 8(a)(1): THE IMPRIMATUR OF THE PHYSICIAN-PATIENT RELATIONSHIP

Section 8(a)(1) requires a physician to determine the patient's suitability for the medical use of marijuana. It provides:

> (1) A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's

[69] *Id*. at 415-416. In *Kolanek*, we did not determine the standard by which a defendant must establish a § 8 defense. We now clarify that well-established rules of criminal procedure require a defendant to prove the affirmative defense by a preponderance of evidence. See, e.g., *D'Angelo*, 401 Mich at 183 (holding that the defendant has the burden of proving entrapment by a preponderance of the evidence). Thus, when the § 8 affirmative defense is submitted to a fact-finder, the defendant's burden of proof is to establish the elements of § 8(a) by a preponderance of the evidence.

> serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition[.][70]

This provision may be reduced to three elements:

(1) The existence of a bona fide physician-patient relationship,

(2) in which the physician completes a full assessment of the patient's medical history and current medical condition, and

(3) from which results the physician's professional opinion that the patient has a debilitating medical condition and will likely benefit from the medical use of marijuana to treat the debilitating medical condition.

Each of these elements must be proved in order to establish the imprimatur of the physician-patient relationship required under § 8(a)(1) of the MMMA. Hartwick and Tuttle argue that the registry identification card establishes these three elements. We do not find merit in this position.

As part of the process for obtaining a registry identification card, an applicant must submit, among other materials, a "written certification."[71] At the time of the offenses at issue,[72] the MMMA defined a written certification as

> a document signed by a physician, stating the patient's debilitating medical condition and stating that, in the physician's professional opinion, the patient is likely

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[70] MCL 333.26428(a)(1).

[71] MCL 333.26426(a)(1).

[72] In 2012, the Legislature garnered sufficient votes to satisfy the three-fourths super majority required to amend a voter-enacted initiative and amended the MMMA to include the additional requirement that the physician conducted a full, in-person assessment of the patient. See 2012 PA 512, effective April 1, 2013.

> to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's debilitating medical condition or symptoms associated with the debilitating medical condition.[73]

Thus, at the time of the offenses at issue, a written certification was a document prepared by a physician that contained at least two representations: (1) the patient has a debilitating medical condition, and (2) the patient will likely benefit from the medical use of marijuana. Further, MCL 333.26426(c) provides that the department "shall verify the information contained in an application" and that the department "may deny an application . . . only if the applicant did not provide the information required pursuant to this section, or if the department determines that the information provided was falsified."

Comparing the definition of "written certification" with the elements of § 8(a)(1), a registry identification card satisfies the third element (the patient has a debilitating medical condition and would likely benefit from the medical use of marijuana). A registry identification card, however, does not establish the second element (a physician has completed a full assessment of the patient's medical history and current medical condition).[74] The second element must be established through medical records or other evidence submitted to show that the physician actually completed a full assessment of the patient's medical history and current medical condition before concluding that the patient is likely to benefit from the medical use of marijuana and before the patient engages in the medi-

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[73] Former MCL 333.26423(*l*). "Written certification" has since been amended and renumbered as § 3(m). See 2012 PA 512, effective April 1, 2013.

[74] We note that registry identification cards issued on or after April 1, 2013, the effective date of 2012 PA 512, establish the second element. See note 72 of this opinion.

cal use of marijuana. Additionally, the physician certification leaves unsatisfied the first element of § 8(a)(1) (the existence of a bona fide physician-patient relationship).

At the time of the offenses at issue, the MMMA did not define "bona fide physician-patient relationship."[75] In *Kolanek*, we stated that "this term envisions 'a pre-existing and ongoing relationship with the patient as a treating physician.' "[76] Thus, to satisfy the first element—the existence of a bona fide physician-patient relationship—there must be proof of an actual and ongoing physician-patient relationship at the time the written certification was issued.[77]

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[75] The MMMA has since been amended by 2012 PA 512, effective April 1, 2013, to define a "bona fide physician-patient relationship."

> "Bona fide physician-patient relationship" means a treatment or counseling relationship between a physician and patient in which all of the following are present:
>
> (1) The physician has reviewed the patient's relevant medical records and completed a full assessment of the patient's medical history and current medical condition, including a relevant, in-person, medical evaluation of the patient.
>
> (2) The physician has created and maintained records of the patient's condition in accord with medically accepted standards.
>
> (3) The physician has a reasonable expectation that he or she will provide follow-up care to the patient to monitor the efficacy of the use of medical marihuana as a treatment of the patient's debilitating medical condition.
>
> (4) If the patient has given permission, the physician has notified the patient's primary care physician of the patient's debilitating medical condition and certification for the use of medical marihuana to treat that condition. [MCL 333.26423(a).]

[76] *Kolanek*, 491 Mich at 396 n 30 (quoting a joint statement by the Michigan Board of Medicine and the Michigan Board of Osteopathic Medicine and Surgery).

[77] We acknowledge that the actual text of the physician's statement submitted as part of the registration process might suffice. Although

A primary caregiver has the burden of establishing the elements of § 8(a)(1) for each patient to whom the primary caregiver is alleged to have unlawfully provided marijuana. In this context, a primary caregiver who provides marijuana to a putative patient plainly assumes the risk that the patient does not actually meet the elements of § 8(a)(1) or that the patient may not cooperate in a subsequent prosecution of the primary caregiver, regardless what that person may have otherwise told the primary caregiver.[78]

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hearsay, the physician's written certification is a "report of . . . occurrences, events, conditions, opinions, or diagnoses, made at or near the time by . . . a person with knowledge [that is] kept in the course of a regularly conducted business activity [and is a] regular practice of that business activity to make . . . ." MRE 803(6). That physicians are required by statute to prepare a certificate to recommend the medical use of marijuana tends to establish that the certificate is prepared in regular practice. Moreover, nothing prevents a physician from including a statement in the written certificate indicating that it was prepared in the course of a bona fide physician-patient relationship or indicating the physician's recommendation as to the particular amount of marijuana. Likewise, nothing prevents the department from revising the physician certification to attest to these elements. Nor does anything prevent another individual from creating his or her own written certification acceptable to the department. Accordingly, the written certification could itself provide prima facie evidence of the elements of § 8(a). Further, a defendant may present patient testimony or other evidence to satisfy his or her burden of presenting prima facie evidence of the elements of § 8(a). A defendant who submits proper evidence would not likely need his or her physician to testify to establish prima facie evidence of any element of § 8(a).

[78] Because "[p]ossession, manufacture, and delivery of marijuana remain punishable offenses under Michigan law," *Kolanek*, 491 Mich at 394, a caregiver-defendant's patient might be unwilling to testify to the patient's marijuana-related activities due to fear of criminal prosecution. This would present a significant barrier to the caregiver's ability to establish a defense under § 8. And because a witness cannot be compelled to give testimony that the witness reasonably believes could be used against him or her in a criminal prosecution, a patient's justified refusal to cooperate might prove fatal to the primary caregiver's § 8 defense. See *Hoffman v United States*, 341 US 479, 486; 71 S Ct 814; 95

2. SECTION 8(a)(2): THE QUANTITY OF MARIJUANA

Section 8(a)(2) requires a patient or primary caregiver to show that

> [the] patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition[.][79]

The critical phrase from the above quoted passage is "reasonably necessary to ensure uninterrupted availability of marihuana [for treatment] . . . ." Hartwick and Tuttle maintain that a registry identification card establishes a presumption that any amount of marijuana possessed by a defendant is a reasonable amount of marijuana under the MMMA. In the alternative, they argue that a valid registry identification card, coupled with compliance with the volume limitations in § 4, establishes a presumption that the amount of marijuana possessed is reasonable. Again, we do not find support for the defendants' position in the text of the MMMA.

The issuance of a registry identification card or compliance with the volume limitations in § 4 does not show that an individual possesses only a "reasonably necessary" amount of marijuana "to ensure uninterrupted availability" for the purposes of § 8(a)(2). A registry identification card simply qualifies a patient for the medical use of marijuana. It does not guarantee

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L Ed 1118 (1951) ("It is for the court to say whether [the witness's] silence is justified."). While this may seem a harsh consequence, this Court has no power to alter the statutory language.

[79] MCL 333.26428(a)(2).

that an individual will always possess only the amount of marijuana allowed under the MMMA.

Further, nothing in the MMMA supports the notion that the quantity limits found in the immunity provision of § 4 should be judicially imposed on the affirmative defense provision of § 8. Sections 4 and 8 feature contrasting statutory language intended to serve two very different purposes.[80] Section 4 creates a specific volume limitation applicable to those seeking immunity. In contrast, § 8 leaves open the volume limitation to that which is "reasonably necessary." The MMMA could have specified a specific volume limitation in § 8, but it did not. In the absence of such an express limitation, we will not judicially assign to § 8 the volume limitation in § 4 to create a presumption of compliance with § 8(a)(2). Indeed, the only instance in which a primary caregiver must control a patient's dosage is when he or she is the parent of a minor patient.[81] That the statute requires these particular caregivers to control a patient's dosage, but does not require it of others, indicates that all other caregivers need not be particularly aware of their patients' medical needs. Instead, a primary caregiver may reasonably rely on the amount his or her patient states is needed to treat the patient's debilitating medical condition.

A patient seeking to assert a § 8 affirmative defense may have to testify about whether a specific amount of marijuana alleviated the debilitating medical condition and if not, what adjustments were made to the consumption rate and the amount of marijuana consumed to determine an appropriate quantity. Once the

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[80] Section 4 grants broad immunity *from* arrest or prosecution, while § 8 provides for an affirmative defense *during* a prosecution.

[81] MCL 333.26426(b)(3)(C).

patient establishes the amount of usable marijuana needed to treat the patient's debilitating medical condition, determining whether the patient possessed "a quantity of marihuana that was not more than was reasonably necessary to ensure [its] uninterrupted availability" also depends on how the patient obtains marijuana and the reliability of this source. This would necessitate some examination of the patient/caregiver relationship.

The same analysis applies to primary caregivers seeking to present a defense under § 8. Primary caregivers must establish the amount of usable marijuana needed to treat their patients' debilitating medical conditions and then how many marijuana plants the primary caregiver needs to grow in order ensure "uninterrupted availability" for the caregiver's patients. This likely would include testimony regarding how much usable marijuana each patient required and how many marijuana plants and how much usable marijuana the primary caregiver needed in order to ensure each patient the "uninterrupted availability" of marijuana.

3. SECTION 8(a)(3): THE USE OF MARIJUANA FOR A MEDICAL PURPOSE

Section 8(a)(3) requires a patient or primary caregiver to show that

> [t]he patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.[82]

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[82] MCL 333.26428(a)(3).

Although there is a purposeful distinction made between the amount of marijuana permitted under § 4 and the "reasonably necessary" restraint on quantity found in § 8(a)(2), § 8(a)(3) requires a patient and primary caregiver to show that any marijuana use complied with a very similar "medical use" requirement found in § 4, and defined in § 3(f):

> "Medical use" means the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition.[83]

The slight variance between the definition of "medical use" in § 4 and medical use as it appears in § 8 can be attributed to the fact that only registered qualifying patients and registered primary caregivers may engage in the "medical use" of marijuana, as indicated by use of the term in § 4.[84] Those patients and primary caregivers who are not registered may still be entitled to § 8 protections if they can show that their use of marijuana was for a medical purpose—to treat or alleviate a serious or debilitating medical condition or its symptoms. Hartwick and Tuttle again argue that a registry identification card alone, or a registry identification card coupled with compliance with either the volume limitations of § 4(a) and (4)(b) or § 8(a)(2), satisfies § 8(a)(3). Once again, defendants seek to attribute greater significance to the registry identifica-

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[83] MCL 333.26423(f).

[84] The definition in § 4 includes "internal possession" and specifies that the patient is a registered qualifying patient. The permitted uses in § 8 do not include "internal possession," and the requirements apply to "patients" who are not necessarily registered.

tion card than that which is expressly provided in the MMMA. We simply do not find support for the defendants' arguments in the text of the MMMA.

A registry identification card merely qualifies a patient for the medical use of marijuana. It does not establish that at the time of the charged offense, the defendant was actually engaged in the protected use of marijuana. Section 8(a)(3) requires that both the patient's and the primary caregiver's use of marijuana be for a medical purpose, and that their conduct be described by the language in § 8(a)(3). Thus, patients must present prima facie evidence regarding their use of marijuana for a medical purpose regardless whether they possess a registry identification card. Primary caregivers would also have to present prima facie evidence of their own use of marijuana for a medical purpose and any patients' use of marijuana for a medical purpose.

III. APPLICATION TO *HARTWICK* AND *TUTTLE*

A. *PEOPLE v HARTWICK*

1. SECTION 4 IMMUNITY

Hartwick is a registered qualifying patient, his own caregiver, and at all times pertinent to this dispute, a primary caregiver to five registered qualifying patients. The prosecuting attorney charged Hartwick with manufacturing marijuana and possession of marijuana with the intent to deliver. Hartwick sought to invoke § 4 immunity. In order to qualify for § 4 immunity, Hartwick must prove by a preponderance of the evidence that for each charged offense he

(1) possessed a valid registry identification card for himself as a qualifying patient and for each of the five other connected registered qualifying patients,

(2) possessed no more than 72 marijuana plants and 15 ounces of usable marijuana,[85]

(3) kept the marijuana plants in an enclosed, locked facility, and

(4) was engaged in the medical use of marijuana.

Hartwick is entitled to a presumption of the medical use of marijuana if he shows by a preponderance of the evidence that he possessed:

(1) a valid registry identification card for himself as a patient and for each of the five other registered qualifying patients to whom he is connected under the MMMA, and

(2) no more than 72 marijuana plants and 15 ounces of usable marijuana.

The prosecution may then rebut this presumption in accordance with § 4(d)(2).

The lower courts erred with respect to Hartwick's entitlement to immunity under § 4. There is no statutory requirement under § 4 that Hartwick know the debilitating conditions of, the amount of marijuana needed for, the length of time treatment should continue for, or the identities of the physicians of, the registered qualifying patients to whom Hartwick is connected under the MMMA. This lack of information cannot be used to rebut Hartwick's presumption of the medical use of marijuana under § 4(d). For purposes of § 4, the lower courts should have instead focused on Hartwick's conduct.

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[85] As a registered qualifying patient, Hartwick may possess up to 12 marijuana plants and 2.5 ounces of usable marijuana. As a primary caregiver, Hartwick may possess up to 12 marijuana plants and 2.5 ounces of usable marijuana for each connected registered qualifying patient.

The Court of Appeals also should not have determined that the number of marijuana plants Hartwick possessed was "moot."[86] The trial court never made a factual determination of the number of marijuana plants in Hartwick's possession or the other elements of § 4. Even if such facts had been established, the Court of Appeals reviews the trial court's factual findings for clear error. Thus, a new § 4 evidentiary hearing conforming to the holdings expressed in this opinion is necessary to determine Hartwick's entitlement to § 4 immunity.

2. SECTION 8 DEFENSE

In contrast to Hartwick's claim of immunity under § 4, the lower courts correctly concluded that Hartwick was not entitled to the § 8 affirmative defense. Even though Hartwick provided testimony of his own medical condition and evidence of registry identification cards for himself and five patients, he did not present prima facie evidence for each element of § 8(a). Specifically, Hartwick failed to provide any evidence of § 8(a)(1) (bona fide physician-patient relationship), § 8(a)(2) (amount of marijuana the patients needed), or § 8(a)(3) (whether the patients engaged in the use of marijuana for a medical purpose).

Further, to the extent the Court of Appeals determined that a written certification was comparable to a pharmaceutical prescription, this determination was erroneous. A written certification is not similar to that of a pharmaceutical prescription. Marijuana is a Schedule 1 controlled substance.[87] Therefore, a doctor is not legally able to prescribe marijuana to an indi-

[86] *Hartwick*, 303 Mich App at 259.

[87] See MCL 333.7212(c).

vidual for any reason. A written certification is a statutorily mandated document that must meet specific statutory requirements so that an individual may successfully apply for a registry identification card. While the MMMA states that "[m]odern medical research . . . has discovered beneficial uses for marihuana in treating . . . debilitating medical conditions,"[88] the terminology employed in the MMMA and the actual function of primary caregivers and patients is not comparable to a medical doctor's treatment of an actual patient. Primary caregivers carry out a statutorily created task that is completely unrelated to how a doctor would treat a patient.

B. *PEOPLE v TUTTLE*

1. SECTION 4 IMMUNITY

Tuttle is a registered qualifying patient, his own caregiver, and a primary caregiver to at least one registered qualifying patient. The prosecuting attorney charged Tuttle with multiple counts of manufacturing, possessing, and delivering marijuana. Tuttle sought to have Counts IV through VII, which relate to the manufacture and possession of marijuana in Tuttle's home, dismissed under the immunity provisions of § 4.

In order to qualify for immunity under § 4, Tuttle must prove by a preponderance of the evidence that for each charged offense he

(1) possessed a valid registry identification card for himself as a qualifying patient and for each connected registered qualifying patient,

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[88] MCL 333.26422(a).

(2) possessed no more than the volume of marijuana permitted by § 4(a) and § 4(b),[89]

(3) kept the marijuana plants in an enclosed, locked facility, and

(4) was engaged in the medical use of marijuana.

Tuttle is entitled to a presumption that he was engaged in the medical use of marijuana if he shows by a preponderance of the evidence that he possessed:

(1) a valid registry identification card for himself as a patient and for each connected registered qualifying patient, and

(2) no more than the volume of marijuana allowed by § 4(a) and § 4(b).

The prosecution may then rebut this presumption in accordance with § 4(d)(2).

The lower courts erred when they concluded that Tuttle's provision of marijuana to Lalonde necessarily tainted all of Tuttle's marijuana-related activity thereby negating his ability to claim § 4 immunity for each charged offense. Providing marijuana to Lalonde did not per se taint all of Tuttle's marijuana-related conduct. Tuttle was not connected to Lalonde under the MMMA. Therefore, Tuttle was clearly outside the parameters of § 4 when he provided marijuana to Lalonde (Counts I through III).

Tuttle, however, may still be entitled to immunity

[89] It is unclear in the record exactly how many qualifying patients Tuttle was connected to under the MMMA. Without that information, we are unable to determine how many marijuana plants and how much usable marijuana Tuttle was allowed to possess under § 4(a) and § 4(b). If Tuttle was his own caregiver and the primary caregiver to two other qualifying patients, then Tuttle would be permitted to possess no more than a total of 36 marijuana plants. Under those facts Tuttle would not be entitled to § 4 immunity for any charged offense if he possessed more than 36 marijuana plants.

for the remaining charges in Counts IV through VII. With regard to the charges of possessing and manufacturing marijuana in his home, the trial court must make factual determinations regarding the number of patients connected to Tuttle under the MMMA, the number of marijuana plants Tuttle had in his home and the amount of usable marijuana Tuttle possessed,[90] whether the marijuana plants were stored in an enclosed, locked facility, and whether Tuttle was engaged in the medical use of marijuana.

Tuttle must prove entitlement to immunity for each charged offense. And the prosecution may only use evidence of conduct relating to one charged offense to rebut the presumption of medical use for another charged offense if a nexus exists between the charged offenses. Put simply, improper conduct related to Lalonde in Counts I through III may only affect Counts IV through VII if the prosecution can establish a nexus between the improper conduct in Counts I through III and the otherwise MMMA through compliant conduct in Counts IV through VII. Only if this nexus exists can the trial court determine that the illicit conduct in Counts I through III rebuts the presumption that Tuttle was engaged in the medical use of marijuana for the conduct underlying Counts IV through VII.

The trial court must ultimately weigh the evidence to determine if the prosecution successfully rebutted Tuttle's presumption of medical use for Counts IV through VII by evidence of the conduct relating to marijuana in Counts I through III and, if so, whether Tuttle has otherwise shown that the charged conduct for which he claims immunity was consistent with the medical use of marijuana. The flexibility allowing the trial court to make this decision in § 4(d) permits the trial court to

[90] Subject to the exclusion of "any incidental amount of seeds, stalks, [or] unusable roots . . . ." MCL 333.26424(4)(a) and (b)(3).

hear evidence to determine if Tuttle truly was a primary caregiver simply trying to assist patients, or if Tuttle acted outside the protection of the MMMA.[91]

To that end, factual findings are needed to determine Tuttle's entitlement to immunity under § 4 for Counts IV through VII. As a result, a new § 4 evidentiary hearing conforming to the holdings expressed in this opinion is necessary to determine Tuttle's entitlement to § 4 immunity.

2. SECTION 8 DEFENSE

The lower courts properly concluded that Tuttle was not entitled to the § 8 affirmative defense. During an evidentiary hearing, Tuttle presented his registry identification card and the registry identification cards belonging to Michael Batke and Frank Colon. Lalonde, Batke, and Colon also testified at the hearing.

Lalonde testified that he first came into contact with Tuttle through an unofficial internet site intended to match medical marijuana patients and caregivers. He also testified that he was a registered qualifying patient and that he told Tuttle he was using marijuana to alleviate pain. Lalonde's testimony, however, did not meet the first and third element of § 8(a), requiring his condition to be diagnosed in the course of a bona fide physician-patient relationship through which the physician found the condition suitable for the medical use of marijuana. Lalonde did not testify about how much

[91] Under § 4, losing the § 4(d) presumption is not fatal. Even if the prosecution successfully rebuts the § 4(d) presumption in Counts IV through VII related to Tuttle's manufacturing of marijuana for himself and any patients, Tuttle may still prove by a preponderance of the evidence that he satisfied the last element of § 4(a) and § (4)(b), which requires that he was engaged in the medical use of marijuana during the conduct resulting in the specific charged offense(s).

marijuana he needed to treat his debilitating condition under § 8(a)(2) or if he engaged in the use of marijuana under § 8(a)(3) to treat his debilitating condition.

Batke testified that he was a registered qualifying patient and that Tuttle was connected to him as a registered caregiver. Batke also testified that he would call Tuttle every time he needed marijuana. As a result, Tuttle provided Batke with approximately two ounces of marijuana a month. This does not speak to the amount of marijuana Batke reasonably needed in order to treat his debilitating condition, only to the amount of marijuana actually provided. Nor did Batke establish that he had a bona fide relationship with a physician. Lastly, Colon testified that he was a registered qualifying patient, that he had a medical condition, and that he utilized Tuttle as a caregiver. Colon stated he would request between one and two ounces of marijuana each week from Tuttle. Colon did not testify that he received a full medical assessment in the course of a bona fide physician-patient relationship.

Lalonde's, Batke's, and Colon's testimony was deficient in establishing at least one element of § 8(a). Additionally, the patients' testimony combined with their registry identification cards did not establish prima facie evidence under § 8(a). Therefore, Tuttle failed to present prima facie evidence of each element of § 8(a). The Court of Appeals correctly affirmed the trial court's denial of Tuttle's motion to dismiss under § 8 and correctly denied his request to present a § 8 defense at trial.

IV. CONCLUSION

In *People v Hartwick*, Docket No. 148444, we conclude that (1) the trial court must hold a new evidentiary hearing to determine Hartwick's entitlement to

immunity under § 4, and (2) Hartwick is not entitled to an affirmative defense under § 8. Accordingly, we affirm the judgment of the Court of Appeals in part, reverse in part, and remand to the trial court for proceedings not inconsistent with this opinion.

In *People v Tuttle*, Docket No. 148971, we conclude that (1) the trial court must hold a new evidentiary hearing to determine Tuttle's entitlement to immunity under § 4, and (2) Tuttle is not entitled to an affirmative defense under § 8. Accordingly, we affirm the judgment of the Court of Appeals in part, reverse in part, and remand to the trial court for proceedings not inconsistent with this opinion.

YOUNG, C.J., and MARKMAN, KELLY, MCCORMACK, VIVIANO, and BERNSTEIN, JJ., concurred with ZAHRA, J.

PEOPLE v JACKSON

Docket No. 149798. Argued on application for leave to appeal May 5, 2015. Decided July 28, 2015.

Timothy W. Jackson was convicted by a jury in the Wayne Circuit Court of six counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) and (b)(*iii*), for sexually abusing a young member of the church where he served as pastor. The abuse occurred while the complainant was serving as a "youth nurse" to defendant, and came to light when the complainant's aunt—who was a parishioner at the church, and had previously served as a nurse to defendant—asked the complainant about her relationship with defendant. At trial, the complainant's aunt testified that she had approached the complainant to discuss the possible abuse in light of her own experiences and after talking with another woman who had also served as a nurse to defendant and had subsequently left the church. Defense counsel objected and moved for a mistrial, arguing that this testimony indicated that defendant had engaged in sexual relationships with the complainant's aunt and her acquaintance, and was inadmissible evidence of other acts under MRE 404(b). The court, James A. Callahan, J., overruled the objection and denied the motion, ruling that admissibility of the testimony was not governed by MRE 404(b) because the testimony was not evidence that defendant had engaged in prior sexual conduct with underage parishioners. The Court of Appeals, JANSEN, P.J., and OWENS, J. (SHAPIRO, J., concurring), affirmed in an unpublished opinion per curiam issued April 10, 2014 (Docket No. 310177), holding that although the testimony was evidence of other acts under MRE 404(b), it fell within an exception to that rule for res gestae evidence and thus could be admitted without reference to or compliance with the rule. The Supreme Court ordered and heard oral argument on whether to grant defendant's application or take other peremptory action. 497 Mich 930 (2014).

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

The Court of Appeals erred by holding that the testimony at issue could be admitted without reference to or compliance with MRE 404(b) by virtue of a "res gestae exception" to that rule.

There is no "res gestae exception" to MRE 404(b), nor does the definition of "res gestae" set forth in *People v Delgado*, 404 Mich 76 (1978), or *People v Sholl*, 453 Mich 730 (1996), delineate the limits of that rule's applicability. To the extent that previous Court of Appeals cases have held otherwise, they are overruled. Because the testimony at issue constituted evidence of other acts under MRE 404(b), its admission was governed by that rule and its procedural requirements. However, the Court of Appeals correctly determined that the defendant's convictions should be affirmed because defendant failed to show that he was entitled to relief on the basis of this error.

1. The plain language of MRE 404(b) limits the rule's scope to evidence of other crimes, wrongs, or acts that are contemporaneous with, or prior or subsequent to, the conduct at issue in the case and may be offered to prove the character of a person in order to show action in conformity therewith. Thus, by its plain terms, MRE 404(b) only applies to evidence of crimes, wrongs, or acts other than the conduct at issue in the case that risks an impermissible character-to-conduct inference. Acts comprised by or directly evidencing the conduct at issue are not subject to scrutiny under MRE 404(b). The conduct at issue in the instant case was defendant's charged acts of criminal sexual conduct against the complainant. Defendant's prior relationships with the complainant's aunt and her acquaintance plainly did not constitute, directly evidence, or contemporaneously facilitate the commission of this conduct. Rather, the testimony regarding those prior relationships was offered to provide inferential support for the conclusion that the charged conduct did, in fact, occur as alleged, and that those allegations were not fabricated. Such evidence fell within the prevailing and established scope of "other acts" contemplated by MRE 404(b), and the propriety of its inferential support was subject to scrutiny under that rule.

2. The trial court erred by ruling that the challenged testimony was too vague and nonspecific to constitute evidence of other acts. Although the complainant's aunt did not expressly state that defendant had engaged in sexual conduct with her and her acquaintance, her testimony clearly indicated as much, and in fact, the offered relevance of her testimony turned on the role this prior sexual conduct played in her decision to approach the complainant. While the testimony's level of detail regarding this prior conduct bore on its admissibility under MRE 404(b), the testimony constituted evidence of other acts and its admission was governed by that rule.

3. The trial court erred by deeming MRE 404(b) inapplicable because the testimony involved women who were above the age of consent at the time of their prior relationships with defendant. This was not factually established and, in any event, had no bearing on whether the testimony was subject to MRE 404(b). The rule does not limit its reach to evidence of other criminal conduct; rather, it expressly contemplates evidence of other crimes, wrongs, or acts that may give rise to an impermissible character-to-conduct inference. Evidence that defendant had previously engaged in sexual relationships with other parishioners, above or below the age of consent, fell well within this scope of coverage.

4. The Court of Appeals majority erred by holding that the challenged testimony fell within a "res gestae exception" to MRE 404(b). The plain language of MRE 404(b) sets forth no such exception from its coverage, nor was such an exception created in *Delgado* or *Sholl*, which provide a definition for potentially admissible "res gestae" evidence but which do not purport to exempt all evidence meeting that definition from scrutiny under MRE 404(b). This definition of "res gestae" also does not provide an apt delineation the boundaries of MRE 404(b)'s applicability; to the contrary, it is readily susceptible to a broad reading that significantly overlaps with the established scope of MRE 404(b), which risks unduly eroding the rule's plainly stated scope and undermining its procedural protections. MRE 404(b) applies to evidence of crimes, wrongs, or acts other than the conduct at issue in the case that may give rise to a character-to-conduct inference. In this case, the prior sexual relationships to which the challenged testimony referred plainly did not constitute the conduct at issue, nor did they directly evidence or contemporaneously facilitate its commission; instead, they were offered to provide inferential support for the conclusion that the conduct at issue occurred as alleged. Accordingly, the admissibility of that testimony was governed by MRE 404(b).

5. Defendant was not entitled to relief based on the erroneous handling of the challenged testimony because the error was harmless. The testimony was logically relevant to a material fact in the case as required by MRE 401 and MRE 402 and was offered for the proper, nonpropensity purpose of explaining the timing and circumstances of the complainant's disclosure of the alleged abuse to her aunt, which was necessary to counter defendant's theory that the complainant's allegations of abuse were fabricated at the behest of the complainant's aunt. Further, the probative value of the testimony was not substantially out-

weighed by the danger of unfair prejudice under MRE 403 because the testimony was tailored to its proper purpose and did not delve into unnecessary detail or unduly invite the jury to draw an impermissible character-to-conduct inference from it. Therefore, the testimony was substantively admissible under MRE 404(b), notwithstanding the trial court's failure to properly analyze it under that rule. And while defendant was not provided proper pretrial notice of the testimony as required by MRE 404(b)(2), he has not shown outcome-determinative prejudice from that error. The lack of proper pretrial notice under MRE 404(b)(2) did not result in the admission of substantively improper other-acts evidence. Although defendant was not afforded an opportunity to marshal arguments against its admission before it was introduced at trial, he did not show that any such arguments would have been availing or would have affected the scope of testimony ultimately presented to the jury. While defendant suffered unfair surprise from the unexpected introduction of this testimony at trial, he was aware of the general version of events in the challenged testimony before trial and did not demonstrate how he would have approached trial or presented his defense differently with proper notice of the proposed testimony. Lastly, irrespective of the challenged testimony, the other evidence of defendant's guilt was overwhelming. The complainant testified at length and in detail regarding defendant's alleged acts of abuse, and her account was corroborated not only by other witness testimony but also by substantial objective evidence for which defendant had no colorable explanation or response. Accordingly, the erroneous handling of the challenged testimony did not undermine the reliability of the verdict.

Convictions affirmed; Court of Appeals opinion vacated in part.

CRIMINAL LAW — EVIDENCE — ADMISSIBILITY — OTHER CRIMES, WRONGS, OR ACTS — SCOPE — LACK OF "RES GESTAE" EXCEPTION.

MRE 404(b) governs the admissibility of evidence of other crimes, wrongs, or acts that are contemporaneous with, or prior or subsequent to, the conduct at issue in the case and may be offered to prove the character of a person in order to show action in conformity therewith; there is no "res gestae exception" to MRE 404(b), and evidence of other acts is not exempt from scrutiny under that rule simply because it meets the definition of "res gestae" set forth in *People v Delgado*, 404 Mich 76 (1978), and *People v Sholl*, 453 Mich 730 (1996).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *David A. McCreedy*, Lead Appellate Attorney, for the people.

Lisa B. Kirsch Satawa LLC (by *Lisa B. Kirsch Satawa*) for defendant.

MCCORMACK, J. The defendant, Timothy Ward Jackson, was convicted by a jury of six counts of first-degree criminal sexual conduct (CSC-I), for sexually abusing a 12- to 13-year-old member of the church where he served as a pastor.[1] Before us is whether certain testimony regarding prior sexual relationships the defendant had with other parishioners constituted evidence of "other acts" under MRE 404(b) and, if so, whether that testimony could be admitted without reference to or compliance with MRE 404(b) by virtue of a "res gestae exception" to that rule. We agree with the Court of Appeals that the testimony was other-acts evidence as contemplated by MRE 404(b), and that the trial court erred in concluding otherwise. We disagree with the Court of Appeals majority, however, that the trial court's failure to subject the testimony to scrutiny under MRE 404(b) was nonetheless correct because the testimony fell within a "res gestae exception" to that rule. By its plain language, MRE 404(b) creates no such exception from its coverage. Accordingly, because the testimony at issue constituted evidence of "other acts" as contemplated by MRE 404(b), its admission was governed by that rule and its procedural requirements. We agree, however, with the Court of Appeals'

[1] The defendant was convicted of three counts of CSC-I under MCL 750.520b(1)(a) (victim less than 13 years of age), and three counts of CSC-I under MCL 750.520b(1)(b)(*iii*) (coercion by use of authority).

determination that the defendant's convictions should be affirmed, as the defendant has failed to show entitlement to relief on the basis of this error. We therefore affirm the defendant's convictions, but vacate that portion of the opinion of the Court of Appeals majority reasoning that the testimony at issue could be admitted without reference to or compliance with MRE 404(b) by virtue of a "res gestae exception" to that rule.

I. FACTUAL AND PROCEDURAL BACKGROUND

The defendant's six CSC-I convictions arose from allegations that he repeatedly engaged in sexual intercourse and fellatio with the complainant, a female parishioner at his church, while she was 12 to 13 years old and serving as one of his "youth nurses."[2] The abuse was alleged to have occurred on a regular basis for approximately a year, until the complainant disclosed it to her aunt, Jacklyn Price, who was also a parishioner in the same church. This disclosure triggered a police investigation, which in turn led to the institution of the charges of which the defendant was ultimately convicted.

At trial, the complainant testified to the alleged abuse; the prosecution also offered testimony from Price and the complainant's mother, as well as other testimony and physical evidence corroborative of the complainant's version of events. The defendant testified in his own defense, denying the allegations in full, questioning the complainant's credibility, and asserting that Price had fabricated the allegations and ma-

[2] As a youth nurse, the complainant was responsible for attending to the defendant and assisting him with various matters before, during, and after church services; she was also frequently alone with the defendant in his church office and traveled with him for certain church functions.

nipulated the complainant out of spite toward the defendant for refusing to preside over Price's marriage to a non-Christian man. The defendant pointed to the year-long delay in the complainant's disclosure of the alleged abuse as supporting his claim that the allegations were false. The defendant also offered testimony from other parishioners, including former youth nurses, to corroborate his version of events.

Price's trial testimony is central to the claim of error before us, and bears elaboration. The prosecutor's direct examination of Price focused on developing the circumstances and events surrounding the complainant's disclosure of the alleged abuse to her. Price testified that she started attending the defendant's church when she was 15, and at one point had served as a nurse for the defendant; she had subsequently left the church for a few years on two occasions, but had since returned and was an active member at the time of the complainant's disclosure. This disclosure came on the heels of a conversation that Price had initiated with the complainant after a morning church service. According to Price, she "had a specific motive" for initiating this conversation: to "see[] if [the complainant] had been touched in any sexual way" by the defendant. Price acknowledged that she had not "notice[d] anything out of the ordinary" in the defendant's interactions with the complainant. She explained, however, that roughly a month prior to her conversation with the complainant, she had fallen back in touch with a woman named Latoya Newsome, who had formerly been a parishioner at the church and had been a friend of Price's and a fellow nurse to the defendant. Newsome, however, had left the church for reasons unknown to Price at the time, and according to Price, "every time I would ask somebody about her and where was she, it was almost like quiet and secret as if

I had said something wrong by bringing her name up." Price had not heard from Newsome for years, which Price believed was because Newsome "didn't want anything to do with me or the church." Price testified that, when the two fell back in touch, she expressed this belief to Newsome, and Newsome offered a response that "[a]ffected me badly — very, very badly." This, according to Price, prompted her to approach the complainant.

Price then testified to the substance of her conversation with the complainant. Price started the conversation with small-talk about the complainant entering high school and developing into a young woman. She then told the complainant "that there was some things that I experience[d] when I was a little younger, that I didn't say anything to anybody about because I was embarrassed, and I didn't know what would happen," and that the complainant should "say something to somebody" if anyone touches her in a way that makes her "feel bad . . . , because it's not supposed to be that way." The complainant then disclosed the alleged abuse to Price, and Price in turn told the complainant's mother. According to Price, her "exact words" to the mother were that "this cannot happen. There was some things that happened to me and I know wasn't right, and I didn't say anything, and I buried it. And I'm not going to let this happen to my niece. . . . He touched the wrong one." The court later questioned Price on this topic as well:

> *The Court*: "All right. Because of this conversation that you had with [Newsome], why did you want to talk to your niece?"
>
> *Price*: "Because [Newsome] said some things to me that kind of — there was some similarities of what she –"

The Court: "What do you mean? Hold on for one second. Did you ever see any familiarity between your niece and [the defendant] before you sat down an[d] spoke with her in [her] mother's car."

Price: "No; not that I seen."

During Price's direct examination, defense counsel objected and moved for a mistrial; counsel later renewed this motion. The trial court heard argument on the objection and motion outside the presence of the jury, and ultimately rejected both. Defense counsel argued that Price's testimony regarding her decision to approach the complainant constituted impermissible other-acts evidence under MRE 404(b)(1) because the testimony clearly indicated that the defendant had previously engaged in sexual relations with Price and Newsome, and gave rise to the improper inference that the defendant had a propensity to abuse his position of authority over his parishioners in the manner alleged in the instant case. Defense counsel also stressed that the prosecution had not provided any notice of intent to introduce this testimony, as required under MRE 404(b)(2), and had instead represented to defense counsel at the start of trial that Price had been instructed not to bring the matter up. The prosecutor argued that the testimony was not other-acts evidence governed by MRE 404(b) because it did not identify any specific acts performed by the defendant and did not purport to demonstrate that the defendant had engaged in prior sexual conduct with underage parishioners.[3] The pros-

[3] The prosecutor explained to the court that Price had apparently engaged in "kissing and heavy petting" with the defendant, but was above the age of consent at the time. Neither the prosecutor nor defense counsel knew the details of whatever sexual relationship the defendant may have had with Newsome, including whether she was underage at the time. The prosecutor indicated that efforts to locate and contact Newsome had proved unsuccessful.

ecutor further argued that Price's testimony was offered for a proper purpose under MRE 404(b)—to counter the defendant's theory of fabrication by explaining why Price approached the complainant when she did—and that the testimony had been limited to this proper purpose. As to notice, the prosecutor argued that it was not required because the testimony was not governed by MRE 404(b), and also that defense counsel was well aware before trial of the defendant's purported history of sexual conduct with other parishioners (including Price and Newsome) and the role this history played in Price's conversation with the complainant.

The trial court agreed with the prosecution that Price's testimony did not implicate MRE 404(b) because it did not provide evidence of prior bad acts by the defendant—namely, prior sexual conduct with underage parishioners—given that Price was above the age of consent at the time of her prior relationship with the defendant and her testimony did not provide any specifics regarding that relationship. The court made clear that defense counsel was free to recall Price to the stand and question her about any such details, and could call other witnesses to further explore the defendant's sexual history; the court, however, declined defense counsel's request to delay the trial to pursue any such further measures.

The jury convicted the defendant as charged. On appeal, the defendant raised a number of challenges to these convictions in the Court of Appeals, including that the trial court erred in admitting Price's testimony regarding her and Newsome's prior relationships with him. The Court of Appeals unanimously affirmed the defendant's convictions, but disagreed regarding whether the trial court erred in its handling of Price's

testimony. *People v Jackson*, unpublished opinion per curiam of the Court of Appeals, issued April 10, 2014 (Docket No. 310177). The panel unanimously rejected the trial court's conclusion that Price's testimony was not evidence of "other acts" as contemplated by MRE 404(b). A majority of the panel, however, determined that the testimony was nonetheless admissible without regard to MRE 404(b) because it fell within a "res gestae exception" to that rule, given that "[t]he jury was entitled to know why Price decided to ask the victim whether she had been touched" and Price's testimony "was necessary to explain the sequence of events leading up to [her] conversation with the [complainant]." The majority correspondingly found no error in the prosecution's failure to provide "reasonable notice" of the testimony under MRE 404(b)(2), as such notice is not required "when the evidence [the prosecution] intends to present falls within the res gestae exception to MRE 404(b)." The majority further explained that, even if such notice were required, "the failure to provide [it] could not have prejudiced the defense, which was aware of Price's testimony regarding [the] defendant's past relationships as early as the preliminary examination."

Judge SHAPIRO concurred. He disagreed with the majority that Price's testimony was exempt from MRE 404(b), including its notice requirement, by virtue of a "res gestae exception" to the rule, noting that the majority cited no authority to support that proposition and the rule itself did not suggest it. He concluded, however, that this error did not entitle the defendant to relief because "[t]he testimony in question was brief and general and, given the extensive inculpatory evidence, it is difficult to see how the possibility that [the] defendant previously had an affair with an adult woman, even if 'inappropriate' in some sense, was a

serious consideration of the jury, let alone the determinative factor that led them to convict him of the repeated sexual abuse of a 12- to 13-year-old girl."

The defendant then filed the instant application for leave to appeal, seeking this Court's review of the admission of Price's testimony. We heard oral argument on the application after directing the parties to address the following issues:

> (1) whether the challenged testimony of Jacklyn Price regarding the defendant's prior sexual relationships was admissible res gestae evidence; (2) if so, whether the prosecutor was required to provide notice pursuant to MRE 404(b)(2); and (3) whether, if notice was required, any failure in this regard was prejudicial error warranting reversal. [*People v Jackson*, 497 Mich 930 (2014).]

II. LEGAL BACKGROUND

"The decision whether to admit evidence falls within a trial court's discretion and will be reversed only when there is an abuse of that discretion." *People v Duncan*, 494 Mich 713, 722; 835 NW2d 399 (2013). A trial court abuses its discretion when it makes an error of law in the interpretation of a rule of evidence. *Id*. at 723. We review such questions of law de novo. *Id*. "If the court's evidentiary error is nonconstitutional and preserved, then it is presumed not to be a ground for reversal unless it affirmatively appears that, more probably than not, it was outcome determinative—i.e., that it undermined the reliability of the verdict." *People v Douglas*, 496 Mich 557, 565-566; 852 NW2d 587 (2014) (quotation marks and citations omitted).

"When construing court rules, including evidentiary rules, this Court applies the same principles applicable to the construction of statutes." *Duncan*, 494 Mich at 723. "Accordingly, we begin with the rule's plain lan-

guage," and if that language is unambiguous, we enforce its "plain meaning without further judicial construction." *Id*.

MRE 404(b) provides:

> Other crimes, wrongs, or acts.
>
> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.
>
> (2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or 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.

People v VanderVliet, 444 Mich 52, 64; 508 NW2d 114 (1993), sets forth the prevailing framework for analyzing the admissibility of "[e]vidence of other crimes, wrongs, or acts" under MRE 404(b). As this Court explained then and has consistently reaffirmed since, MRE 404(b) "is a rule of legal relevance" that "limits only one category of logically relevant evidence": "[i]f the proponent's only theory of relevance is that the other act shows defendant's inclination to wrongdoing in general to prove that the defendant committed the conduct in question, the evidence is not admissible." *Id*. at 61-63. " 'Under-

lying the rule is the fear that a jury will convict the defendant inferentially on the basis of his bad character rather than because he is guilty beyond a reasonable doubt of the crime charged.' " *People v Watkins*, 491 Mich 450, 468; 818 NW2d 296 (2012), quoting *People v Crawford*, 458 Mich 376, 384; 582 NW2d 785 (1998). MRE 404(b) governs but does not prohibit all evidence of other acts that risks this character-to-conduct inference; the rule "is not exclusionary, but is inclusionary, because it provides a nonexhaustive list of reasons to properly admit evidence that may nonetheless also give rise to an inference about the defendant's character." *People v Mardlin*, 487 Mich 609, 616; 790 NW2d 607 (2010); see, e.g., *Watkins*, 491 Mich at 468 ("MRE 404(b) requires the exclusion of other-acts evidence if its only relevance is to show the defendant's character or propensity to commit the charged offense."); *People v Sabin* (*After Remand*), 463 Mich 43, 56; 614 NW2d 888 (2000) ("The *VanderVliet* analytical framework reflects the theory of multiple admissibility on which MRE 404(b) is founded."). Accordingly,

> [t]o admit evidence under MRE 404(b), the prosecutor must first establish that the evidence is logically relevant to a material fact in the case, as required by MRE 401 and MRE 402, and is *not* simply evidence of the defendant's character or relevant to his propensity to act in conformance with his character. The prosecution thus bears an initial burden to show that the proffered evidence is relevant to a proper purpose under the nonexclusive list in MRE 404(b)(1) or is otherwise probative of a fact other than the defendant's character or criminal propensity. Evidence relevant to a noncharacter purpose is *admissible* under MRE 404(b) *even if* it also reflects on a defendant's character. Evidence is *inadmissible* under this rule *only* if it is relevant solely to the defendant's character or criminal propensity. . . . Any undue prejudice that arises because the evidence also unavoidably reflects the defen-

> dant's character is then considered under the MRE 403 balancing test, which permits the court to exclude relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice . . . ." MRE 403. Finally, upon request, the trial court may provide a limiting instruction to the jury under MRE 105 to specify that the jury may consider the evidence only for proper, noncharacter purposes. [*Mardlin*, 487 Mich at 615-616 (footnotes omitted).][4]

In light of the "inherent complexity" in applying this framework to the various circumstances and scenarios that may arise in a "modern day trial," this Court has adopted a pretrial notice requirement, first set forth in *VanderVliet* and now codified in MRE 404(b)(2), "[t]o assist the trial court in this extraordi-

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[4] Before this Court's decision in *VanderVliet*, there had been some confusion regarding the general scope and nature of MRE 404(b)'s rule of admissibility for other-acts evidence. As explained in *VanderVliet*, this confusion stemmed from the mischaracterization of MRE 404(b) as "a rule of general exclusion allowing admission of other acts evidence only for the purposes set forth in the rule" and only if it satisfied particular criteria set forth in an earlier decision from this Court, *People v Golochowicz*, 413 Mich 298, 308; 319 NW2d 518 (1982). *VanderVliet*, 444 Mich at 65. As a result of this mischaracterization, other-acts evidence that was logically relevant and properly offered for a nonpropensity purpose nonetheless could not be admitted under MRE 404(b)—an analytical incongruity that courts struggled to reconcile. See, e.g., *People v Hall*, 433 Mich 573, 585-588; 447 NW2d 580 (1989) (plurality opinion of BOYLE, J.) (characterizing this restrictive interpretation of MRE 404(b) as misguided, and explaining why the evidence at issue would be admissible under a proper understanding of the rule even though it did not satisfy the *Golochowicz* test). *VanderVliet* expressly dispelled this mischaracterization and its resulting incongruity, emphasizing that MRE 404(b) reflects an "inclusionary theory of admissibility" and clarifying that, while "*Golochowicz* identifie[d] the requirements of logical relevance [for other-acts evidence] when the proponent is utilizing a *modus operandi theory* to prove *identity*," that case did "not set the standard for the admissibility of other acts evidence" and "the courts of this state, including this Court, . . . have been too quick to recite the *Golochowicz* test even when it was probably inapplicable." *VanderVliet*, 444 Mich at 65-66, 67 n 17.

narily difficult context and to promote the public interest in reliable fact finding." *VanderVliet*, 444 Mich at 87, 89. Requiring the prosecution to give "pretrial notice of its intent to introduce other acts evidence at trial" is designed to "promote[] reliable decision making," to "prevent[] unfair surprise," and to "offer[] the defense the opportunity to marshal arguments regarding both relevancy and unfair prejudice." *Id*. at 89, 89 n 51; see *Sabin*, 463 Mich at 60 n 6. The notice must be "reasonable" and provided before trial, but may be provided "during trial if the court excuses pretrial notice on good cause shown." MRE 404(b)(2). And as its plain terms make clear, this notice requirement is coextensive with and reflective of MRE 404(b)'s inclusionary nature, applying to "any [other-acts] evidence" the prosecution in a criminal case "intends to introduce at trial," regardless of whether "the rationale . . . for admitting the evidence" is "mentioned in subparagraph (b)(1)."

III. ANALYSIS

At issue is whether and to what extent MRE 404(b), including its notice requirement, governs the admissibility of Price's testimony regarding the defendant's prior relationships with her and Newsome. As summarized above, the trial court concluded that the testimony did not constitute evidence of "other acts" under MRE 404(b); the Court of Appeals unanimously rejected that conclusion, but a majority of the panel nonetheless determined that the testimony could be admitted without regard to MRE 404(b) by virtue of a "res gestae exception" to the rule. We agree with the Court of Appeals on the former point, but disagree with the Court of Appeals majority on the latter.

A. PRICE'S TESTIMONY CONSTITUTED EVIDENCE OF "OTHER ACTS" AS CONTEMPLATED BY MRE 404(b)

We begin with the plain language of MRE 404(b), *Duncan*, 494 Mich at 723, which, as set forth above, limits the rule's scope to "[e]vidence of other crimes, wrongs, or acts" that "are contemporaneous with, or prior or subsequent to the conduct at issue in the case" and may be offered "to prove the character of a person in order to show action in conformity therewith."[5] Thus, by its plain terms, MRE 404(b) only applies to evidence of crimes, wrongs, or acts "other" than the "conduct at issue in the case" that risks an impermissible character-to-conduct inference. Correspondingly, acts comprised by or directly evidencing the "conduct at issue" are not subject to scrutiny under MRE 404(b). See, e.g., *Mardlin*, 487 Mich at 616 n 10 (noting that "MRE 404(b) is not even implicated if the prosecution seeks to introduce logically relevant evidence of other acts performed by the defendant if the evidence does not generate an intermediate inference as to his character"), citing *VanderVliet*, 444 Mich at 64; *People v Houston*, 261 Mich App 463, 468-469; 683 NW2d 192 (2004) aff'd on other grounds 473 Mich 399; 702 NW2d 530 (2005) (explaining that "MRE 404(b) was not implicated" in the admission of evidence that, three days before the charged offense, the defendant possessed a firearm like the one used in the charged offense, as such evidence "was directly relevant to identifying [the] defendant as the killer" and "did not

[5] The phrase "conduct at issue" was added to the rule in 1991, to replace the phrase "the crime charged," and to thereby clarify that "[t]he rule applies in civil cases even though it is used more often in criminal cases." MRE 404, Note to 1991 Amendment, 437 Mich cci. See also, e.g., *People v Starr*, 457 Mich 490, 499; 577 NW2d 673 (1998) (noting that "MRE 404(b) specifically addresses the admissibility of *uncharged* conduct").

operate through an intermediate inference"). Other jurisdictions are in accord with this understanding, aptly explaining that evidence of acts other than the charged conduct is "intrinsic" to that conduct and thus not subject to 404(b) scrutiny if the uncharged acts "directly prove[] the charged offense" or if they "were performed contemporaneously with" the charged offense and "facilitated [its] commission." *United States v Green*, 617 F3d 233, 248-249 (CA3, 2010) (quotation marks omitted); e.g., *State v Ferrero*, 229 Ariz 239, 243; 274 P3d 509 (2012); *State v Rose*, 206 NJ 141, 180; 19 A3d 985 (2011); *United States v Bowie*, 344 US App DC 34, 40; 232 F3d 923 (2000).

As the Court of Appeals correctly recognized, the "conduct at issue" in the instant case was the defendant's charged acts of criminal sexual conduct against the complainant. The defendant's prior relationships with Price and Newsome plainly did not constitute, directly evidence, or contemporaneously facilitate the commission of this conduct. Rather, Price's testimony regarding those prior relationships was offered to provide inferential support for the conclusion that the charged conduct did, in fact, occur as alleged, and that those allegations were not fabricated. Such evidence falls comfortably within the prevailing and established scope of "other acts" contemplated by MRE 404(b), and the propriety of its inferential support is subject to scrutiny under that rule. See *People v Starr*, 457 Mich 490, 494-496; 577 NW2d 673 (1998) (recognizing, in a case charging the defendant for the sexual abuse of his daughter, that testimony regarding the defendant's prior sexual abuse of his half-sister constituted evidence of "other acts" subject to scrutiny under MRE 404(b)); see also *VanderVliet*, 444 Mich at 87 (confirming that MRE 404(b) effectuates the notion "that other acts evidence must move through a permissible inter-

mediate inference . . . to be relevant to actus reus" and that, "[a]bsent such an intermediate inference, the other acts evidence bears only on propensity and is inadmissable"); *People v Engelman*, 434 Mich 204, 215-217; 453 NW2d 656 (1990) (discussing MRE 404(b)'s role in determining whether evidence of other acts "tends to establish some intermediate inference, other than the improper inference of character, which is in turn probative of . . . the commission of the [alleged criminal] act").

Like the Court of Appeals, we are not persuaded by the trial court's reasoning to the contrary. First, we disagree with the trial court that Price's testimony regarding her and Newsome's prior relationships with the defendant was too vague and nonspecific to constitute evidence of "other acts." Although Price did not expressly state that the defendant engaged in sexual conduct with her and Newsome, her testimony clearly indicated as much. Indeed, as discussed below, the offered relevance of her testimony turned on the role this prior sexual conduct played in Price's decision to approach the complainant. Thus, while (as also discussed below) the testimony's level of detail regarding this prior conduct may bear on its admissibility under MRE 404(b), the testimony constituted evidence of "other acts" whose admission was governed by that rule.

Similarly, the trial court erred in deeming MRE 404(b) inapplicable because Price and Newsome were above the age of consent at the time of their prior relationships with the defendant. While the parties appear to agree this was true as to Price, neither party seems to know precisely how old Newsome may have been at the relevant time. Regardless, we do not see how Price's and Newsome's ages at the time of these

relationships impacts whether Price's testimony is subject to MRE 404(b). The rule does not limit its reach to evidence of other criminal conduct; rather, it expressly contemplates evidence of "other crimes, wrongs, or acts" that may give rise to an impermissible character-to-conduct inference. Evidence that the defendant previously engaged in sexual relationships with other parishioners, above or below the age of consent, falls well within this scope of coverage.

Accordingly, we agree with the Court of Appeals that the trial court erred in its interpretation of MRE 404(b), and in its corresponding conclusion that Price's testimony did not constitute evidence of "other acts" as contemplated by that rule.

B. THERE IS NO "RES GESTAE EXCEPTION" TO MRE 404(b)

Despite properly recognizing Price's testimony as evidence of "other acts" under MRE 404(b), the Court of Appeals majority concluded that the trial court did not ultimately err in admitting the testimony without reference to or compliance with that rule. According to the Court of Appeals majority, Price's testimony fell within a "res gestae exception" to MRE 404(b), which rendered the rule, and its notice requirement, inapplicable. We cannot agree with this analysis and conclusion.

We begin once again with the plain language of MRE 404(b), which sets forth no such "res gestae exception" from its coverage. Nor do we see any basis for reading one into the rule. In concluding otherwise, the Court of Appeals majority looked to this Court's decisions in *People v Delgado*, 404 Mich 76; 273 NW2d 395 (1978), and *People v Sholl*, 453 Mich 730; 556 NW2d 851 (1996). We do not read either decision, however, as

creating a "res gestae exception" for evidence of "other acts" under MRE 404(b), contrary to the plain language of the rule.

In *Delgado*, the defendant was charged for the delivery of heroin to an undercover police officer. At trial, the prosecution introduced evidence regarding a separate delivery of heroin the defendant had made to this same officer a few days earlier, successfully arguing that it was admissible under MCL 768.27.[6] This Court affirmed the admission of this evidence of the uncharged prior sale,[7] but found it "unnecessary to decide whether the evidence was admissible under [MCL 768.27] and intimate[d] no view with respect thereto." *Delgado*, 404 Mich at 84. Instead, this Court reasoned that the evidence of the prior sale was "properly before the jury" because it was "inextricably related" to the charged offense, which "[q]uite literally . . . followed from the sale [preceding it], as does an

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[6] MCL 768.27 provides:

> In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant.

At the time of the defendant's trial in *Delgado*, MRE 404(b) had not yet been enacted; the rule became effective on March 1, 1978.

[7] The defendant had initially been charged for the prior sale in a separate information; the prosecution moved to consolidate that case with the one pertaining to the subsequent sale, but the trial court denied the motion on the basis that the sales constituted two separate transactions. The prosecution thereafter dismissed the case pertaining to the prior sale. See *Delgado*, 404 Mich at 79-80, 80 n 2.

effect follow from a cause," and "[t]he jurors were entitled to have before them the facts concerning the [prior sale] as an integral part of the events which were incidental to the" charged offense. *Id*. This Court supported that conclusion with the following general explanation:

> It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the "complete story" ordinarily supports the admission of such evidence. . . .

Stated differently:

> Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime. [*Id*. at 83 (quotation marks and citations omitted).]

This Court reiterated and relied upon this general definition in *Sholl*, which involved a defendant charged with third-degree criminal sexual conduct in connection with a sexual encounter between him and his then girlfriend. At trial, the prosecution offered evidence that the defendant had been using marijuana on the evening in question; the court had ruled before trial that this evidence could be admitted to impeach the defendant's memory of the encounter, but did not subsequently instruct the jury that the evidence could be considered only for this limited purpose. The Court of Appeals found error in the trial court's failure to provide such an instruction. This Court rejected that conclusion, however, quoting the *Delgado* standard

above and explaining that, while "there are substantial limits on the admissibility of evidence concerning other bad acts,"

> it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place. The presence or absence of marijuana could have affected more than the defendant's memory. It could have affected the behavior of anyone who used the drug. Further, inferences made by a person about the intended conduct of another might have been affected by the person's knowledge that the other's conduct was taking place in a setting where illegal drugs were being used.
>
> In this case, a jury was called upon to decide what happened during a private event between two persons. The more the jurors knew about the full transaction, the better equipped they were to perform their sworn duty. [*Sholl*, 453 Mich at 741-742.]

Courts have frequently looked to *Delgado* and *Sholl* for guidance when assessing whether certain evidence is part of the "res gestae" of a charged offense,[8] and some, like the Court of Appeals majority here, have relied upon them in recognizing a "res gestae exception" to MRE 404(b).[9] We agree that *Delgado* and *Sholl* provide firm support for the notion that evidence meeting their "res gestae" definition is potentially relevant and admissible. Neither case, however, indicates that evidence of "other acts" is exempt from

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[8] See, e.g., *People v Cash*, 419 Mich 230, 249; 351 NW2d 822 (1984); *People v Maxson*, 181 Mich App 133, 136; 449 NW2d 422 (1989); *People v Bostic*, 110 Mich App 747, 749-750; 313 NW2d 98 (1981).

[9] See, e.g., *People v Malone*, 287 Mich App 648, 661-662; 792 NW2d 7 (2010); *People v Crowell*, 186 Mich App 505, 508; 465 NW2d 10 (1990); *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983). To the extent that such caselaw holds that there is a "res gestae exception" to MRE 404(b), and thus conflicts with our holding in the instant case, it is overruled.

scrutiny under or compliance with MRE 404(b) simply because it meets this definition.

Delgado concluded that evidence of an uncharged prior act could be admitted without reference to MCL 768.27. The decision did not address or mention MRE 404(b)—understandably, as that evidentiary rule had only recently become effective at the time of the decision, and correspondingly had not been offered at trial as a basis for the evidence's admission. And while MRE 404(b) and MCL 768.27 certainly overlap, they are not interchangeable. MCL 768.27 authorizes the admission of evidence of "like acts or other acts of [a criminal] defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question," when one or more of such matters "is material." This statutory authorization comports with and is encompassed by MRE 404(b), as made clear by that rule's enumerated list of proper purposes for admitting other-acts evidence. Unlike MCL 768.27, however, MRE 404(b)'s list of such purposes is expressly nonexhaustive, and thus plainly contemplates the admission of evidence that may fall outside the statute's articulated scope. *Delgado* thus reflects what the plain language of MRE 404(b) confirms: that MCL 768.27 does not purport to define the limits of admissibility for evidence of uncharged conduct. And while *Delgado* indicates that evidence meeting its definition of "res gestae" is potentially admissible, it does not suggest that the admissibility of all such evidence is properly evaluated without reference to MRE 404(b).

Nor do we find this proposition in *Sholl*. Unlike *Delgado*, *Sholl* does refer to MRE 404(b), albeit in passing, when noting that "there are substantial limits on the admissibility of evidence concerning other bad

acts." *Sholl*, 453 Mich at 741. *Sholl* then holds that, because the evidence in question satisfied *Delgado*'s "res gestae" definition, its admission was not precluded by MRE 404(b)'s "substantial limits." This conclusion, like that in *Delgado*, comports with MRE 404(b)'s inclusionary nature, recognizing that the rule does not prohibit the admission of evidence of uncharged conduct that is relevant for nonpropensity reasons. It does not, however, purport to place all evidence meeting the *Delgado*/*Sholl* definition of "res gestae" outside the purview of MRE 404(b).

Accordingly, we fail to see in *Delgado* and *Sholl* an exception from MRE 404(b)'s coverage for all evidence meeting their definition of "res gestae." Nor do we think that definition aptly delineates the limits of "other acts" evidence contemplated by and subject to MRE 404(b). As this Court has long recognized, and as the *Delgado*/*Sholl* definition reflects, the concept of "res gestae" evidence is inherently indefinite and malleable. See, e.g., *People v Kayne*, 268 Mich 186, 192; 255 NW 758 (1934) (noting that "[n]o inflexible rule has ever been, and probably one never can be, adopted as to what is a part of the res gestae," as "[i]t must be determined largely in each case by the peculiar facts and circumstances incident thereto") (quotation marks and citation omitted). This malleability, however, proves problematic when the concept is used to define the boundaries of MRE 404(b)'s applicability. For while the *Delgado*/*Sholl* definition of "res gestae" undoubtedly covers evidence of the "conduct at issue" in a given case, it is also readily susceptible to a much broader reading that significantly overlaps with MRE 404(b)'s established scope.

For instance, it is well recognized that MRE 404(b) governs the admission of evidence of uncharged acts

that are offered "to establish a common plan, design, or scheme embracing a series of crimes, including the crime charged, so related to each other that proof of one tends to prove the other." *Sabin*, 463 Mich at 62-63 (quotation marks and citations omitted). Such uncharged acts, however, could just as easily be characterized as "inextricably related" to the charged offense, *Delgado*, 404 Mich at 84, part of its "full transaction," *Sholl*, 453 Mich at 742, and necessary "to give the jury an intelligible presentation of the full context in which disputed events took place," *id*. at 741. Indeed, courts have often considered whether evidence of an "other act" is necessary to "complete the story" of the charged offense when evaluating whether that evidence has been offered for a proper nonpropensity purpose under MRE 404(b). See, e.g., *Starr*, 457 Mich at 502 (explaining that evidence of the defendant's prior sexual abuse of his half-sister was admissible under MRE 404(b)(1) because it was necessary to rebut the defendant's claim of fabrication and " '[w]ithout such evidence, the fact finder would be left with a chronological and conceptual void regarding the events' "), quoting *VanderVliet*, 444 Mich at 81; *People v Dobek*, 274 Mich App 58, 91; 732 NW2d 546 (2007) (concluding that evidence of the defendant's prior acts of sexual abuse of the complainant was admissible under MRE 404(b)(1) because the evidence was "significantly probative on issues of intent, scheme, plan, and system, as well as on credibility and presenting the full picture to the jury"), citing *People v DerMartzex*, 390 Mich 410; 213 NW2d 97 (1973); *People v Hawkins*, 245 Mich App 439, 449; 628 NW2d 105 (2001) (quoting and relying upon the *Delgado* definition of "res gestae" to conclude that other-acts evidence had been offered for a proper purpose under MRE 404(b)(1)).

The instant case well illustrates the problem. When the *Delgado*/*Sholl* definition of "res gestae" is read properly, Price's testimony does not fall within it, largely for the same reasons it does not constitute evidence of the "conduct at issue" under MRE 404(b). The defendant's prior relationships with Price and Newsome were not part of the "full transaction" of the alleged sexual misconduct against the complainant, *Sholl*, 453 Mich at 742, nor were they "so blended or connected with" that misconduct as to be "inextricably related" to it. *Delgado*, 404 Mich at 83-84. Rather, they were wholly distinct occurrences whose only offered relevance was to explain not "the circumstances of the crime," *id*. at 83, but the circumstances of the complainant's eventual disclosure of it to Price. See also *Kayne*, 268 Mich at 192 (explaining that, at their core, "res gestae are the facts which so illustrate and characterize the principal fact as to constitute the whole one transaction, and render the latter necessary to exhibit the former in its proper effect") (quotation marks and citation omitted). That said, and as the reasoning of the Court of Appeals majority reflects, the *Delgado*/*Sholl* definition can be easily stretched to support the opposite conclusion: given that the defendant put the circumstances of the complainant's disclosure squarely in dispute at trial and used it to support his claim that the alleged conduct never occurred, evidence explaining why Price approached the complainant when she did could be characterized as "essential . . . to give the jury an intelligible presentation of the full context in which disputed events took place," *Sholl*, 453 Mich at 741, and to "complete the story" of the allegations, *Delgado*, 404 Mich at 83. The *Delgado*/*Sholl* definition of "res gestae" is thus indefinite and malleable enough to sweep Price's testimony within its scope, despite the fact that it is plainly "other

acts" evidence as contemplated by MRE 404(b)—resulting in the Court of Appeals majority's confused determination that the testimony both was and was not evidence governed by that rule.[10]

As a number of other jurisdictions have recognized, the danger such confusion poses to the integrity of MRE 404(b) is substantial; using the *Delgado*/*Sholl* standard to define the boundaries of that rule risks unduly eroding the rule's plainly stated scope and undermining its procedural protections. See, e.g., *Green*, 617 F3d at 246-248 (rejecting the use of a "res gestae" or "inextricably intertwined" standard to define the scope of FRE 404(b), as such a standard is "vague, overbroad, and prone to abuse, and we cannot ignore the danger it poses to the vitality of Rule 404(b)"); *United States v Boone*, 628 F3d 927, 933 (CA 7, 2010) (confirming its rejection of the "inextricable intertwinement" doctrine because it was "unhelpfully vague, and was often used as a basis to admit evidence

[10] This confusion, and the general notion of an "exception" from MRE 404(b) for certain other-acts evidence, may also be attributable in part to semantic vestiges of the pre-*VanderVliet* interpretation of MRE 404(b), which, as noted above, viewed the rule as one of exclusion, permitting the admission of other-acts evidence only in limited circumstances. These limited circumstances, in turn, were often characterized as "exceptions to the general exclusionary rule regarding [a] defendant's prior bad acts or crimes." *People v Flynn*, 93 Mich App 713, 718; 287 NW2d 329 (1979). See *id*. at 718-722 (explaining that, because the evidence at issue was part of the "res gestae" of the charged offenses and was relevant to demonstrate motive, it was admissible under two such "exceptions"); *Robinson*, 128 Mich App at 340 (discussing "the 'res gestae' exception to th[e] general rule" reflected by MRE 404(b) that "evidence of 'bad acts' is inadmissible to prove guilt of the charged offense"). As *VanderVliet* made clear, this nomenclature is ill suited to the prevailing understanding of MRE 404(b): the rule does not operate through "exceptions" to exclusion, but rather is an inclusionary "rule of legal relevance" that countenances the admission of all but "one category of logically relevant [other-acts] evidence." 444 Mich at 61-62.

that was more properly admissible either as direct evidence or as evidence under Rule 404(b)") (quotation marks omitted); *Bowie*, 344 US App DC at 38-40 (making clear that "there is no general 'complete the story' or 'explain the circumstances' exception to Rule 404(b)" because "[s]uch broad exclusions have no discernible grounding in the 'other crimes, wrongs, or acts' language of the rule" and "threaten[] to override" the rule); *Ferrero*, 229 Ariz at 243 (abandoning an "inextricable intertwinement" test for 404(b) evidence due to difficulties in its proper interpretation and application); *Rose*, 206 NJ at 176-182 ("end[ing] the practice of invoking 'res gestae' as an explanation for the admission of evidence" in general, and rejecting the use of that concept to define the boundaries of 404(b) other-acts evidence). We share the apprehensions articulated by these other jurisdictions, and agree that MRE 404(b), "particularly its notice requirement, should not be disregarded on such a flimsy basis" as the "res gestae exception" invoked by the Court of Appeals majority here. *Bowie*, 344 US App DC at 40.

We therefore clarify that there is no "res gestae exception" to MRE 404(b), nor does the definition of "res gestae" set forth in *Delgado* and *Sholl* delineate the limits of that rule's applicability.[11] As the plain

[11] We stress that this clarification does not mean that all evidence meeting the *Delgado*/*Sholl* definition of "res gestae" is other-acts evidence subject to scrutiny under MRE 404(b); to the contrary, there is likely to be substantial overlap between evidence of acts properly understood to be part of the "res gestae" of the charged conduct, and evidence of acts that directly prove or contemporaneously facilitate the commission of that conduct. Nor does this clarification affect the substantive scope of evidence potentially admissible under the *Delgado*/*Sholl* definition of "res gestae"—just whether the admission of such evidence is governed by MRE 404(b) and its procedural requirements. See, e.g., *Green*, 617 F3d at 249 ("As a practical matter, it is unlikely that our holding will exclude much, if any, evidence that is

language of the rule makes clear, MRE 404(b) applies to evidence of "crimes, wrongs, or acts" other than the "conduct at issue in the case" that may give rise to a character-to-conduct inference. Here, the prior sexual relationships to which Price's testimony referred plainly did not constitute the "conduct at issue" in the instant case, nor did they directly evidence or contemporaneously facilitate its commission; instead, they were offered to provide inferential support for the conclusion that the "conduct at issue" occurred as

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currently admissible as background or 'completes the story' evidence under the inextricably intertwined test. . . . [M]ost, if not all, other crimes evidence currently admitted outside the framework of Rule 404(b) as 'background' evidence will remain admissible under the approach we adopt today. The only difference is that the proponent will have to provide notice of his intention to use the evidence, and identify the specific, non-propensity purpose for which he seeks to introduce it (i.e., allowing the jury to hear the full story of the crime). Additionally, the trial court will be required to give a limiting instruction upon request.") (citation omitted).

We are also cognizant of the challenges that may attend compliance with MRE 404(b)'s procedural requirements in this context; it is not always possible for a prosecutor to anticipate before trial, for instance, what the defendant's theory of the case may be, and thus what evidence of "other acts" may prove relevant and necessary to "complete the story" of the charged conduct and the defendant's guilt. We thus take this opportunity to emphasize that, while a prosecutor's failure to comply with these procedural requirements may result in the exclusion of substantively admissible evidence, that is not their driving purpose. Rather, as we explained when enacting these requirements in *VanderVliet*, they are intended and designed to facilitate the fair and proper handling of other-acts evidence in the "extraordinarily difficult context" of a "modern day trial," and to accommodate the various circumstances and practical difficulties that may arise in that context. See *VanderVliet*, 444 Mich at 87-89. Correspondingly, MRE 404(b)(2) provides that the prosecution's notice of other-acts evidence must be "reasonable," and that provision of notice during trial rather than before it may be excused "on good cause shown." Courts should bear these provisions, and their underlying purposes, in mind when evaluating whether a prosecutor's failure to properly notice other-acts evidence before trial requires its exclusion, or instead warrants another solution.

alleged. Accordingly, the admissibility of that testimony was governed by MRE 404(b), including its notice requirement.

C. THE DEFENDANT IS NOT ENTITLED TO RELIEF BASED ON THE ERRONEOUS HANDLING OF PRICE'S TESTIMONY

Thus, contrary to the determination of the Court of Appeals majority, we conclude that it was error to admit Price's testimony without reference to or compliance with MRE 404(b). Because this error was harmless, however, we agree with the Court of Appeals that the defendant is not entitled to relief.

First, this error did not result in the introduction of substantively inadmissible other-acts evidence against the defendant. Price's testimony regarding the defendant's prior relationships with her and Newsome certainly carried the risk of a character-to-conduct inference; indeed, under Price's version of events, it was that inference that led Price to wonder whether the defendant was abusing the complainant. As we have made clear, however, MRE 404(b) does not prohibit all other-acts evidence "that may . . . give rise to an inference about the defendant's character," but only that which is "relevant *solely* to the defendant's character or criminal propensity." *Mardlin*, 487 Mich at 615-616. Here, Price's testimony was "logically relevant to a material fact in the case, as required by MRE 401 and MRE 402, and [was] *not* simply evidence of the defendant's character or relevant to his propensity to act in conformance with his character." *Id*. at 615. Namely, it was offered for the proper, nonpropensity purpose of explaining the timing and circumstances of Price's conversation with the complainant—an explanation necessary to counter the defendant's theory that the complainant's allegations of abuse were fabricated at

Price's behest. See *Starr*, 457 Mich at 501-502 (testimony regarding the defendant's prior sexual abuse of his half-sister was offered for a proper purpose under MRE 404(b)(1) because it was necessary to explain the circumstances of the complainant's disclosure of the charged abuse to her mother and to "effectively rebut [the] defendant's claim that the charges were groundless and fabricated by her mother"). Nor was the probative value of this evidence "substantially outweighed by the danger of unfair prejudice" under MRE 403. See *Mardlin*, 487 Mich at 616. Price's testimony was tailored to its proper purpose, and did not delve into unnecessary detail or unduly invite the jury to draw an impermissible character-to-conduct inference from it.[12] We do not see, and the defendant has not explained, how the testimony could have been limited to meaningfully reduce the risk of this impermissible inference while still preserving the testimony's legitimate probative value. Cf. *Crawford*, 458 Mich at 398 (finding other-acts evidence unfairly prejudicial under MRE 403 because "the specter of impermissible character evidence is likely to have significantly overshadowed any legitimate probative value" the evidence may have had).[13]

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[12] For instance, while Price's testimony indicated that she herself had drawn such an inference on the basis of the defendant's prior relationships with her and Newsome, the testimony did not purport to validate her inference to that effect; rather, Price made clear in her testimony that she had not "notice[d] anything out of the ordinary" in the defendant's interactions with the complainant.

[13] The defendant notes that the lack of detail in Price's testimony added to its unfair prejudice, as it left the jury free to infer that the defendant's prior sexual relationships with Price and Newsome had occurred when the two women were below the age of consent, like the complainant was at the time of the alleged abuse. As noted above, the parties appear to agree that this was not the case as to Price, but there is some uncertainty regarding Newsome's age at the time of her

Accordingly, Price's testimony was substantively admissible under MRE 404(b), notwithstanding the trial court's failure to properly analyze it under that rule. And while it was error for the prosecution not to provide, and the trial court not to require, "reasonable notice" of Price's testimony under MRE 404(b)(2), the defendant has not demonstrated that this error "more probably than not . . . was outcome determinative." *Douglas*, 496 Mich at 566 (quotation marks omitted). As discussed above, the lack of proper pretrial notice did not result in the admission of substantively improper other-acts evidence. Thus, although the defendant was not afforded his due "opportunity to marshal arguments" against its admission before it was introduced at trial, *VanderVliet*, 444 Mich at 89 n 51, he has not shown that any such arguments would have been availing, or would have affected the scope of testimony ultimately presented to the jury. Furthermore, while the defendant suffered "unfair surprise" from the unexpected introduction of this testimony at trial, *id*., he was admittedly aware of Price's general version of events before trial, including her and Newsome's prior relationships with the defendant,[14] and he has not demon-

relationship with the defendant. In any event, as the trial court made clear, the defendant was free to develop the details of these relationships at trial to the extent he felt necessary and advantageous to his defense. While the defendant presumably would have preferred to avoid the topic of these relationships entirely, their introduction at trial resulted from his challenge to the veracity of the complainant's disclosure and to Price's motives in connection therewith. We do not see unfair prejudice in the level of detail Price offered, and the defendant chose to let stand, on this topic. See *Crawford*, 458 Mich at 398 ("Rule 403 does not prohibit prejudicial evidence; only evidence that is unfairly so.").

[14] In particular, and as the prosecutor stresses, Price's witness statement indicated that she "was sexually assaulted in the past," which gave rise to "some concerns" that prompted her conversation with the complainant; it also indicated, in a separate portion of the statement, that Price had been in touch with Newsome, "a former church member," and

strated how he would have approached trial or presented his defense differently had he known in advance that Price would be permitted to testify as she did. For instance, the defendant has not suggested that he would have chosen to explore these prior relationships in greater depth with Price, nor has he identified or presented offers of proof from any witnesses he might have called in response to her testimony.[15] He also has not suggested that he would have altered or abandoned his theory of fabrication so as to prevent Price from offering this testimony to counter it. We therefore cannot conclude that the defendant suffered outcome-determinative prejudice from the prosecution's failure to follow, and the trial court's failure to apply, MRE 404(b)(2). Cf. *Hawkins*, 245 Mich App at 455-456 (concluding the defendant was not entitled to relief due to the prosecutor's failure to provide the

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Newsome "said she was sexually assaulted by our pastor and I told her about my incident with our pastor too." According to the prosecutor, this witness statement, coupled with the fact that Price was an endorsed witness for the prosecution, were sufficient to provide the defendant with the "reasonable notice" required under MRE 404(b)(2). We disagree. By its plain terms, MRE 404(b)(2) requires reasonable pretrial notice not only that potential other-acts evidence exists, but that the prosecutor "intends to introduce [that evidence] at trial" and has an articulable "rationale for admitting" it. Price's witness statement focused largely on detailing her role as the individual to whom the complainant first disclosed the abuse, and who then set in motion the chain of events leading to the defendant's arrest; her endorsement as a witness for the prosecution, in turn, simply reflected the unremarkable proposition that she would be called to testify as to these events. Neither her witness statement nor the fact of her endorsement suggested, let alone provided reasonable notice of, the prosecution's intent to have Price testify to her and Newsome's prior relationships with the defendant, or what the rationale for admitting that other-acts evidence might be.

[15] Indeed, in denying the defendant's motion for a mistrial, the trial court made clear that the defendant could recall Price to the stand to take further testimony on the topic and could also put on additional witnesses, but the defendant did neither.

notice required under MRE 404(b) because, *inter alia*, the lack of notice did not result in the prosecutor being "able to use irrelevant, inadmissible prior bad acts evidence to secure [the defendant's] conviction" and the defendant "has never suggested how he would have reacted differently to th[e] evidence had the prosecutor given notice").

Lastly, we agree with Judge SHAPIRO's concurring observation in the Court of Appeals that, irrespective of Price's testimony, the other evidence of the defendant's guilt was overwhelming. The complainant testified at length and in detail regarding the defendant's alleged acts of abuse. While the defendant denied these allegations and offered his own version of events, this was not, as he claims, a pure credibility contest. To the contrary, as the Court of Appeals majority detailed, the complainant's account was corroborated not only by other witness testimony, but by substantial objective evidence for which the defendant had no colorable explanation or response.[16] Our review of this other evidence, and the record as a whole, leaves no doubt that the erroneous handling of Price's testimony was harmless, and did not "undermine[] the reliability of the verdict" against the defendant. *Douglas*, 496 Mich at 566.

IV. CONCLUSION

For the reasons set forth above, we agree with the Court of Appeals that the trial court erred in ruling

[16] Namely, (1) a medical examination performed the day following the complainant's disclosure of the abuse revealed physical injuries consistent with the complainant's allegations of abuse; (2) the police recovered from the defendant's church office a semen-stained towel containing his DNA, which was consistent with the complainant's description of the defendant's use of such towels in connection with the alleged abuse; and (3) the defendant was confirmed to have a distinctive birthmark on his inner thigh near to and obscured by his scrotum, which the complainant had described in detail during a statement to the police.

that Price's testimony was not evidence of "other acts" as contemplated by MRE 404(b). We conclude, however, that the Court of Appeals majority erred in determining that the testimony could nonetheless be admitted without reference to or compliance with MRE 404(b) by virtue of a "res gestae exception" to that rule, and we vacate that portion of the majority's opinion. Despite this error, we agree with the Court of Appeals that the defendant's convictions should be affirmed, as he has not demonstrated entitlement to relief based on the erroneous handling of Price's testimony.

YOUNG, C.J., and MARKMAN, KELLY, ZAHRA, VIVIANO, and BERNSTEIN, JJ., concurred with MCCORMACK, J.

UAW v GREEN

Docket No. 147700. Argued January 13, 2015 (Calendar No. 1). Decided July 29, 2015.

The International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America and others brought an action in the Court of Appeals against Nino E. Green and other members of the Michigan Employment Relations Commission, the Governor, and the Attorney General, seeking a declaratory judgment that portions of 2012 PA 349—which amended the public employment relations act, MCL 423.201 *et seq*., to prohibit public employers from requiring their employees to join a union or pay union-related expenses—were unconstitutional with respect to employees in the classified state civil service. The Court of Appeals, SAAD, P.J., and DONOFRIO, J. (GLEICHER, J., dissenting), held that the challenged portions of 2012 PA 349 were constitutional. 302 Mich App 246 (2013). The Supreme Court granted plaintiffs' application for leave to appeal. 495 Mich 921 (2014).

In an opinion by Chief Justice YOUNG, joined by Justices MARKMAN, ZAHRA, and VIVIANO, the Supreme Court *held*:

The Civil Service Commission lacked the constitutional authority to compel civil service employees to make involuntary financial contributions to subsidize the commission's exercise of its constitutional duties and responsibilities. Although the commission had authority over civil service employees' rates of compensation, conditions of employment, and grievance procedures under Const 1963, art 11, § 5, the commission's power to regulate the conditions of employment through public collective bargaining agreements did not encompass the specific authority to tax or appropriate, which generally rested exclusively with the Legislature unless the Constitution affirmatively provided that power to another constitutional body. The funding provision of Const 1963, art 11, § 5, ¶ 10 indicated that the ratifiers understood that the commission would be adequately funded by the Legislature in proportion to the size of the civil service and, therefore, that the commission lacked the power to compel funding for its administrative operational duties from another

and unstated source. Accordingly, allowing the imposition of mandatory agency shop fees on civil servants under Civ Serv R 6-7.2 was beyond the commission's constitutional authority. *Dudkin v Civil Serv Comm*, 127 Mich App 397 (1983), was overruled to the extent it held that the imposition of an agency shop fee was constitutionally authorized pursuant to efficient civil service operations.

Court of Appeals judgment affirmed on different grounds.

Justice KELLY, joined by Justices MCCORMACK and BERNSTEIN, dissenting, would have reversed the Court of Appeals judgment, upheld the authority of the commission to promulgate Civ Serv R 6-7.2 as part of its power to regulate all conditions of employment in the classified civil service and to determine the qualifications of all candidates for positions in the classified service under Const 1963, art 11, § 5, and held that Const 1963, art 4, § 48 precluded 2012 PA 349 from applying to employees in the state classified civil service.

CIVIL SERVICE — CIVIL SERVICE COMMISSION — CONSTITUTIONAL LAW — AGENCY SHOP FEES.

The Civil Service Commission lacks the constitutional authority to compel civil service employees to make involuntary financial contributions to subsidize the commission's exercise of its constitutional duties and responsibilities (Const 1963, art 11, § 5).

William A. Wertheimer for all plaintiffs.

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Sachs Waldman, PC (by *Andrew Nickelhoff* and *Mami Kato*), for SEIU Local 517M and the Michigan Corrections Organization.

Fraser Trebilcock Davis & Dunlap, PC (by *Michael E. Cavanaugh* and *Brandon W. Zuk*), for the Michigan State Employees Association.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Ann M. Sherman* and *Margaret A. Nelson*, Assistant Attorneys General, for all defendants.

Amici Curiae:

Miller, Canfield, Paddock and Stone, PLC (by *Michael J. Hodge* and *Scott R. Eldridge*), for the Michigan Civil Service Commission.

Dykema Gossett PLLC (by *Gary P. Gordon*, *Leonard C. Wolfe*, and *Courtney F. Kissel*) and *Warner Norcross & Judd LLP* (by *John J. Bursch*) for the Michigan Chamber of Commerce.

Patrick J. Wright and *Derk A. Wilcox* for the Mackinac Center Legal Foundation.

John N. Raudabaugh for Thomas Haxby.

YOUNG, C.J. The Civil Service Commission's rules allow public collective bargaining agreements that require collection of a mandatory service fee, also known as an "agency shop fee," from union-eligible employees who opt out of union membership. Civ Serv R 6-7.2. Although we conclude that public collective bargaining is a method by which the Civil Service Commission (the commission) may choose to exercise its constitutional duties, we hold that the commission may not effectively require civil servants to fund the commission's own administrative operations. Accordingly, we affirm, albeit on different grounds, the judgment of the Court of Appeals.

FACTS AND HISTORY

The legislation commonly known as the "Right to Work" laws—Public Acts 348 and 349 of 2012—were made effective March 27, 2013. 2012 PA 348 governs private employers and 2012 PA 349 governs public employers. This case concerns the constitutionality of

2012 PA 349. Section 3 of 2012 PA 349 amends the public employment relations act (PERA), MCL 423.201 *et seq*., to provide that public employers may not require their employees to join a union or pay union dues, fees, or other expenses "as a condition of obtaining or continuing public employment . . . ." MCL 423.210(3) ("[A]n individual shall not be required as a condition of obtaining or continuing public employment to do any of the following: . . . (c) [p]ay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value to a labor organization or bargaining representative.").

The commission's current rules, however, affirmatively and expressly allow public collective bargaining agreements that provide for the collection of an agency shop fee from union-eligible employees who opt out of union membership. Civ Serv R 6-7.2 (last amended April 29, 2004) provides:

> Nothing in this rule precludes the employer from making an agreement with an exclusive representative to require, as a condition of continued employment, that each eligible employee in the unit who chooses not to become a member of the exclusive representative shall pay a service fee to the exclusive representative. If agreed to in a collective bargaining agreement, the state may deduct the service fee by payroll deduction. An appointing authority shall not deduct a service fee unless the employee has filed a prior written authorization or as otherwise authorized in a collective bargaining agreement.

Plaintiffs, union representatives of classified civil service employees, contend that agency shop fees defray various union activity costs. In accordance with the current rules, plaintiff unions have negotiated various agreements with the state that contain agency shop fee arrangements covering the employees whom they represent.

2012 PA 349 purports to make these mandatory agency shop fees illegal. Plaintiff labor unions filed the instant complaint in February 2013 challenging the validity of 2012 PA 349, § 3.[1] Plaintiffs alleged that, under Const 1963, art 11, § 5, the statute's agency shop fee prohibition cannot apply to the commission because it infringes the commission's constitutional mandate to "regulate all conditions of employment" for civil servants.

The Court of Appeals in a split decision held that the Legislature possesses the authority to enact legislation concerning and restricting agency shop fees. *Int'l Union v Green*, 302 Mich App 246; 839 NW2d 1 (2013). In reaching that conclusion, the Court of Appeals reasoned that the commission's power to "regulate" conditions of employment is necessarily subservient to the Legislature's power to "enact laws" relative to hours and conditions of employment. The dissent, on the other hand, would have held that agency shop fees are "conditions of employment" by virtue of being "on-duty employment concerns." *Id*. at 294 (GLEICHER, J., dissenting).

STANDARD OF REVIEW

Questions of constitutional and statutory interpretation are reviewed de novo. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009).

ANALYSIS

Our primary goal in construing a constitutional provision is to give effect to the intent of the people of the state of Michigan who ratified the Constitution, by

[1] Under § 10(6) of 2012 PA 349, the Court of Appeals exercises exclusive original jurisdiction over such actions. MCL 423.210(6).

applying the rule of "common understanding." See *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554, 558-559; 737 NW2d 476 (2007) ("When interpreting constitutional provisions, our primary objective is to realize the intent of the people by whom and for whom the constitution was ratified. That is, we seek the 'common understanding' of the people at the time the constitution was ratified. This involves applying the plain meaning of each term used at the time of ratification, unless technical, legal terms are used.") (citations and quotation marks omitted). We identify the common understanding of constitutional text by applying the plain meaning of the text at the time of ratification. *Wayne Co v Hathcock*, 471 Mich 445, 468-469; 684 NW2d 765 (2004). Interpretation of a constitutional provision also takes account of "the circumstances leading to the adoption of the provision and the purpose sought to be accomplished." *People v Tanner*, 496 Mich 199, 226; 853 NW2d 653 (2014) (citation and quotation marks omitted). Unless we are able to determine that a constitutional provision had some other particularized or specialized meaning in the collective mind of the 1963 electorate, we must give effect to the natural meaning of the language used in the Constitution. *Mich United Conservation Clubs v Secretary of State (After Remand)*, 464 Mich 359, 376; 630 NW2d 297 (2001) (YOUNG, J., concurring). Technical legal terms are those that have acquired a special meaning and "must be interpreted in light of the meaning that those sophisticated in the law would have given those terms at the time of ratification." *Dep't of Transp v Tomkins*, 481 Mich 184, 191; 749 NW2d 716 (2008). The Address to the People, which was distributed to Michigan citizens in advance of the ratification vote and which explained in everyday language what each provision of the proposed new Con-

stitution was intended to accomplish, *Walker v Wolverine Fabricating & Mfg Co, Inc*, 425 Mich 586, 597; 391 NW2d 296 (1986), and, to a lesser degree, the constitutional convention debates themselves are also relevant in determining the ratifiers' intent. *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003).

"The Civil Service Commission is a constitutional body . . . ." *Viculin v Dep't of Civil Serv*, 386 Mich 375, 393; 192 NW2d 449 (1971). It possesses "plenary and absolute powers in its field." *Id*. at 398. The constitutional provision concerning the commission, Article 11, § 5, provides, in relevant part:

> The Commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service. [Const 1963, art 11, § 5, ¶ 4.]

Article 11, § 5 thus sets forth the "duties of the Civil Service Commission[.]" See *Mich Coalition of State Employee Unions v Civil Serv Comm*, 465 Mich 212, 221; 634 NW2d 692 (2001). The commission possesses authority over and exercises its duties concerning, in part, "the procedures by which a state civil service employee may review his grievance," *Viculin*, 386 Mich at 393, as well as rates of compensation and conditions of employment. See *Council No 11, AFSCME v Civil Serv Comm*, 408 Mich 385, 406; 292 NW2d 442 (1980).

The commission's rules authorize the use of public collective bargaining agreements as a mechanism for

exercising its constitutional authority over such matters as grievance procedures and rates of compensation. See, e.g., Civ Serv R 6-9.6(a) ("An exclusive representative and the employer may agree upon a procedure for the resolution of grievances of exclusively represented employees against the departmental employer . . ."); Civ Serv R 6-3.6(b) ("The rates of compensation for all existing grades within a classification of positions . . . may be established in a collective bargaining agreement . . ."). The commission retains absolute authority over the contents of a public collective bargaining agreement. Civ Serv R 6-3.1(b) ("The civil service commission retains the authority to (1) approve, modify, or reject, in whole or in part, a proposed collective bargaining agreement presented to it for review and (2) to impose on the parties and eligible employees a collective bargaining agreement as modified by the commission."). This authority makes clear that the commission uses public collective bargaining as one important tool within its constitutional arsenal, establishing a procedure by which civil servants and the state employer may bargain over a variety of employment-related matters. This choice presumably reflects the commission's judgment that it wishes to facilitate input from the employees' representatives. If the commission deems public collective bargaining to be an appropriate mechanism for exercising its constitutional duties, that is its prerogative and we have no warrant to challenge this aspect of its exercise of authority. See *Makowski v Governor*, 495 Mich 465, 471; 852 NW2d 61 (2014), citing *Marbury v Madison*, 5 US (1 Cranch) 137, 170; 2 L Ed 60 (1803) (applying *Marbury* to Michigan's three branches of government and stating that "courts may not inquire into how the executive or his officers perform their duties in which they have discretion").

Having established for the purposes of this case that the commission may authorize public collective bargaining as a tool in the exercise of its constitutional duties, we turn to the specific issue before us: whether the mandatory agency shop fee is consistent with such authorization. Although authorizing public collective bargaining agreements is within the commission's sound judgment, we hold that the commission *lacks* the authority to tax or appropriate—to wit, the authority to compel civil service employees to make involuntary financial contributions to subsidize the commission's exercise of its constitutional duties and responsibilities.

Generally, of course, the power to tax and appropriate rests exclusively with the Legislature. See *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 141; 719 NW2d 553 (2006) (opinion by MARKMAN, J.); see also Const 1963, art 9, § 1 ("The legislature shall impose taxes sufficient with other resources to pay the expenses of state government."). It has been stated:

> The power to tax defines the extent to which economic resources will be apportioned between the people and their government, while the power to appropriate defines the priorities of government. Partly in recognition of the enormity of these powers, the framers of our constitutions determined that the branch of government to exercise these powers should be that branch which is closest to, and most representative of, the people [i.e., the Legislature]. [*46th Circuit Trial Court*, 476 Mich at 141-142 (opinion by MARKMAN, J.).]

Indeed, we have recognized that this is "the most fundamental aspect of the 'legislative power . . . .' " *Id.* at 141 (opinion by MARKMAN, J.). Therefore, in order for another constitutional body, such as the commission, to exercise the same powers that are historically vested

in our Legislature, the Constitution must affirmatively provide for them. See *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 752-753; 330 NW2d 346 (1982).

In an unrelated, but illustrative, context, the commission actually enjoys such a narrow and highly distinctive power of appropriation. Paragraph 7 of Const 1963, art 11, § 5, expressly empowers the commission to increase civil servants' rates of compensation by having that increase placed into the state's annual budget. That increase becomes effective unless the Legislature vetoes the commission's increase by a supermajority vote. In turn, when the commission opts to increase the payroll of employees in the civil service, the Constitution automatically increases the commission's own administrative operational budget in direct proportion to the payroll increase. Const 1963, art 11, § 5, ¶¶ 7 and 10. Specifically, ¶ 10 of Const 1963, art 11, § 5 provides:

> To enable the commission to exercise its powers, the legislature shall appropriate to the commission for the ensuing fiscal year a sum not less than one per cent of the aggregate payroll of the classified service for the preceding fiscal year, as certified by the commission. Within six months after the conclusion of each fiscal year the commission shall return to the state treasury all moneys unexpended for that fiscal year.

At the constitutional convention, this—the commission's "privilege of a mandatory [administrative operational] appropriation"—was rightfully described as "extraordinary." 1 Official Record, Constitutional Convention 1961, p 639 (stating that "[t]he commission does not appear to have abused its extraordinary privilege of a mandatory appropriation" in order to raise the payroll and, by extension, its own budget).

But the commission's limited and explicit power to appropriate its own administrative funding by adjusting budgeted rates of compensation stands in stark contrast to an asserted broad and implicit power to appropriate funds from whatever source. The former has textual support in the Constitution, while the latter does not. There is simply no authority in the Constitution that would support an argument that its ratifiers commonly and reasonably understood the commission as possessing the authority that plaintiffs ascribe to it—in particular, the power to require that assessments from civil servants' paychecks additionally subsidize the commission's own duties and responsibilities.

Reading this administrative funding provision in Article 11, § 5, ¶ 10 in context with the enumeration of the commission's powers in ¶ 4 underscores that the ratifiers could not have contemplated that civil servants would serve as an alternative or additional source of funding for the commission's budget. The *only* potential source of an authority to permit mandatory agency shop fees is the commission's power to "regulate" the conditions of employment, which regulation is effected through public collective bargaining agreements. But the power to "regulate" does not encompass the specific authority to compel other entities, including civil servants themselves, to subsidize the commission's constitutional operations. This authority is one of taxation and appropriation and is fundamentally legislative in character.

Indeed, the presence of the funding provision of Article 11, § 5, ¶ 10 serves to confirm this analysis, which concludes that the ratifiers must have understood, consistent with separation of powers principles, that the commission would be adequately funded by

the Legislature in proportion to the size of the civil service. In that paragraph, the Constitution provides the commission with the financial means "[t]o enable the commission to exercise its powers[.]" In other words, upon receiving an operating appropriation, which is scaled to one percent of the total payroll of all classified civil servants, the Constitution considers the commission "enable[d]" to exercise all of its powers—including its power to "regulate all conditions of employment in the classified service." In light of the foregoing, the commission cannot simply provide itself with additional administrative operating funds as a function of its authority to "regulate."[2] Instead, because the Constitution provides the commission with a source of funding "to enable [it] to exercise its powers," the ratifiers must have reasonably understood that to be the commission's *exclusive* source of funding. See *Blank v Dep't of Corrections*, 462 Mich 103, 142 n 14; 611 NW2d 530 (2000) (MARKMAN, J., concurring) ("There is nothing unusual about the principle that language couched in terms of an affirmative grant can also reasonably imply a restriction."); see also Cooley, Constitutional Limitations (1868), p 64 ("[W]here the means for the exercise of a granted power are given, no other or different means can be implied, as being more effective or convenient.") (citation and quotation marks omitted). It follows then that the commission lacks the power to compel funding for its administrative operational duties from another and unstated source. Ac-

[2] It may seem excessive to suggest that the commission might someday seek to use compelled contributions from civil servants in order to cover administrative costs *other* than those associated with public collective bargaining. However, absent affirmative constitutional authority, the premise of the commission's supposed power to assess agency shop fees from civil servants has no apparent or necessary limiting principle that would preclude such an action.

cordingly, we hold that allowing the imposition of mandatory agency shop fees upon civil servants is beyond the commission's constitutional authority.[3] Civ Serv R 6-7.2 is unconstitutional to the extent it allows the exaction of such fees.[4]

RESPONSE TO THE DISSENT

The dissent does not disagree with our conclusion that the commission lacks the authority to demand additional administrative operating funds from third parties. Rather, it is the dissent's position that, because employees are forced to pay the agency shop fees *directly to the unions*, rather than to the commission itself, the fees "do not fund the commission's 'administrative operational duties' to establish the conditions of employment" as we have reasoned.[5] We respectfully argue that the dissent misses the point of our analysis.

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[3] Because the commission's power to "regulate" does not encompass the general legislative authority to tax or appropriate, we overrule *Dudkin v Civil Serv Comm*, 127 Mich App 397, 408-409; 339 NW2d 190 (1983), to the extent that it held that "imposition of an agency shop fee" is constitutionally authorized "pursuant to efficient civil service operations."

[4] Given our holding that the commission may not impose mandatory agency shop fees on civil servants because it lacks the affirmative constitutional authority to do so under Const 1963, art 11, § 5, we need not consider whether it is also prohibited by 2012 PA 349 from doing the same. Thus, we need not address the meaning and breadth of "conditions of employment" in Article 4, § 49 and Article 11, § 5, or how the commission's authority in Article 11, § 5 to "regulate all conditions of employment in the classified service" should be reconciled with the Legislature's authority in Article 4, § 1 to exercise "[t]he legislative power of the State of Michigan" and its authority in Article 4, § 49 to "enact laws relative to . . . conditions of employment." Furthermore, there is no need to address plaintiffs' argument that 2012 PA 349 is inapplicable to civil servants as a function of its placement within PERA.

[5] *Post* at 303.

The fact that, here, the agency fees are paid to the union does not change the fact that the commission permits collective bargaining in order to fulfill *its* constitutional obligation to regulate conditions of employment. Thus, using collective bargaining for that purpose provides a benefit that flows directly to the commission.[6] Contrary to the dissent's assertion that "there has been no finding—not even an allegation—that agency fees fund [the commission's] regulatory efforts,"[7] the commission's own rules link collective bargaining *directly* to conditions of employment. Under Civ Serv R 6-2.1(d), "[t]he provisions of a collective bargaining agreement, when approved by the commission, *become a subset of the civil service rules governing . . . conditions of employment* for the eligible employees in the applicable unit."[8] This is underscored by the commission's absolute control over collective bargaining agreements, which renders them merely advisory until approved by the commission and illustrates that the *commission* is the true beneficiary of the collective bargaining process it has authorized in order to fulfill its constitutional regulatory obligation. Although the employers and employees may benefit from collective bargaining, those entities enjoy any such positive externalities at the grace of the commission.

As explained earlier, collective bargaining is one method by which the commission has chosen to exercise its obligation to "regulate all conditions of employment." And this is the critical point in our analysis that

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[6] Specifically, collective bargaining agreements relieve the commission of the burden of its constitutional responsibility to regulate particularized "conditions of employment for the eligible employees in the applicable unit." Civ Serv R 6-2.1(d).

[7] *Post* at 303-304.

[8] Emphasis added.

explains why the commission is the true beneficiary of the collective bargaining process: Unless collective bargaining was a proper method of regulating conditions of employment within the civil service, there would be no lawful basis for the commission to permit it at all. Stated differently, because the commission can permit collective bargaining, it follows that it does so as part of its own duty to regulate. The agency fees in turn exist to support that regulatory duty, regardless of who receives them.

Having chosen this method of regulating conditions of employment, what the commission cannot do is foist the administrative costs of that choice onto anyone else. This principle remains true regardless of who pays whom. What matters is who authorizes and receives the benefit. Illustratively, had the commission chosen another method by which to regulate conditions of employment—for example, by hiring a panel of consultant labor economists—no one would assert that the labor economists could then submit their invoice to the affected civil servants. That is precisely what the commission has done in passing on to civil servants the cost of regulating conditions of employment through the mechanism of collective bargaining.

The dissent further assigns significance to the fact that the commission authorizes, rather than requires, an employer to force its employees to pay agency shop fees. This does not affect our reasoning. The dissent cites no authority for the proposition that the commission can authorize an employer to do something that the commission itself cannot do.[9] Given the fact that collective bargaining can only exist as a means to

[9] The dissent warns of "other conditions of employment" being "subject to invalidation by this Court as improper 'appropriations[.]' " *Post* at 308. However, the instant holding is founded solely on the agency shop

permit the commission to discharge its constitutional obligation, it is irrelevant that an employer retains the choice whether to require agency shop fees. When no agency shop fee is assessed, there is no constitutional problem. But whenever an employer opts to require the agency shop fee, the fee comes into existence as a mechanism to fund collective bargaining and, by extension, the commission's regulatory obligations. Permitting agency shop fees is therefore impermissible for the reasons stated earlier.

It therefore remains unnecessary for us to respond to the dissent's argument that 2012 PA 349 is prohibited by Const 1963, art 4, § 48.[10]

CONCLUSION

The authority of the Civil Service Commission is not without limits. Although public collective bargaining is a method by which the commission may choose to exercise its constitutional duties, it may not require collection of agency shop fees to fund its administrative operations in pursuit of those duties. The commission's rules must yield to the Constitution when there is no authority for it to impose such fees. Accordingly, we affirm, albeit on different grounds, the judgment of the Court of Appeals.

MARKMAN, ZAHRA, and VIVIANO, JJ., concurred with YOUNG, C.J.

KELLY, J. (*dissenting*). I respectfully dissent from the majority's conclusion that the Civil Service Commission's "agency fee" rule, Civ Serv R 6-7.2, ex-

fee's unique relationship to the entire collective bargaining framework. "Other conditions of employment" are not before this Court.

[10] See note 4 of this opinion.

ceeds the bounds of its constitutional authority. Instead, I would hold that Rule 6-7.2 is consistent with the commission's authority to "regulate all conditions of employment in the classified [civil] service" and to determine "the qualifications of all candidates for positions in the classified service."[1] Moreover, I would hold that the Legislature cannot abrogate Rule 6-7.2 by enacting 2012 PA 349 because the people of this state have specifically limited the Legislature's authority to "enact laws providing for the resolution of disputes concerning public employees" to public employees who are not in the classified civil service.[2] I would therefore reverse the Court of Appeals and hold that 2012 PA 349 does not apply to employees in the classified civil service.

I. THE CIVIL SERVICE COMMISSION'S CONSTITUTIONAL AUTHORITY

Article 11, § 5 of the Michigan Constitution establishes the Civil Service Commission as an executive agency and enumerates the following powers unique to the commission:

> The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service.[3]

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[1] Const 1963, art 11, § 5; see also *Dudkin v Civil Serv Comm*, 127 Mich App 397, 408-409; 339 NW2d 190 (1983).

[2] Const 1963, art 4, § 48.

[3] Const 1963, art 11, § 5.

This provision originated in substantially the same form by a vote of the people in 1940,[4] four years after a report by then Governor Frank Fitzgerald's study commission condemned "the system of political appointments, promotions, demotions, rewards and punishments" that existed in Michigan as part of the spoils system.[5]

In the 75 years since the people of Michigan created the commission, this Court has consistently held that "[t]he power to make 'rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service' is indeed a plenary grant of power."[6] This power includes the "authority to regulate employment-related activity involving internal matters such as job specifications, compensation, grievance procedures, discipline, collective bargaining and job performance, including the power to prohibit activity during working hours which is found to interfere with satisfactory job performance" and "to regulate and even prohibit off-duty activity which is found to interfere with job performance."[7]

Given that promulgating rules authorizing collective bargaining is within the scope of the commission's

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[4] The provision, as initially enacted, did not refer to "competitive examination and performance," only "competitive performance." Const 1908, art 6, § 22. The current language was added during the 1961-1962 Constitutional Convention and ratified by the people as part of the 1963 Constitution.

[5] *Council No 11, AFSCME v Civil Serv Comm*, 408 Mich 385, 397; 292 NW2d 442 (1980).

[6] *Id*. at 406. This grant of power is mandatory: the commission "*shall* . . . regulate all conditions of employment in the classified service." Const 1963, art 11, § 5 (emphasis added). See *State Hwy Comm v Vanderkloot*, 392 Mich 159, 180; 220 NW2d 416 (1974) (opinion by WILLIAMS, J.) ("[T]he popular and common understanding of the word 'shall' is that it denotes mandatoriness.").

[7] *Council No 11*, 408 Mich at 406-407.

authority—a claim that the majority does not contest—the Court of Appeals has long held that the commission determines whether employees in the classified civil service may engage in collective bargaining at all:

> The constitution of 1963 does not expressly give public employees the right to collectively bargain. . . . The commission controls all conditions of employment and is vested with plenary powers in its sphere of authority. . . . Only the Civil Service Commission has the power to provide for grievance procedures because it alone has the power to "regulate *all* conditions of employment" in the state classified civil service.[8]

In regulating the conditions of employment, the commission has determined as a matter of policy to allow collective bargaining when the employees transfer bargaining authority to their exclusive representative.[9]

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[8] *Welfare Employees Union v Civil Serv Comm*, 28 Mich App 343, 352; 184 NW2d 247 (1970) (citations omitted), quoting Const 1963, art 11, § 5. The Court of Appeals has further held that the commission "is not required to extend to state classified employees collective bargaining benefits," *id*. at 354, and this is consistent with the majority opinion's conclusion that the commission may permit collective bargaining, even while the commission maintains substantial discretion to reject or alter collective bargaining agreements. See Civ Serv R 6-10.2 ("The civil service commission may reject or modify, in whole or in part, any provision of a proposed collective bargaining agreement, including a provision previously approved by the commission."); Civ Serv R 6-3.4 ("A primary or secondary collective bargaining agreement approved by the civil service commission remains in effect between the parties during its approved term, unless otherwise amended by the commission during its term as provided in rules 6-3.5 or 6-3.8(c).").

[9] While the commission's decision to allow collective bargaining is a discretionary policy decision that can be rescinded, see *Welfare Employees Union*, 28 Mich App at 352, its current policy is consistent with labor policies articulated in 1935 by the federal Wagner Act, which describes collective bargaining as "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 USC 151. Collective bargaining further "encourag[es] practices funda-

"Employees may organize, form, assist, join, or refrain from joining labor organizations,"[10] and a majority of votes within a particular employee unit establishes "a labor organization as the exclusive representative of all eligible employees in [the] unit . . . ."[11] The exclusive representative is the sole representative that may bargain with the employer.[12]

As part of its decision to establish collective bargaining, the commission enacted Rule 6-7.2, which allows an employer and an exclusive collective bargaining representative to agree—either as part of a collective bargaining agreement or by separate agreement—to "require, as a condition of continued employment, that each eligible employee in the unit who chooses not to become a member of the exclusive representative shall pay a service fee to the exclusive representative."[13] Accordingly, under agreements authorized by Rule 6.7-2, while an employee has the option to join or refrain from joining labor organizations,[14] an employee

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mental to the friendly adjustment of . . . disputes arising out of differences as to wages, hours, or other working conditions, and [restores] equality of bargaining power between employers and employees." *Id*.

[10] Civ Serv R 6-5.1.

[11] Civ Serv R 6-6.3.

[12] Civ Serv R 6-5.3(a) ("With respect to proper subjects of bargaining, exclusively represented employees may be represented only through their exclusive representative.").

[13] Rule 6-7.2 does not *require* agency fees; it merely *authorizes* them. Whether a collective bargaining agreement or other agreement requires employees to pay agency fees is, ultimately, a matter negotiated between the employer and the exclusive representative. If the parties' agreement to charge an agency fee appears in a collective bargaining agreement that is then ratified by a vote of the employees, the fee may be paid as an automatic deduction from the employee's paycheck. However, the employer "shall not deduct a service fee unless the employee has filed a prior written authorization or as otherwise authorized in a collective bargaining agreement." Civ Serv R 6-7.2.

[14] Civ Serv R 6-5.1 ("Employees may organize, form, assist, join, or refrain from joining labor organizations.").

does not have the option both to refrain from joining the labor organization that is his or her exclusive representative and to refuse to pay the service fee. Otherwise, the employee would receive the benefit of the exclusive representative's mandated services without paying for those services.[15]

As a result, the service fee (or "agency fee") contemplated in Rule 6-7.2 is designed to pay the exclusive representative for its responsibilities to represent all employees—both members and nonmembers—not only during the collective bargaining process but also while the collective bargaining agreement is in effect. Agency fees cannot, however, encompass any activities outside of that process. To this end, Rule 6-7.3 specifies that the fee "cannot exceed the employee's proportionate share of the costs of the activities that are necessary to perform its duties as the exclusive representative in dealing with the employer on labor-management issues" and "may include only the costs germane to collective bargaining, contract administration, grievance adjustment, and any other cost necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues."[16] To ensure that agency fees encompass only the designated activities, Rule 6-7.4 details the right of an employee to object to the amount of a fee and the concurrent obligation of the exclusive representative to provide "financial information sufficient to determine how the service fee is calculated."[17]

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[15] See *Eastern Mich Univ Chapter of Amer Ass'n of Univ Professors v Morgan*, 100 Mich App 219, 227; 298 NW2d 886 (1980) (describing an agency fee as both "an effort to promote effectiveness of the bargaining unit and to discourage 'free riders' ").

[16] Civ Serv R 6-7.3.

[17] Civ Serv R 6-7.4(a). See also Civ Serv R 6-7.6 ("An exclusive

While the enactment of 2012 PA 349 illustrates that the policy rationales behind mandatory agency fees are debatable, what is clear to both sides of the policy debate is that agency fees are paid directly to an employee's exclusive representative, not to the commission, the employer, or any other public entity. By likening the commission's rule authorizing agency fees to the legislative "power to tax and appropriate" and by claiming that the commission's agency fee rule attempts to exercise "the power to compel funding for its administrative operational duties from another . . . source,"[18] the majority disregards this essential purpose of agency fees. Contrary to the majority's claim, agency fees do not amount to a tax or appropriation because, quite simply, they do not fund the commission's "administrative operational duties" to establish the conditions of employment.[19] Rather, employees pay agency fees directly to their exclusive representative for the costs associated with representation during the collective bargaining process and while a collective bargaining agreement is operable. While the commission has separate operational and regulatory duties that include approving, rejecting, or amending the collective bargaining agreement that arises out of the collective bargaining process,[20] there has been no finding—not even an allegation—that agency fees fund

representative shall account for and report fees and expenses in such detail as necessary to allow employees to determine the proportionate costs of expenditures necessarily or reasonably incurred for the purposes of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.").

[18] *Ante* at 290, 293.

[19] *Ante* at 293.

[20] Civ Serv R 6-3.1(b) ("The civil service commission retains the authority to (1) approve, modify, or reject, in whole or in part, a proposed collective bargaining agreement presented to it for review and (2) to

these regulatory efforts.[21]

As stated, this Court has specifically held that the commission's authority includes the authority "to regulate employment-related activity involving internal matters such as job specifications, compensation, grievance procedures, discipline, *collective bargaining* and job performance[.]"[22] The agency fee rule is a permissible exercise of the commission's regulatory authority because the rule regulates the mechanics of an employment-related activity—the collective bargaining process.[23]

The majority's conclusion upsets this traditional understanding of the scope of the commission's consti-

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impose on the parties and eligible employees a collective bargaining agreement as modified by the commission."); Civ Serv R 6-3.1(c) ("[T]he commission retains the authority, during the term of a collective bargaining agreement, to modify the agreement without the approval of the parties . . . .").

[21] Furthermore, as noted earlier, whether a collective bargaining agreement or other agreement requires employees to pay agency fees is, ultimately, a matter negotiated between the employer and the exclusive representative.

[22] *Council No 11*, 408 Mich at 406 (emphasis added). Moreover, I would conclude that Rule 6-7.2 also falls within the commission's authority to "determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service[.]" Const 1963, art 11, § 5. Rule 6-7.2 bears on the efficiency of civil service operations: by enacting a rule that conditions continued employment either on membership in a union or on payment of an agency fee, the commission has determined that negotiating with a single exclusive representative, rather than employees individually, enhances the efficiency of the classified civil service. *Dudkin*, 127 Mich App at 408-409. Importantly, this Court has interpreted the term "candidates for positions" to include those already employed in civil service positions, and therefore the criterion of efficiency applies to existing employees, such as those covered by Rule 6-7.2. *Reed v Civil Serv Comm*, 301 Mich 137, 159; 3 NW2d 41 (1942).

[23] In the same way, Civ Serv R 6-9.2 regulates the collective bargaining process by requiring the state personnel director to "establish a time frame for the conduct of primary negotiations and impasse resolution."

tutional authority to regulate the conditions of employment for employees in the classified state civil service. We do not misunderstand the majority's argument: the majority itself observes that a ratified collective bargaining agreement does not establish the conditions of employment for classified state employees. That collective bargaining agreement is only the starting point for the commission's purposes, because it must accept, reject, or modify the agreement during its own internal review process. Only when approved by *the commission*—using the Legislature's appropriation—does a collective bargaining agreement actually establish the conditions of employment.[24] The majority's analysis conflates the collective bargaining *negotiation* process, which is external to the commission, with the commission's own process for *approving* a collective bargaining agreement. In reviewing, and then accepting, rejecting, or modifying the collective bargaining agreement, the commission must still "regulate particularized 'conditions of employment for the eligible employees in the applicable unit.' "[25]

Indeed, in alleging that the commission "foist[s] the administrative costs" of establishing the conditions of employment onto employees, the majority ignores the fact that the employees *themselves* have chosen, for better or worse, to organize and select an exclusive representative.[26] Similarly, the employees themselves can change a bargaining unit's exclusive representative—or dispense with the collective bargaining process entirely, if they believe that the costs of

[24] See Civ Serv R 6-2.1(d).

[25] *Ante* at 295 n 6, quoting Civ Serv R 6-2.1(d).

[26] *Ante* at 296. For this reason, the majority's comparison to "a panel of consultant labor economists," *ante* at 296, is inapt.

agency fees do not warrant further representation.[27] If the employees choose the latter approach, the commission's rules establish that any existing collective bargaining agreement is "immediately void and the unit members are subject to the rates of compensation and other conditions of employment applicable to other nonexclusively represented employees."[28] Once that occurs, the employer "shall not deduct dues or service fees from any classified employee . . . except dues and service fees deducted through the pay period in which the decertification is issued."[29]

That the nature of the commission's authority to promulgate Rule 6-7.2 is policy-driven and not a quasi-tax or quasi-appropriation is further supported in the legislative history of the Right to Work law itself. From 1973 until 2012, the Legislature explicitly permitted employers of *nonclassified* public employees to require similar agency fees.[30] Moreover, while 2012 PA 349

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[27] See Civ Serv R 6-6.2.

[28] Civ Serv R 6-6.3(e)(2). Indeed, if collective bargaining did not exist at all, the commission would simply apply these default rates of compensation and conditions to all classified employees. The collective bargaining process proposes an *alternative* to those default rates of compensation and conditions of employment, and the commission must review that alternative proposal and accept, reject, or revise using the funds appropriated to it from Article 11, § 5. This review would occur *regardless* of whether agency fees existed and shows that, while the commission has established a policy to allow collective bargaining, it does not benefit either from the collective bargaining process or from the agency fees that employees pay their exclusive representative.

[29] Civ Serv R 6-6.3(e)(3).

[30] Former MCL 423.210(1)(c) was enacted by 1973 PA 25 and stated

> [t]hat nothing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative . . . to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to

purported to ban the imposition of agency fees on most public employees,[31] it exempted this prohibition with regard to "public police or fire department employee[s]" and "state police trooper[s] or sergeant[s]."[32] The Legislature's policy decision to do so was an exercise of its authority to "enact laws providing for the resolution of disputes concerning public employees" outside of the classified civil service[33] or to "enact laws relative to the . . . conditions of employment,"[34] not its authority to tax or appropriate.[35]

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the amount of dues uniformly required of members of the exclusive bargaining representative[.]

This provision was upheld by the United States Supreme Court against a First Amendment challenge in *Abood v Detroit Bd of Ed*, 431 US 209; 97 S Ct 1782; 52 L Ed 261 (1977). The pending decision in *Friedrichs v California*, ___ US ___; ___ S Ct ___; ___ L Ed 2d ___ (Docket No. 14-915), cert gtd June 30, 2015, may affect *Abood*'s continued viability, although *Abood*'s holding that the First Amendment does not preclude public employee agency fees remained in effect at the time this case was decided.

[31] MCL 423.210(3).

[32] MCL 423.210(4)(a).

[33] Const 1963, art 4, § 48.

[34] Const 1963, art 4, § 49.

[35] Const 1963, art 9, § 1 (taxation); Const 1963, art 4, § 31 (general appropriation bills). Public Act 349 of 2012 is, and the former MCL 423.210(1)(c) was, a part of the public employment relations act (PERA). It was only with the enactment of 2012 PA 53 that the phrase "to make appropriations" was added as one of the purposes of PERA. 1947 PA 336, title, as amended by 2012 PA 53. Notably, though, 2012 PA 53 contained an *explicit* appropriation of $100,000 to implement a requirement that, by March 1 of every year, "each exclusive bargaining representative that represents public employees in this state shall file with the commission an independent audit of all expenditures attributed to the costs of collective bargaining, contract administration, and grievance adjustment during the prior calendar year." Similarly, 2012 PA 349, to prohibit agency fees in most circumstances, the Legislature explicitly appropriated $1 million to the Department of Licensing and Regulatory Affairs. See MCL 423.210(7).

Indeed, the majority's analysis fails on its own terms. Even assuming (as we do not) the majority's premise that agency fees are "foisted on" employees, the commission has the explicit authority to "fix rates of compensation for all classes of positions," subject only to a legislative override for compensation increases.[36] As a result, the commission has the absolute authority to *reduce* employees' compensation, and the majority likewise ignores the effect that mandatory agency fees have on reducing a bargaining unit's compensation.

The majority's decision is an untested application of state constitutional law that may well yield unintended consequences. If the commission's rule—merely authorizing, and not *requiring*, agency fees to appear in collective bargaining agreements—is an unconstitutional appropriation, then what other conditions of employment are subject to invalidation by this Court as improper "appropriations"? Because I prefer a more straightforward application of our Constitution, I dissent from the majority's conclusion and instead would hold that Rule 6-7.2 is a constitutional exercise of the commission's authority to regulate the conditions of employment and to determine the qualifications of employees in the classified civil service.

II. LIMITS OF LEGISLATIVE AUTHORITY

By invalidating Rule 6-7.2 as beyond the scope of the commission's constitutional authority, the majority avoids the issue that divided the Court of Appeals and that was actually presented to this Court: whether the Legislature has the authority to invalidate the policy created by Rule 6-7.2 by enacting a

[36] Const 1963, art 11, § 5.

conflicting statute—namely, 2012 PA 349. For the following reasons, I would hold that article 4, § 48 precludes 2012 PA 349 from applying to employees in the state classified civil service and that, instead, Rule 6-7.2 continues to apply to employees in the state classified civil service.[37]

Article 4, § 48 provides the Legislature with the discretionary authority to "enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service." This exception to the legislative power is crucial because it demonstrates that the drafters and ratifiers understood the commission as having the *exclusive* role in resolving disputes concerning employees in the classified service. Moreover, the Constitutional Convention's Address to the People specifically indicates that "[t]he state classified civil service is exempted" from Article 4, § 48 "because the constitution has specific provisions in this area," namely, Article 11, § 5.[38]

As explained earlier, an agency fee is adopted as part of the collective bargaining process and involves an employee's payment to the exclusive representative in lieu of membership dues. The collective bargaining process, culminating in a collective bargaining agreement, delineates and memorializes how the employer and employee will resolve disputes or grievances, including the role that the exclusive representative has in resolving those disputes or grievances.[39] In other words, agency fees are intended not just to pay for the

[37] That the majority does not examine this issue at all further emphasizes the fact that they resolved this case on the basis of issues that were outside the issues that were actually briefed and argued.

[38] 2 Official Record, Constitutional Convention 1961, p 3377.

[39] See Civ Serv R 6-5.3(b) ("With respect to grievances brought under the provisions of the collective bargaining agreement, an employee may be represented only by the exclusive representative.").

collective bargaining process that determines employees' rights, but also to pay for the services rendered by the exclusive representative on behalf of a classified employee in matters such as "the resolution of disputes concerning public employees" that arise under the collective bargaining agreement.[40] As a result, the Legislature's attempt to abolish the agency fee rule runs afoul of article 4, § 48 to the extent that it seeks to regulate employment relations for a class of individuals who have been expressly exempted from such regulation.

The fact that agency fees are directly paid to the employees' exclusive representative is crucial to this conclusion because it directly ties those fees to the specific exclusion of legislative authority in Article 4, § 48. If Rule 6-7.2 were to require a payment to an organization that is unaffiliated with the collective bargaining or employee grievance process—whether a charitable organization, a civic organization, or a political organization—then Article 4, § 48 would not prohibit the Legislature's attempt to ban those payments. But, when the commission's agency fee rule defines the relationship between an employee and his or her exclusive representative, an attempt by the Legislature to override such a rule is limited by the exclusion of state classified employees from the Legislature's Article 4, § 48 powers.

III. CONCLUSION

For the reasons stated, I respectfully dissent from the majority's decision to affirm the judgment of the Court of Appeals on alternative grounds. Instead, I would uphold the authority of the commission to promulgate the agency fee rule, reverse the judgment of

[40] Const 1963, art 4, § 48.

the Court of Appeals, and hold that Article 4, § 48 precludes 2012 PA 349 from applying to employees in the state classified civil service.

MCCORMACK and BERNSTEIN, JJ., concurred with KELLY, J.

MICHIGAN COALITION OF STATE EMPLOYEE UNIONS v STATE OF MICHIGAN

Docket No. 147758. Argued January 13, 2015 (Calendar No. 2). Decided July 29, 2015.

The Michigan Coalition of State Employee Unions and others brought an action in the Court of Claims against the state of Michigan and various state agencies and officers, alleging that portions of 2011 PA 264, which amended the State Employees' Retirement Act (SERA), MCL 38.1 *et seq*., were unconstitutional because the resulting changes to retirement benefits altered rates of compensation or conditions of employment, which are within the exclusive authority of the Civil Service Commission to regulate. The Court of Claims, Joyce A. Draganchuk, J., granted plaintiffs' motion for summary disposition. The Court of Appeals, OWENS, P.J., and GLEICHER and STEPHENS, JJ., affirmed in part, reversed in part, and remanded, holding that SERA retirement benefits were properly classified as both "rates of compensation" and "conditions of employment," neither of which was subject to legislative alteration. 302 Mich App 187 (2013). The Supreme Court granted plaintiffs' application for leave to appeal. 495 Mich 921 (2014).

In an opinion by Chief Justice YOUNG, joined by Justices MARKMAN, ZAHRA, and VIVIANO, the Supreme Court *held*:

The amendment of SERA by 2011 PA 264 did not infringe the Civil Service Commission's authority to fix rates of compensation because the ratifiers of Michigan's 1963 Constitution did not understand that phrase to include pensions or other fringe benefits. When the commission acquiesced in the application of SERA to the employees of the civil service system, the presumed infringement of 2011 PA 264 presented no constitutional problem. The commission's authority to regulate did not permit the commission to enact, amend, or maintain the laws of this state.

1. The term "rates of compensation" as used in Const 1963, art 11, § 5 was not understood by the ratifiers to include fringe benefits such as pensions. Textual indicators in the constitution uniformly indicate that "rates of compensation" was commonly understood to include only salaries and wages. This understand-

ing was confirmed in various parts of the Constitution, the Address to the People, and the transcript of the constitutional convention debates. Because 2011 PA 264 did nothing to change an employee's salary or wages, it did not implicate the commission's constitutional authority over classified civil servants' rates of compensation.

2. The Civil Service Commission did not have the authority to require the Legislature to exercise its lawmaking power regarding conditions of employment. Assuming for the limited purpose of this case that a pension is a condition of employment as used in Const 1963, art 11, § 5, ¶ 4, and that the commission's authority under Const 1963, art 11, § 5 to regulate all conditions of employment included the authority to establish, maintain, and amend a pension plan, the commission had no authority to prevent the Legislature from enacting 2011 PA 264 any more than it had authority to compel the enactment of SERA itself because either act would have constituted an unconstitutional exercise of legislative authority under Const 1963, art 3, § 2. The commission's authority was part of the executive branch power, which could not be used to enact or amend statutes because that power was vested exclusively in the Legislature. Likewise, the commission could not mandate appropriations relating to conditions of employment, because the appropriation power also resided in the Legislature. In order for one branch of government to have authority of a character typically associated with another branch, the Constitution must explicitly grant that authority, and there was no provision in Const 1963, art 11, § 5, ¶ 4 that granted the commission any legislative or appropriation authority when regulating conditions of employment. By the same logic, the commission had no explicit authority to require the Legislature to exercise its lawmaking power regarding conditions of employment. When the commission wishes to regulate conditions of employment, it must proceed within its own sphere, using its own constitutionally provided tools.

3. The Legislature did not violate the Civil Service Commission's constitutional authority by enacting 2011 PA 264. Plaintiff unions complained of an infringement on the commission's authority. Yet the commission itself had acquiesced in the alleged infringement. For as long as SERA has existed, the commission has, by its own formally promulgated rules, acquiesced in the application of such retirement programs provided by law to members of the civil service. That acquiescence by Commission rule has never been rescinded. Because the constitutional author-

ity allegedly infringed by 2011 PA 264 could only be held by the commission, plaintiffs' objections failed to establish a basis for relief.

Reversed and remanded to the Court of Claims for further proceedings.

Justice KELLY, concurring in part and dissenting in part, concurred in the decision to reverse the Court of Appeals' judgment and remand the case to the Court of Claims, and agreed that the Legislature did not infringe the commission's authority to "fix rates of compensation" under Const 1963, art 11, § 5 by enacting 2011 PA 264 because the ratifiers of the 1963 Constitution understood that phrase to authorize the commission to establish job-specific salaries and pay schedules, not pensions or other fringe benefits. However, she disagreed with the majority's decision to uphold 2011 PA 264 on the basis of the commission's continued acquiescence in SERA because the majority assumed without deciding, or "assumed for purposes of this case," that employees' pensions were conditions of employment within the meaning of Const 1963, art 11, § 5. Instead, she would have addressed that very issue as necessary to the question on which the Supreme Court specifically granted leave and upheld 2011 PA 264 on the ground that it did not regulate a condition of employment under Const 1963, art 11, § 5.

Justice MCCORMACK, concurring in part and dissenting in part, concurred in the decision to reverse the Court of Appeals' judgment and remand the case to the Court of Claims, but would have held that pensions are conditions of employment for the purposes of Const 1963, art 11, § 5. Furthermore, because the commission, as the affected constitutional actor, is not a party to this lawsuit, has not otherwise officially objected to the legislature's action, and appears by its own official pronouncement to have acceded to the legislation, she would have refrained from commenting on how the commission's power to regulate pensions as a condition of employment within the civil service could be reconciled with the Legislature's exclusive authority to make appropriations.

Justice BERNSTEIN, dissenting, would have affirmed the Court of Appeals' judgment and held that the challenged provisions of 2011 PA 264 were an unconstitutional violation of the separation-of-powers doctrine as applied to employees in the classified civil service because pensions fall under the commission's plenary authority over conditions of employment under Const 1963, art 11, § 5 and the commission did not acquiesce to the Legislature's intrusion into its constitutional sphere of authority.

William A. Wertheimer for all plaintiffs.

Michael B. Nicholson and *Ava R. Barbour* for International Union UAW and Local 6000.

Sachs Waldman, PC (by *Andrew Nickelhoff* and *Mami Kato*), for SEIU Local 517M and the Michigan Corrections Organization.

Fraser Trebilcock Davis & Dunlap, PC (by *Michael E. Cavanaugh* and *Brandon W. Zuk*), for the Michigan Coalition of State Employee Unions.

Miller Cohen, PLC (by *Robert D. Fetter* and *Keith D. Flynn*), for Michigan AFSCME Council 25.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, *Larry F. Brya*, Special Assistant Attorney General, and *Frank J. Monticello*, *Joshua O. Booth*, and *Patrick M. Fitzgerald*, Assistant Attorneys General, for all defendants.

Amicus Curiae:

Miller, Canfield, Paddock and Stone, PLC (by *Michael J. Hodge* and *Scott R. Eldridge*), for the Civil Service Commission.

YOUNG, C.J. Plaintiffs are several unions that represent employees in the state classified civil service. Their members are the beneficiaries of and participants in Michigan's retirement system established under the State Employees' Retirement Act (SERA).[1] SERA was enacted in 1943 and has been amended many times since. Plaintiffs challenge the most recent SERA

[1] MCL 38.1 *et seq*.

amendment, 2011 PA 264. They contend that, because 2011 PA 264 increases the cost and reduces the accumulation of future pension benefits previously recognized, it unconstitutionally infringes the exclusive constitutional powers of the Civil Service Commission (commission) to manage and oversee the civil service system. The commission has never formally opposed or attempted to repudiate the application of SERA or any of its several amendments, including 2011 PA 264, to the employees of the state classified civil service.

While the commission has considerable constitutional powers to manage the civil service system and to preserve its sphere of constitutional authority, the commission has no legislative powers. It may neither enact legislation nor revise an enactment, nor may it dictate that the Legislature repeal or modify an enactment. Therefore, we hold that because the commission has acquiesced in the application of SERA to the employees of the civil service system, plaintiff's objections fail to establish a basis for relief.

We reverse the judgment of the Court of Appeals and remand to the Court of Claims for further proceedings consistent with this opinion.

I. FACTS

A. BACKGROUND

In 1940, through an initiative petition, the people of Michigan ratified a constitutional amendment establishing a state civil service system.[2] Const 1908, art 6, § 22 became effective on January 1, 1941, and provided in part:

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[2] For a discussion of the motivations behind the creation of the state civil service, see, e.g., *Council No 11, AFSCME v Civil Serv Comm*, 408 Mich 385, 397-401; 292 NW2d 442 (1980).

> The commission shall classify all positions in the state civil service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the state civil service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the state civil service. No person shall be appointed to or promoted in the state civil service who has not been certified as so qualified for such appointment or promotion by the commission. No removals from or demotions in the state civil service shall be made for partisan, racial, or religious considerations.
>
> The administration of the commission's powers shall be vested in a state personnel director who shall be a member of the state civil service and who shall be responsible to and selected by the commission after open competitive examination.

Shortly after its creation, the commission promulgated a rule requiring its state personnel director to recommend that the Legislature establish a retirement plan for classified employees:

> RETIREMENT. The director, in conjunction with appointing authorities, other supervising officials, the state budget director and members of the legislature, shall prepare and submit to the commission for approval and subsequent recommendation to the governor and the legislature for adoption by law, a comprehensive and workable contributory retirement system for employees in the state civil service.[3]

Apparently, the commission thereafter designed a model retirement plan, which it submitted to the Governor for comment. However, before the Governor

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[3] Civ Serv R XXXVIII (1941) (emphasis added).

completed his review of the commission's plan,[4] the precursor to SERA was introduced in the House of Representatives as House Bill No. 177.[5] SERA was signed into law as 1943 PA 240, and was codified as MCL 38.1 *et seq*.

Subsequently, the people ratified a new Constitution in 1963, which altered somewhat the way that the commission operates. Const 1963, art 11, § 5, ¶ 4, remains largely unchanged from Const 1908, art 6, § 22, and provides in relevant part:

> The commission *shall* classify all positions in the classified service according to their respective duties and responsibilities, *fix rates of compensation for all classes of positions*, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering all personnel transactions, and *regulate all conditions of employment* in the classified service.[6]

In the same section, however, the ratifiers introduced a new legislative check on compensation increases for civil servants authorized by the commission:

> Increases in rates of compensation authorized by the commission may be effective only at the start of a fiscal year

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[4] The Governor's letter to the commission's state personnel director, dated February 18, 1943, acknowledged receipt of the commission's proposed retirement plan on February 1, 1943, and noted that he was assigning someone to review the submissions who would communicate with the commission at a future date.

[5] House Bill 177 was dated February 15, 1943. It automatically included employees in the classified civil service, but also provided that "any state employee whose position is not included in the state civil service may become a member by filing a written notice . . . ." 1943 HB 177 at § 15(a).

[6] Emphasis added.

> and shall require prior notice to the governor, who shall transmit such increases to the legislature as part of his budget. The legislature may, by a majority vote of the members elected to and serving in each house, waive the notice and permit increases in rates of compensation to be effective at a time other than the start of a fiscal year. *Within 60 calendar days following such transmission, the legislature may, by a two-thirds vote of the members elected to and serving in each house, reject or reduce increases in rates of compensation authorized by the commission.* Any reduction ordered by the legislature shall apply uniformly to all classes of employees affected by the increases and shall not adjust pay differentials already established by the civil service commission. The legislature may not reduce rates of compensation below those in effect at the time of the transmission of increases authorized by the commission.[7]

Following the ratification of the 1963 Constitution, the commission replaced its initial retirement rule, Rule XXXVIII, but its replacement did not purport to fundamentally change the commission's *advisory* role in SERA's administration:

> Section 31 — Retirement.
>
> 31.1 Cooperation With State Retirement Board. —
>
> The state personnel director shall *cooperate* with the State Employees' Retirement Board in maintaining a comprehensive contributory retirement system for state civil service employees.[8]

The commission's rules have remained substantively unchanged in this regard.[9]

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[7] Const 1963, art 11, § 5, ¶ 7 (emphasis added).

[8] Civ Serv R 31.1 (1963) (emphasis added).

[9] Civ Serv R 2-17.1 currently provides that "[t]he state personnel director shall cooperate with the state employees' retirement board in maintaining a comprehensive retirement system for classified employees." It was last amended effective April 29, 2004.

B. 2011 PA 264

In 2011, the Legislature amended SERA.[10] Relevant to the instant case are the amendments of MCL 38.1e, MCL 38.35a, and MCL 38.50a. Broadly speaking, the amendments (1) potentially reduce the value of overtime compensation as it factors into a member's pension formula for future benefits,[11] and (2) require members to make an election between paying to remain in a defined benefit plan (that was previously free), or instead joining a "Tier 2," 401(k)-style defined contribution plan.[12]

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[10] See 2011 PA 264.

[11] As amended, MCL 38.1e(1) provides in part:

> Beginning January 1, 2012, compensation used to compute final average compensation shall not include includable overtime compensation paid to the member on or after January 1, 2012, except that a member's final average compensation that is calculated using any time period on or after January 1, 2012 shall also include, as prorated for the time period, the average of annual includable overtime compensation paid to the member during the 6 consecutive years of credited service ending on the same final date as used to calculate the final average compensation or, if the calculation date is before January 1, 2015, the average of the annual includable overtime compensation paid to the member on or after January 1, 2009 and before the final date as used to calculate the final average compensation.

[12] As amended, MCL 38.35a(1) provides in part:

> Beginning with the first pay date after April 1, 2012 and ending upon the member's termination of employment or attainment date, as applicable under section 50a [MCL 38.50a], *each member who made the election under section 50a shall contribute an amount equal to 4% of his or her compensation to the employees' savings fund to provide for the amount of retirement allowance that is calculated only on the credited service and compensation received by that member after March 31, 2012*. The member shall not contribute any amount under this subsection for any years of credited service accrued or compensation received before April 1, 2012. [Emphasis added.]

II. PROCEDURAL HISTORY

Plaintiffs argue that SERA retirement benefits are "rates of compensation" or, alternatively, "conditions of employment," as these terms are used in Const 1963,

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As amended, MCL 38.50a provides in part:

> (1) The retirement system shall permit each member who is a member on December 31, 2011 to make an election with the retirement system to continue to receive credit for any future service and compensation after March 31, 2012, for purposes of a calculation of a retirement allowance under this act. A member who makes the election under this section shall make the contributions prescribed in section 35a [MCL 38.35a].
>
> * * *
>
> (4) A member who does not make the election under this section or who rescinds an election on or before the close of the election period under this section is subject to all of the following:
>
> (a) He or she ceases to receive credit for any future service and compensation for purposes of a calculation of a retirement allowance as prescribed in section 20j [MCL 38.20j], beginning 12 midnight on March 31, 2012.
>
> (b) He or she becomes a qualified participant in Tier 2 beginning 12:01 a.m. on April 1, 2012.
>
> (c) He or she shall receive a retirement allowance calculated under section 20 [MCL 38.20] that is based only on credited service and compensation allowed under section 20j(1) and (2). This subdivision does not affect a person's right to health insurance coverage provided under section 20d [MCL 38.20d] or credit for service provided under section 20j(3).
>
> (5) A member who makes the election under this section and the designation under subsection (2) and who does not rescind the election and designation on or before the close of the election period under this section is subject to all of the following:
>
> (a) He or she ceases to receive credit for any future service and compensation for purposes of a calculation of a retirement allowance as prescribed in section 20j, beginning 12 midnight on the member's attainment date.
>
> (b) He or she becomes a qualified participant in Tier 2 beginning 12:01 a.m. on the day after the attainment date if he or she remains employed by this state.

art 11, § 5. Accordingly, plaintiffs claim, SERA retirement benefits are not subject to legislative change because the regulation of "rates of compensation" and "conditions of employment" of employees in the classified civil service is within the exclusive and plenary authority of the commission.

The Court of Claims held that 2011 PA 264 was unconstitutional. The Court of Appeals affirmed the ruling of the Court of Claims, concluding that SERA retirement benefits are properly classified as both "rates of compensation" and "conditions of employment," neither of which is subject to legislative alteration.[13] The state appealed and we granted leave, directing the parties to brief "whether 2011 PA 264 is unconstitutional, in whole or in part, in violation of Const 1963, art 11, § 5."[14]

III. STANDARD OF REVIEW

This Court reviews the grant or denial of summary disposition de novo.[15] Questions of constitutional and statutory interpretation also are reviewed de novo.[16]

IV. ANALYSIS

As noted, plaintiffs make two alternative arguments that by enacting 2011 PA 264, the Legislature infringed the commission's constitutional authority. First, plaintiffs allege that the pension accrual characteristics altered by 2011 PA 264 affect classified employees' "rates of compensation" under Const 1963, art

[13] *Mich Coalition of State Employee Unions v Michigan*, 302 Mich App 187; 838 NW2d 708 (2014).

[14] *Mich Coalition of State Employee Unions v Michigan*, 495 Mich 921 (2014).

[15] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[16] *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009).

11, § 5, and that the Legislature cannot act in that area. Second and in the alternative, plaintiffs allege that the pension accrual characteristics affected by 2011 PA 264 are "conditions of employment" under Const 1963, art 11, § 5. We address these two arguments in turn.

A. "RATES OF COMPENSATION"

As used in Article 11, § 5, we conclude that the term "rates of compensation" was not understood by the ratifiers of the 1963 constitution to include fringe benefits such as pensions; rather, the common understanding of the term at that time was that it included only salaries and wages.

Our primary goal in construing a constitutional provision is to give effect to the intent of the people of the state of Michigan who ratified the Constitution, by applying the rule of "common understanding."[17] We locate the common understanding of constitutional text by determining the plain meaning of the text as it was understood at the time of ratification.[18] Interpretation of a constitutional provision also takes account of "the circumstances leading to the adoption of the provision and the purpose sought to be accomplished."[19] The Address to the People, which was dis-

[17] See *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554, 558-559; 737 NW2d 476 (2007) ("When interpreting constitutional provisions, our primary objective is to realize the intent of the people by whom and for whom the constitution was ratified. That is, we seek the 'common understanding' of the people at the time the constitution was ratified. This involves applying the plain meaning of each term used at the time of ratification, unless technical, legal terms are used.") (citations and quotation marks omitted).

[18] *Wayne Co v Hathcock*, 471 Mich 445, 468-469; 648 NW2d 765 (2004).

[19] *People v Tanner*, 496 Mich 199, 226; 853 NW2d 653 (2014) (citation omitted).

tributed to Michigan citizens in advance of the ratification vote and which explained in everyday language what each provision of the proposed new Constitution was intended to accomplish,[20] and, to a lesser degree, the constitutional convention debates are also relevant to understanding the ratifiers' intent.[21]

Textual indicators in the Constitution uniformly indicate that the phrase "rates of compensation," as used in Article 11, § 5, was commonly understood to include only salaries and wages, i.e., amounts paid out to employees in a paycheck.[22] For instance, Article 11, § 5 only reserves to the commission the authority to "fix *rates* of compensation," rather than "compensation" generally. In the context of compensation for one's employment-related services, "rate" was defined as "a wage paid on a specified time basis: *a salary figured on an hourly rate*."[23] "Wages," in turn, was defined as

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[20] *Walker v Wolverine Fabricating & Mfg Co, Inc*, 425 Mich 586, 597; 391 NW2d 296 (1986) (stating that the Address "sought to explain each provision in terms the common person could understand").

[21] *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003); see also *Regents of the Univ of Mich v Michigan*, 395 Mich 52, 60; 253 NW2d 1 (1975) (establishing that the Address to the People is superior to the constitutional convention debates as an interpretive tool).

[22] We acknowledge that, in isolation, the word "compensation" has a broad enough meaning to encompass pensions and other fringe benefits. See *Random House Dictionary of the English Language, Unabridged Edition* (1966) (defining "compensation" as "something given or received as an equivalent for services"), def 3. Other cases addressing "compensation" in other contexts, as well as the Court of Appeals below, recognize this. See, e.g., *Kane v City of Flint*, 342 Mich 74; 69 NW2d 156 (1955) (addressing municipalities' authority to define pensions as compensation). However, we are here concerned with the entire phrase, "rates of compensation," as that phrase is used in its constitutional context and as specifically understood by the ratifiers of our Constitution.

[23] *Random House Unabridged Dictionary*, def 11.

"money that is paid or received for work or services, *as by the hour, day, or week*."[24]

This understanding is confirmed elsewhere. Highly significant to our assessment is the Address to the People. Apart from the text of the Constitution itself, the Address provides an authoritative contemporary construction of the constitutional provisions that the citizens of Michigan were asked to vote on.[25] The Address confirms that "rates of compensation" did not include fringe benefits such as pensions. As previously stated, the current ¶ 7 of Article 11, § 5 gives the Legislature a supermajority veto over the commission's proposed changes to "rates of compensation." The Address explains that this provision "provides for limited legislative control of *wage increases* under specified circumstances."[26] The Address alternatively explains the same legislative control as pertaining to "the total level of state *payroll*[.]"[27] "Compensation" was thus directly understood as the money employees received in their paychecks.

Moreover, the portion of the Address explaining Article 11, § 5 states: "Of special interest to civil service personnel is the provision in Sec. 24, Article IX, of the proposed constitution which specifies that pension plans and retirement systems of the state shall be contractual obligations 'which shall not be diminished

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[24] *Id*., def 1 (emphasis added).

[25] See *Univ of Mich Regents*, 395 Mich at 60 ("The reliability of the 'Address to the People' . . . lies in the fact that it was approved by the general convention on August 1, 1962 as an explanation of the proposed constitution. The 'Address' also was widely disseminated prior to adoption of the constitution by vote of the people.").

[26] Address to the People, 2 Official Record, Constitutional Convention 1961, p 3405 (emphasis added).

[27] *Id*. at 3359 (emphasis added).

or impaired.' "[28] The ratifiers were thus aware of the special independent status of pensions created for civil servants, as well as the new obligation imposed to protect any such pensions. This portion of the Address is especially noteworthy because, in discussing ¶ 4 of Article 11, § 5, the Address directs the ratifiers' attention elsewhere to the provisions of Article 9, § 24 that expressly discuss pensions, while simultaneously equating "rates of compensation" with wages. We conclude that this explanation confirms our textual construction based on the common understanding of "rates of compensation."

Finally, although of lesser import than the Address, the transcript of the constitutional convention debates further confirms that the common understanding of "rates of compensation" did not extend to pensions. The record is replete with references to "wages" and "salaries" during discussion of the Legislature's then-proposed veto power over commission increases to "rates of compensation,"[29] and there are no relevant references to "pensions" or "retirement."

In conjunction with the text of Article 11, § 5 discussed earlier, these historical sources confirm that the

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[28] *Id*. at 3405.

[29] For example, one proponent of the amendment described "controlling abuses in a *salary* classification" as, "in other words, the right to fix compensation . . . ." 1 Official Record, Constitutional Convention 1961, p 652. Regarding the phrase in Article 11, § 5 providing that "[t]he legislature may not reduce rates of compensation," another delegate explained that this means that "the legislature is prohibited from reducing *salaries* . . . ." *Id*. at 640, quoting from the minority report of the committee on executive branch to Committee Proposal 22 (emphasis added); see also *id*. at 638 ("veto of *wage* determinations"; "control on the total number of dollars expended on *salaries*"), 639 ("*wage* rates"), and 664 ("*salary* fixing") (emphasis supplied throughout); accord Rules of the Civil Service Commission, § 17 (1972) (entitled "Compensation of Employees" and speaking solely in terms of salaries).

phrase "rates of compensation" referred to salaries and wages as opposed to fringe benefits such as the SERA pension program. Accordingly, we find no merit in plaintiffs' argument that 2011 PA 264 infringes the commission's authority to regulate "rates of compensation," because the SERA pension program does not affect "rates of compensation" as that term is used in Const 1963, art 11, § 5.

Notably, 2011 PA 264 does nothing to change the member's salary or wages.[30] With regard to overtime, 2011 PA 264 does not affect the availability of overtime, or the rate at which overtime is paid; it only affects how overtime factors into a member's pension formula.[31] Accordingly, because 2011 PA 264 does not affect "rates of compensation" by requiring changes to wages or salaries, it does not implicate the commission's constitutional authority over classified civil servants' "rates of compensation."

B. "CONDITIONS OF EMPLOYMENT"

As an alternative to their argument that SERA pensions are "rates of compensation," plaintiffs allege that SERA pensions are "conditions of employment." They further allege that, as a result, any legislative action in the field of pensions requires commission approval in order to be constitutional. Plaintiffs also appear to allege that SERA was itself an "exercise" of commission authority.[32] For the limited purpose of this

[30] See MCL 38.50a and MCL 38.63. It is true that those who elect to pay for what was formerly a free benefit would pay that money from their salary, but that does not change the actual salary one earns.

[31] See MCL 38.1e.

[32] See Plaintiff's Brief on Appeal, p 18, quoting *Hanlon v Civil Serv Comm*, 253 Mich App 710, 717; 660 NW2d 74 (2002), to support the proposition that the " 'valid exercise' " of commission power cannot be

case, we assume without deciding that a pension is a "condition[] of employment" as used in ¶ 4 of Const 1963, art 11, § 5. Furthermore, for the limited purpose of this case, we also assume without deciding that the commission's authority under Article 11, § 5 to "regulate all conditions of employment" includes the authority to establish, maintain, and amend a pension plan.[33] Regardless, we hold that the commission has no authority to prevent the Legislature from enacting 2011 PA 264 any more than it had authority to compel the enactment of SERA itself because either act would constitute an unconstitutional exercise of legislative authority.

1. THE COMMISSION LACKS POWER TO ENACT OR REVISE LEGISLATION

"The powers of government are divided into three branches: legislative, executive and judicial."[34] Although the commission is constitutionally created, and its proper functions are therefore constitutionally in-

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" 'taken away by the Legislature' " via 2011 PA 246; see also Plaintiff's Brief at 33 n 16 (asserting that the commission "*voluntarily involved* the Legislature" in creating SERA) (emphasis added). As explained, elsewhere in this opinion the notion that one branch of government can compel another to perform duties assigned to the second is a definitional violation of the separation of powers doctrine. Distinct from the method by which the commission regulates rates of compensation, which involves a budget communication with the Governor, the commission uses its Civil Service Rules as its primary means of regulating "conditions of employment."

[33] Even assuming such a power, the commission, having no legislative power to appropriate funds that are not part of its discretionary administrative budget, would be unlikely to be able to fund any retirement program it might create.

[34] Const 1963, art 3, § 2; see also *Civil Serv Comm v Auditor General*, 302 Mich 673, 684; 5 NW2d 536 (1942) (stating that "set[ting] up, even in effect, a fourth department of government contravenes" the predecessor provision to Const 1963, art 3, § 2).

violable, the commission's authority is part of the executive branch power.[35] The commission "is vested with plenary powers in its sphere of authority."[36] Just as "any executive, legislative or judicial attempt at incursion into that 'sphere' would be unavailing,"[37] the commission itself may not act outside the bounds of its authority.[38] The Legislature—responsible for creating 2011 PA 264—and the commission are each constitutionally precluded from exercising the powers of the other: "No person exercising powers of one branch shall exercise powers properly belonging to another branch except as *expressly* provided in [the] constitution."[39]

It scarcely bears repeating that the executive power cannot be used to enact actual statutes. That power is

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[35] Accord *Straus v Governor*, 459 Mich 526, 537; 592 NW2d 53 (1999) ("[T]he constitutional location of the [State Board of Education]'s functions within the executive branch is similar to that of . . . the Civil Service Commission, under Const 1963, art 11, § 5.") (citation and quotation marks omitted).

The people added the original civil service amendment to Article VI of the 1908 Constitution, which article was entitled "Executive Department." Today, by executive order, the commission has been made a part of the executive Department of Technology, Management, and Budget. See Executive Order No. 2009-55, effective March 21, 2010.

[36] *Plec v Liquor Control Comm*, 322 Mich 691, 694; 34 NW2d 524 (1948).

[37] *Council No 11*, 408 Mich at 408; see also *Burton v Koch*, 184 Mich 250, 257; 151 NW 48 (1915) (holding that the court, in determining the constitutionality of a statute, can only determine whether constitutional restrictions have been exceeded).

[38] See, e.g., *Mich State AFL-CIO v Civil Serv Comm*, 455 Mich 720, 733-734; 566 NW2d 258 (1997) (holding that the commission lacks the authority to define union leave as "actual duty" time, when in fact it is off-duty time not subject to commission regulation).

[39] Const 1963, art 3, § 2 (emphasis added); *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 304; 586 NW2d 894 (1998) ("The doctrine of separation of powers is a shield for each of the branches of government . . . .").

vested exclusively in the Legislature.[40] Likewise, the commission cannot mandate certain appropriations relating to conditions of employment, because the appropriative power also resides in the Legislature.[41] That said, it is true that the separation of powers doctrine does not rigidly confine all powers of a certain character to one branch or another. One branch of government may have authority of a character typically associated with another branch, as long as the Constitution "explicitly" grants that authority.[42] A compelling example in this context is Const 1963, art 11, § 5, ¶ 7, which provides the commission with the express authority to increase rates of compensation. Such increased rates must be included within the budget submitted by the Governor and are subject only to the supermajority veto of the Legislature. This is a singular, if limited, nonlegislative power to allocate taxpayer funds. This explicitly granted power stands in contrast to the absence of such power with respect to regulating conditions of employment. Article 11, § 5 cannot bear an interpretation that the ratifiers allocated any legislative or appropriative authority to the commission to regulate "conditions of employment." Whatever the bounds of the commission's authority to

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[40] Const 1963, art 3, § 2; Const 1963, art 4, § 1; see also *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 65; 718 NW2d 784 (2006) ("It is the legislators who establish the statutory law because the legislative power is exclusively theirs.").

[41] See *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 141; 719 NW2d 553 (2006) (opinion by MARKMAN, J.) ("Perhaps the most fundamental aspect of the 'legislative power' . . . is the power to tax and to appropriate for specified purposes.").

[42] See Const 1963, art 3, § 2; *Soap & Detergent Ass'n v Natural Resource Comm*, 415 Mich 728, 752; 330 NW2d 346 (1982) ("[W]here . . . the constitution explicitly grants powers of one branch to another, there can be no separation of powers problem."), citing *Wood v State Admin Bd*, 255 Mich 220, 224-225; 238 NW 16 (1931).

increase rates of compensation, the Constitution gives the commission no comparable power to expend taxpayer funds in connection with its power to "regulate conditions of employment."

By the same logic, the commission has no explicit authority to require the Legislature to exercise its lawmaking power in the field of "conditions of employment." Under plaintiffs' interpretation of the constitutional provision at issue, the commission's power in this area would be so limitless as to include the authority for it to dictate the nuances of statutory schemes. Plaintiffs' argument that the commission has such authority must fail. Instead, when the commission wishes to regulate "conditions of employment," it must proceed within its own sphere, using its own constitutionally provided tools, which it typically does by promulgating and enforcing its rules.

2. 2011 PA 264 DOES NOT VIOLATE THE COMMISSION'S CONSTITUTIONAL AUTHORITY

Based on the foregoing, we hold that SERA could not have been, and thus is not, a product that the commission could have created by exercising its proper constitutional authority. These principles are equally relevant in considering whether the *Legislature* has overstepped its bounds and intruded into the sphere of the commission's constitutional responsibility. Unlike the federal Constitution, our Constitution is "not a grant of power to the Legislature, but is a limitation upon its powers."[43] Therefore, the legislative authority of the state "can do anything which it is not prohibited

[43] *Taxpayers of Mich Against Casinos v Michigan*, 471 Mich 306, 327; 685 NW2d 221 (2004), quoting *In re Brewster Street Housing Site*, 291 Mich 313, 333; 289 NW 579 (1939) (quotation marks omitted).

from doing by the people through the Constitution of the State or the United States."[44]

The commission has plenary, exclusive authority to "regulate all conditions of employment *in the classified service*."[45] As mentioned earlier, we assume without deciding that pensions are such "conditions of employment" and that the commission's authority under Article 11, § 5 to "regulate all conditions of employment" includes the authority to establish, maintain, and amend its own pension plan.[46] We also assume without deciding that the commission's Article 11, § 5 authority to "regulate all conditions of employment" is exclusive and not subject to the Legislature's authority in Article 4, § 1 to exercise "[t]he legislative power of the State of Michigan" or its authority in Article 4, § 49 to "enact laws relative to . . . conditions of employment." If that is the case, then SERA in its entirety is a legislative intrusion into the commission's sphere of authority to "regulate all conditions of employment," by virtue of the fact that it dictates an element of a condition of employment.[47] However, it is important to note that, in amending SERA by enacting 2011 PA 264, the Legislature has no more encroached upon the commission's authority to regulate pensions than it had before the amendment.

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[44] *Id.*, quoting *Attorney General v Montgomery*, 275 Mich 504, 538; 267 NW 550 (1936) (quotation marks omitted).

[45] Const 1963, art 11, § 5 (emphasis added); see also *Council No 11*, 408 Mich at 408, quoting *Plec*, 322 Mich 691.

[46] But see note 33 of this opinion.

[47] See *Plec*, 322 Mich at 694; *Kent Co Prosecutor v Kent Co Sheriff*, 425 Mich 718, 723; 391 NW2d 341 (1986); see also *Gray v Clerk of Common Pleas Court*, 366 Mich 588, 595; 115 NW 411 (1962) (stating that, because of the separation of powers, "[t]he courts cannot be hampered or limited in the discharge of their functions by either of the other 2 branches of government").

When confronted with a violation of the separation of powers, this Court has noted that it is permissible for one branch to acquiesce in the intrusion of another and thus avoid a constitutional conflict.[48] Here, the commission acquiesced in the Legislature's presumed violation of the separation of powers when it made SERA applicable to civil servants in Rule 5-13, which provides that "[a] classified employee is eligible for retirement benefits *as provided by law*."[49] And Rule 5-13, last amended effective March 18, 2001, was in place when the Legislature enacted 2011 PA 246. Thus, upon enactment, the amendment necessarily became

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[48] In *Judicial Attorneys Ass'n*, 459 Mich at 303, we noted that, although legislative commandeering of decisions related to judicial employment violated the separation of powers, "[t]he judicial branch may determine *on its own authority*, for practical reasons, to share with the legislative branch some limited employment-related decision making upon determining that such sharing is in the best interests of the judicial branch and the public as a whole." We further recognized "the possibility that a court may *choose* to share decision making in a manner that resembles the scheme of [a statute violating the separation of powers] . . . ." *Id*.; see also *McDougall v Schanz*, 461 Mich 15, 27; 597 NW2d 148 (1999) (stating that the Legislature may not interfere with the Supreme Court's *exclusive*, constitutional rulemaking authority "*save as the Court may acquiesce* and adopt for retention at judicial will") (emphasis added), citing with approval *Perin v Peuler (On Rehearing)*, 373 Mich 531, 541; 130 NW2d 4 (1964), which *McDougall* overruled on other grounds.

We are unpersuaded by Justice BERNSTEIN's attempt to diminish the relevance of *Perin* and *McDougall* to the instant case. His dissent would distinguish this Court's rulemaking authority from the commission's authority because this Court's authority "extends *only* to matters of practice and procedure," *McDougall*, 461 Mich at 27; by contrast, he argues, "there is no such limitation on the commission's authority *over conditions of employment* . . . ." *Post* 350 (emphasis added). But the commission's authority is no more "plenary" than this Court's, as long as each is acting within its sphere of authority. "[T]he commission's 'sphere of authority' delimits its rule-making power . . . ." *Council No 11*, 408 Mich at 408.

[49] Civ Serv R 5-13 (emphasis added).

part of the "retirement benefits as provided by law" applicable to classified civil servants.

Furthermore, the dissent rightly states that "there is a meaningful difference between an assertion that the commission has the power to *dictate* what the Legislature enacts into law and an assertion that the commission is empowered to *object* to a legislative incursion into the commission's sphere of authority."[50] Here, both are occurring simultaneously, because plaintiffs object to the amended SERA and demand the reinstatement of the preamendment SERA. But that prior version of the law no longer exists.

We merely hold that the commission may adopt rules that acquiesce in a statute that allegedly intrudes on its sphere of authority, as it has here. What plaintiffs seek in this appeal appears to be beyond the power of the commission. The commission cannot decline to acquiesce by directing the Legislature to "revive" an act that no longer exists. And what the commission cannot constitutionally do directly, it cannot, through surrogates or otherwise, accomplish indirectly by resort to the judiciary.[51]

V. CONCLUSION

Const 1963, art 11, § 5 vests the Civil Service Commission with plenary authority to "fix rates of compen-

[50] *Post* at 347-348.

[51] Finally, and as defendants point out, under Const 1963, art 4, § 49, "The legislature may enact laws relative to the hours and conditions of employment." Defendants assert that this language grants the Legislature superseding authority over the commission on matters related to "conditions of employment." However, because it is unnecessary to resolving this case, we decline to address this argument at this time and instead rest our holding on the conclusion that 2011 PA 264 does not violate the separation of powers or the authority of the commission while it chooses to accept SERA benefits for civil service employees.

sation" and "regulate all conditions of employment[.]" The Legislature, by 2011 PA 264, amended SERA, which provides pensions to state employees, including those in the classified civil service. 2011 PA 264 does not infringe the commission's authority to "fix rates of compensation" because the ratifiers did not understand that phrase to include pensions or other fringe benefits. Likewise, when the commission acquiesces in the application of SERA to employees in the classified civil service, the presumed infringement of 2011 PA 264 presents no constitutional problem. The commission's authority to regulate does not permit the commission to enact, amend, or maintain the laws of this state.

We reverse the Court of Appeals and remand to the Court of Claims for further proceedings not inconsistent with this opinion.

MARKMAN, ZAHRA, and VIVIANO, JJ., concurred with YOUNG, C.J.

KELLY, J. (*concurring in part and dissenting in part*). I concur in the majority's decision to reverse the judgment of the Court of Appeals and remand this case to the Court of Claims. I likewise agree with the majority's conclusion that, by amending the State Employees' Retirement Act (SERA)[1] with 2011 PA 264, the Legislature did not infringe the Civil Service Commission's authority to "fix rates of compensation" under Const 1963, art 11, § 5 because the ratifiers of the 1963 Constitution understood this phrase as authorizing the commission to establish job-specific salaries and pay schedules, not pensions or other fringe benefits. However, I respectfully dissent from the ma-

[1] MCL 38.1 *et seq*.

jority's decision to uphold 2011 PA 264 on the basis of the commission's continued acquiescence in SERA. Rather than "assuming" for purposes of this case that employees' pensions are "conditions of employment" within the meaning of Article 11, § 5, as the majority does, I would address that very issue as necessary to the question on which this Court specifically granted leave.[2] Because pensions are not "conditions of employment" within the meaning of Article 11, § 5, I would hold that SERA and the specific provisions challenged therein—namely, MCL 38.35a, MCL 38.50a, and MCL 38.1e—are not conditions of employment and therefore do not implicate the commission's authority.

In 1943, the Legislature enacted SERA, establishing retirement benefits for state employees and conferring on the commission various powers and duties in implementing the system of retirement benefits.[3] In the 72 years that SERA has been in existence, the Legislature has often amended it to affect state employee pensions, and 2011 PA 264 is no exception.[4] Specifically, under

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[2] *Mich Coalition of State Employee Unions v Michigan*, 495 Mich 921 (2014).

[3] 1943 PA 240.

[4] See, e.g., 1984 PA 3 (providing pension incentives to eligible state employees in exchange for early retirement); 1987 PA 57 (changing the formula for calculating future pensions by using a three-year average instead of the former five-year average); 1991 PA 62 (affecting the computation of members' retirement allowance depending on the age of retirement and providing members the right to elect a specified retirement option); 1992 PA 64 (providing pension incentives for early retirement); 1993 PA 195 (permitting members to increase their pensions by purchasing service credit); 1996 PA 487 (closing the pension fund for newly hired state employees, creating a new contribution plan for those employees, and providing that all employees hired on or after March 31, 1997, are "qualified participants" in a defined contribution plan in which the state contributes an amount equal to 4% of the participant's compensation and will match up to an additional 3% of the participant's contributions, and eliminating any fixed retirement allow-

MCL 38.50a(1) and (2), members currently enrolled in the state pension plan can elect to remain in that plan, but only by contributing "an amount equal to 4% of his or her compensation" until termination or until reaching his or her attainment date, if the latter was designated by the employee.[5] If an existing member in the state pension plan chooses *not* to make those 4% contributions, that member makes the irrevocable election to retain his or her existing accumulated contributions to the pension plan but, going forward, will receive credit for future service and compensation only through the defined contribution plan.[6]

In granting leave to appeal, we specifically asked the parties whether 2011 PA 264 implicates the commission's authority under Article 11, § 5, which, in part, expressly authorizes the commission to "regulate all conditions of employment in the classified service." It is beyond dispute that the challenged provisions of 2011 PA 264 concern amendments to the state employee pension system. The issue confronting this Court is whether these amendments alter a "condition of employment" within the meaning of Article 11, § 5 and, therefore, invade the commission's constitutional au-

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ance provided by the state); 1998 PA 205 (permitting members to increase their pensions by purchasing service credit); 2002 PA 93 (providing for nonduty disability retirement benefits); 2002 PA 743 (providing pension incentives for early retirement); and 2010 PA 185 (providing pension incentives for individuals retiring between November 1, 2010, and January 1, 2011).

[5] MCL 38.35a.

[6] MCL 38.50a(4). 2011 PA 264 also amended MCL 38.1e to change the calculation for overtime earnings. More specifically, a member's "final average compensation" is no longer computed using the three highest-paid consecutive years for overtime and dividing that total by three; rather, overtime earnings are calculated using "the average of annual includable overtime compensation paid to the member during" a specified consecutive six years of credited service.

thority. Rather than avoiding this constitutional issue, I would squarely address this question and, in doing so, would hold that these provisions do not implicate the commission's authority under Article 11, § 5 because a pension, by definition, is not a *condition of employment* but rather an *accrual of future financial benefits*.

The text of Article 11, § 5 suggests that the phrase "conditions of employment" is not without restriction. Indeed, the commission's general authority to "regulate all conditions of employment" is placed at the end of a list of specifically delineated powers: to "classify all positions in the classified service according to their respective duties and responsibilities," to "approve or disapprove disbursements for all personal services," to "determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service," and to "make rules and regulations covering all personnel transactions."

This Court has explained that the commission has the authority "to regulate employment-related activity involving internal matters such as job specifications, compensation, grievance procedures, discipline, collective bargaining and job performance," but not activity that is not related to employment.[7] If "conditions of employment" were interpreted, as plaintiffs and the Court of Appeals contend, as a broad catchall intended to prevent the Legislature from regulating any and all terms of employment involving classified state employees, it would violate the doctrine of *ejusdem generis*, under which general terms are restricted to include

[7] *Council No 11, AFSCME v Civil Serv Comm*, 408 Mich 385, 406-407; 292 NW2d 442 (1980).

only items that are "of the same kind, class, character, or nature as those specifically enumerated."[8]

Instead, because the specific powers articulated in Article 11, § 5 are limited to the commission's authority over internal matters such as professional qualifications and expectations, compensation, job performance, and hiring and firing decisions, only a narrower concept of "conditions of employment" delineates the limited category of issues within the commission's exclusive control.[9] Notably absent from those categories is the authority to regulate pensions or retirement benefits. Furthermore, if the phrase "conditions of employment" were given a broader meaning, it would necessarily include those powers defined in specific terms, rendering that language superfluous.

The history behind the grant of authority in Article 11, § 5 is also instructive. Clearly, the voters intended to provide the commission with the authority to "regulate all conditions of employment for employees in the

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[8] *Huggett v Dep't of Natural Resources*, 464 Mich 711, 718-719; 629 NW2d 915 (2001). See also *People v Brown*, 406 Mich 215, 221; 277 NW2d 155 (1979).

[9] Justice BERNSTEIN suggests that a broader interpretation of the phrase "conditions of employment" is necessary to encompass the commission's authority to regulate "disciplinary procedures" as well as "collective bargaining." *Post* at 355. Far from being "disparate concepts," *post* at 355, disciplinary procedures and collective bargaining are rather congruent; indeed, both involve internal employment-related policies and, therefore, are entirely separate from the notion of pensions. Similarly, Justice BERNSTEIN fails to explain how the commission's purported authority to regulate pensions derives from its authority to regulate certain off-duty political activity. If anything, that this Court has understood the commission's sphere of authority to "delimit[] its rule-making power and confine[] its jurisdiction over the political activity of classified personnel *to on-the-job behavior related to job performance*," *Council No 11*, 408 Mich at 408 (emphasis added), only reinforces a more limited interpretation of the powers identified under Article 11, § 5.

classified service" when they approved the amendment of Const 1908, art 6, § 22 in 1940. By retaining this very same language in the 1963 Constitution, the ratifiers of Article 11, § 5 expressed their intent that the commission continue to have such authority.[10] And because, by that point, SERA had been in effect for 20 years, the Legislature had amended it several times in the interim, and many of those amendments specifically affected pensions, the Legislature plainly did not regard the ratification of Article 6, § 22 as prohibiting its authority to enact and amend SERA.[11] Still, had the drafters of the 1963 Constitution believed SERA to be an unconstitutional usurpation of the commission's authority, they easily could have clarified that by conferring additional powers on the commission pursuant to Article 11, § 5, or by limiting the Legislature's powers under Article 4.[12]

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[10] While Justice BERNSTEIN appears to agree with this proposition, he nevertheless concludes that this "supposed intention shines no light on whether the commission can properly challenge legislative incursion into its sphere of authority." *Post* at 355. However, the ability to challenge an incursion into the commission's sphere of authority is inconsequential where, like here, that authority has not been implicated. Furthermore, to the extent that Justice BERNSTEIN surmises that the 1963 Constitution "did not change the underlying *presumption* that the commission maintained the constitutional authority to regulate pensions," *post* at 355 (emphasis added), that is all that it is: a presumption. Justice BERNSTEIN identifies no constitutional language that plainly or by fair implication supports the conclusion that the commission is vested with the authority to regulate pensions.

[11] Justice BERNSTEIN takes the position that the commission's failure to challenge any portion of SERA between its 1943 enactment and the ratification of the 1963 Constitution merely indicates that the commission "did not believe that the Legislature had yet overstepped its bounds." *Post* at 356. But it is just as likely, if not more probable, that the commission did not challenge SERA and the myriad amendments relating to pensions because the commission understood that it was not within its scope of authority to do so.

[12] See *Council No 11*, 408 Mich at 404.

Furthermore, Article 11, § 5 does not contemplate the commission's authority to regulate "conditions of employment" in a vacuum. For instance, the convention comment to Article 11, § 5 indicates that in connection with the proposed 1963 Constitution, "[o]f special interest to civil service personnel is the provision in [Article 9, § 24], . . . which specifies that pension plans and retirement systems of the state shall be contractual obligations 'which shall not be diminished or impaired.' "[13] Indeed, this Court recognized that Article 9, § 24 specifically prohibits legislative impairment of "accrued financial benefits," though the Legislature "may properly attach new conditions for earning financial benefits which have not yet accrued."[14] Similarly, by adopting Article 9, § 24, the ratifiers conveyed their intent that it would be the employer itself—and *not* the commission—who could *prospectively* change pension benefits.[15]

In examining 2011 PA 264, it is important to note that MCL 38.35a, MCL 38.50a, and MCL 38.1e do nothing to implicate Article 9, § 24 because they do not impair or diminish pension members' already accrued pension benefits; rather, they only affect the accrual of *future* pension benefits. Moreover, because pension proceeds are payable to the member *upon* his or her completion of service, calculation of those benefits does not impose *conditions of* employment, but creates *benefits following* employment.[16] Clearly, then, that the

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[13] 2 Official Record, Constitutional Convention 1961, p 3045 (emphasis added).

[14] *Advisory Opinion re Constitutionality of 1972 PA 258*, 389 Mich 659, 663; 209 NW2d 200 (1973).

[15] *Id.*, citing 1 Official Record, Constitutional Convention 1961, pp 770-771.

[16] Justice BERNSTEIN posits that nothing in the Constitution suggests that a condition of employment must occur *during* employment; instead, he insists that the phrase encompasses an employee's "ability to plan

Legislature offered pension members the opportunity to remain in the defined benefit pension plan (subject to the 4% contribution requirement) demonstrates that the Legislature did not regulate a condition of employment but merely provided members the additional benefit option of membership in the defined contribution plan, which they were free to accept or decline. That 2011 PA 264 presents members with a retirement allowance election makes clear that continued employment is not conditioned on paying the 4% contribution.[17] In other words, because enrolling in the now-contributory defined benefit pension plan does not alter a pension member's existing employment circumstances but rather affects a benefit subsequent to employment, the challenged provisions of 2011 PA 264 do not attempt to regulate a condition of employment and, therefore, do not invade the commission's sphere of authority under Article 11, § 5.[18]

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ahead for expected future outcomes[.]" *Post* at 356. As support for this assertion, Justice BERNSTEIN explains that while grievance procedures likely do not occur as part of an employee's day-to-day employment routine, the commission nevertheless has plenary authority to regulate such matters, thus providing employees with expected future procedures. Regardless of how routine grievance procedures might be, regulating grievance procedures is essential to an employee's *current* employment conditions, even if that employee does not require the use of those procedures during his or her period of employment. This stands in stark contrast to a pension, which, by definition, relates to a time *after* employment.

[17] Contrary to Justice BERNSTEIN's understanding of my analysis, I agree that not all conditions of employment require an employee "to behave a certain way in order to maintain employment." *Post* at 357. Instead, a condition of employment encompasses the policies and procedures existing during the pendency of employment and could be something as commonplace as which entrance an employee should use when entering the building after regular office hours or how long employees are entitled to take breaks.

[18] Curiously, the majority opinion appears to suggest that because the commission was created by the Constitution, the issue of pensions is

As the majority recognizes, the commission's regulatory authority under Article 11, § 5 does not empower the commission to enact, amend, or revise the laws of this state because it is not a legislative body.[19] It necessarily follows, then, that the commission lacks the authority to enact, prevent, or otherwise dictate legislation as it relates to pensions. Even the commission implicitly acknowledges these limitations because it has never attempted to enact a separate retirement system,[20] nor has it adopted any separate rules regulating pensions.[21] To the contrary, the commission acknowledges only an advisory role in the administration of SERA.[22] I therefore disagree with the majority to the extent that it assumes that the terms of the

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equally constitutional in nature. See *ante* at 332. However, as evidenced by the Legislature's enactment of SERA (legislation "creat[ing]" a "state employees' retirement system," MCL 38.2(1)) and the commission's promulgation of Civ Serv R 5-13 (an administrative rule authorizing retirement benefits for eligible classified employees "as provided by law"), the right to pensions is a creature of statute, not the Constitution. Therefore, the constitutional nature of the commission itself does not somehow transform a benefit of employment into a constitutional right.

[19] The commission is an administrative agency "existing" under the Constitution (as opposed to established by the Legislature). *Viculin v Dep't of Civil Serv*, 386 Mich 375, 385 & n 11; 192 NW2d 449 (1971). "As are all such administrative agencies," the commission, like the State Board of Education, "is part of and within the executive branch[.]" *Straus v Governor*, 459 Mich 526, 535, 537; 592 NW2d 53 (1999) (citations and quotation marks omitted).

[20] Indeed, as previously explained, the legislative enactment of SERA was a response to the commission's encouragement of the Legislature to establish a retirement system for classified state employees.

[21] As previously indicated, Civ Serv R 5-13 conspicuously authorizes retirement benefits for eligible classified employees "as provided by law."

[22] See Civ Serv R 2-17.1 (requiring the state personnel director to "cooperate with the state employees' retirement board in maintaining a comprehensive retirement system for classified employees"). Substantively, this rule is indistinguishable from its 1963 counterpart, Civ Serv R 31.1.

pension plan are conditions of employment. Rather, because the terms of pension plans are not conditions of employment, they do not implicate Article 11, § 5 in the first instance. Accordingly, I would conclude that 2011 PA 264 does not intrude into the commission's sphere of authority.

Consistent with this analysis, I concur in the majority's decision to reverse the decision of the Court of Appeals and remand this case to the Court of Claims. Nevertheless, I respectfully dissent from the majority's assumption that a pension is a condition of employment and instead would reach the question this Court posed—and the parties briefed—and uphold 2011 PA 264 because it does not regulate a "condition of employment" within the meaning of Article 11, § 5.

MCCORMACK, J. (*concurring in part and dissenting in part*). I concur in the majority's decision to reverse the judgment of the Court of Appeals and to remand this case to the Court of Claims. I also agree with Justice BERNSTEIN that pensions are "conditions of employment" for the purposes of Const 1963, art 11, § 5 and would explicitly so hold.

I am less confident about what the Civil Service Commission's constitutional authority means in this particular context, given that the commission cannot legislate or make appropriations, as both the majority and Justice BERNSTEIN acknowledge, and therefore cannot accomplish many goals with respect to retirement benefits without legislative action. See Const 1963, art 4, § 1 ("The legislative power of the State of Michigan is vested in a senate and a house of representatives."); *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 141; 719 NW2d 553 (2006) (opinion by MARKMAN, J.) (stating that "the power to tax and to appropriate for

specific purposes" is a "fundamental aspect" of legislative power); Const 1963, art 3, § 2 ("No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in [the] constitution."). Stated differently, I believe the question of how the commission's power to regulate pensions as a "condition of employment" within the civil service can be reconciled with the Legislature's exclusive authority to make appropriations to be a difficult one. I write separately because while the majority's explanation of the commission's historic acquiescence in the legislature's encroachment might be correct, given that it is not essential to the majority's holding and was not explored by the parties, I would refrain from commenting on it. Although the majority may not believe that its discussion of this point drives any of its analysis, I do not believe its opinion makes that sufficiently clear.

Despite the significance of this separation of powers question, I ultimately agree with the majority that it is not a question we should reach just yet. Because the commission, as the affected constitutional actor, is not a party to this lawsuit, has not otherwise officially objected to the legislature's action, and appears by its own official pronouncement, Civ Serv R 5-13, to have acceded to the legislation, I believe we should refrain from deciding the separation of powers question that the plaintiffs have asserted on the commission's behalf for today. But since Rule 5-13 is all we need to decide this case, I would not consider what import, if any, to assign the commission's historical "acquiescence" in the broader context.

If, in the future, the commission changes its position and objects to the Legislature's enactment of 2011 PA 264, we will need to confront the question of the

commission's constitutional authority and the effect of its historical accommodation of the legislative enactments embodied in the State Employees' Retirement Act, MCL 38.1 *et seq*. In my view, those questions should be evaluated once there is a genuine dispute between the commission and the Legislature, once the affected parties have had sufficient opportunity to answer them, and after this Court has taken time to carefully evaluate them with the benefit of that input. For now, I believe the majority is ultimately correct to postpone that difficult constitutional question for another day.

BERNSTEIN, J. (*dissenting*). Our Constitution provides that the Civil Service Commission has plenary authority to "regulate all conditions of employment." Const 1963, art 11, § 5. The majority concludes that the 2011 amendments to the State Employees' Retirement Act (SERA), MCL 38.1 *et seq.*, do not infringe the commission's constitutional grant of authority where the commission has previously acquiesced to SERA. Put simply, the majority holds that to reject only those amendments found in 2011 PA 264, and not SERA in its entirety, would constitute a line-item veto on the part of the commission and that the separation of powers doctrine dictates that an executive body cannot exercise legislative powers.

As an initial matter, I agree with the majority that a pension is a "condition[] of employment" as that phrase is used in Const 1963, art 11, § 5, and that the commission's authority under that provision includes the authority to establish, maintain, and amend a pension plan.[1] However, I disagree that the commission's

[1] Although the majority assumes this without deciding, Justice KELLY would hold that pensions are not conditions of employment under Const 1963, art 11, § 5. I respectfully disagree and address this argument in Part III of my dissent.

historical practice towards SERA constitutes executive acquiescence that would waive its right to object to an unconstitutional legislative infringement. Moreover, because 2011 PA 264 is an unconstitutional infringement of the commission's constitutional grant of *plenary* authority, rejection of the amendments constitutes a recognition of the amendments' unconstitutional nature and not a legislative action akin to a line-item veto. I would therefore affirm the Court of Appeals judgment and hold that the challenged provisions of 2011 PA 264 are unconstitutional as applied to employees in the classified civil service.

I. SEPARATION OF POWERS

I agree with the majority that the separation of powers doctrine generally dictates that an executive body like the commission does not have the authority to either enact statutes or appropriate funds.[2] Save for the express grant of authority that allows the commission to increase rates of compensation for employees in the classified civil service, the commission does not otherwise have the power to appropriate funds in the pursuit of regulating conditions of employment.

The majority thus reasons that the commission lacks the authority to require the Legislature to enact statutes as the commission sees fit. I agree with the majority that the commission's constitutional grant of authority does not go so far as to allow the commission to "dictate [to the Legislature] the nuances of statutory schemes," even when those statutory schemes touch upon the commission's sphere of authority ("conditions of employment"). *Ante* at 331. However, there is a meaningful difference between an

[2] See Const 1963, art 3, § 2.

assertion that the commission has the power to *dictate* what the Legislature enacts into law and an assertion that the commission is empowered to *object* to a legislative incursion into the commission's sphere of authority. The former is a usurpation of legislative powers, which the separation of powers doctrine forbids; the latter is merely a recognition that because the commission's "grant of power is from the Constitution, any executive, legislative or judicial attempt at incursion into that 'sphere' would be unavailing." *Council No 11, AFSCME v Civil Serv Comm*, 408 Mich 385, 408; 292 NW2d 442 (1980).

The majority assumes without deciding that the commission has a constitutional grant of authority to establish, maintain, and amend a pension plan. When the Legislature interferes with this plenary grant of authority, the commission may object to this improper interference. In so doing, the commission does not seek to exercise the legislative power to enact, amend, or veto laws. Instead, the commission's rejection of the challenged provisions in 2011 PA 264 is better characterized as an objection to the *Legislature's* failure to respect the separation of powers doctrine. If one accepts that a pension is a condition of employment over which the commission has plenary authority, the Legislature is the entity that intrudes upon another branch of government by making laws that attempt to govern what lies in the commission's sphere. An objection to unconstitutional action does not equate to the exercise of legislative authority. The commission's objection is not a line-item veto of legislative action that would itself constitute a violation of the separation of powers doctrine, but is instead better understood as a declaration that the legislative action is a violation of the separation of powers

doctrine and is therefore unconstitutional at the outset.[3]

II. EXECUTIVE ACQUIESCENCE

The majority also considers whether the Legislature intruded into the sphere of the commission's authority in enacting the challenged provisions of 2011 PA 264. Again, in assuming without deciding that pensions are conditions of employment over which the commission has plenary authority, the majority concludes that SERA itself is an intrusion into the commission's authority and that the challenged provisions are more of the same. Faced with the Legislature's violation of the separation of powers, the majority turns to the idea of executive acquiescence, concluding that the commission acquiesced to "the Legislature's presumed violation of the separation of powers when it made SERA applicable to civil servants[.]" *Ante* at 333. In support of this claim, the majority cites Civ Serv R 5-13, which provides that "[a] classified employee is eligible for retirement benefits as provided by law." Because the law regarding retirement benefits now encompasses the challenged provisions enacted in 2011 PA 264, the majority concludes that the commission cannot now revoke its acquiescence without itself violating the separation of powers doctrine by directing the Legislature to strike these provisions.

In support of the idea of executive acquiescence, the majority relies on a series of cases that considered the concept of *judicial* acquiescence. This line of cases dealt with judicial acquiescence to legislative action. In

[3] See *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 303-304; 586 NW2d 894 (1998) (holding certain statutory provisions enacted by the Legislature to be unconstitutional under the separation of powers doctrine and therefore struck).

Perin v Peuler, 373 Mich 531, 541; 130 NW2d 4 (1964), this Court first defined the scope of judicial rulemaking by stating that

> [t]he function of enacting and amending judicial rules of practice and procedure has been committed exclusively to this Court (Const 1908, art 7, § 5; Const 1963, art 6, § 5); a function with which the legislature may not meddle or interfere save as the Court may acquiesce and adopt for retention at judicial will.

However, this Court recognized a limit to this general grant of constitutional authority: "[A]s is evident from the plain language of [Const 1963] art 6, § 5, this Court's constitutional rule-making authority extends *only* to matters of practice and procedure." *McDougall v Schanz*, 461 Mich 15, 27; 597 NW2d 148 (1999). In distinguishing between substantive rules and rules of practice and procedure, the *McDougall* Court found that the *Perin* Court had "overstated the reach of our rule-making authority," explaining that the distinction between rules of substance and procedure "is one that was not only advocated by recognized scholars contemporaneously with the development and passage of our 1963 Constitution, but one that . . . the drafters contemplated." *Id*. at 29-30.

The *McDougall* majority thus stands for the proposition that this Court's constitutional grant of authority to promulgate rules is not a grant of *plenary* authority. Although this Court has "exclusive rule-making authority in matters of practice and procedure," *id*. at 26, the *McDougall* majority was primarily concerned with making clear that this Court does not have such authority with regard to *substantive* rules. In contrast, there is no such limitation on the commission's authority over conditions of employment in either the plain language of the Constitution or in the

minds of the ratifiers, whose clear intent was to remove the classified civil service from legislative interference.[4] Moreover, *McDougall* is inapplicable to the question of even *judicial* acquiescence, let alone executive, as this Court recognized that it "is not authorized to enact . . . rules that establish, abrogate, or modify the substantive law." *Id*. at 27. The holding in *McDougall* thus concerned whether the Legislature had enacted a substantive or a procedural rule; in other words, because this Court does not have the constitutional authority to promulgate substantive rules, there is no question of judicial acquiescence where the Court attempts to act outside of the bounds of its sphere of authority.

In contrast to the situation presented in *McDougall*, the commission's authority over conditions of employment is plenary; any legislative incursion into this sphere is itself a violation of the separation of powers doctrine. The commission's involvement, however minimal, in the enactment of SERA and amendments thereafter speaks nothing to this underlying constitutional principle.[5]

The majority finally relies on *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291; 586 NW2d 894 (1998). In that case, this Court held that statutory provisions that designated counties as the employers of judicial employees violated the separation of powers doctrine. *Id*. at 302-303. In so holding, this Court acknowledged that practical necessity (in particular, the lack of the

[4] See *Council No 11*, 408 Mich at 397-401 (detailing the history of the civil service system in Michigan).

[5] "The practical necessity for the judiciary to reach accommodation with those who fund the courts on an annual basis, however, cannot, as a constitutional matter, be used as an excuse to diminish the judiciary's essential authority over its own personnel." *Judicial Attorneys Ass'n*, 459 Mich at 302-303.

ability to appropriate funds) drove the judiciary to reach certain accommodations with the Legislature. *Id*. However, this Court specifically found that this prior acquiescence could *not* "be used as an excuse to diminish the judiciary's essential authority over its own personnel." *Id*. at 303.[6] *Judicial Attorneys Ass'n* thus stands for the proposition that prior acquiescence alone, especially in the face of practical considerations such as the lack of appropriation authority, does not waive one branch's right to contest the intrusion of another branch in the future.[7]

The majority holds that the commission "may adopt rules [like Civ Serv R 5-13] that acquiesce in a statute that allegedly intrudes on its sphere of authority, as it has here." *Ante* at 334. This is in line with the observation in *Judicial Attorneys Ass'n* that one branch may decide, for practical reasons, to acquiesce to another branch's involvement. See *Judicial Attorneys Ass'n*, 459 Mich at 304 ("Separation of powers does not preclude what has proven to be the rule rather than the exception in the operation of Michigan's trial

[6] Although "[t]he judicial branch may determine on its own authority, for practical reasons, to share with the legislative branch some limited employment-related decision making upon determining that such sharing is in the best interests of the judicial branch and the public as a whole[,] . . . [t]he constitutionality of an act must rest on the provisions of the act itself, and not on the compensating actions of those affected by the act." *Id*. at 303-304 (emphasis omitted).

[7] In holding that a legislative veto provision enacted by Congress was unconstitutional, the United States Supreme Court declined to find significant the fact that Congress had previously enacted hundreds of such provisions in prior decades that had gone unchallenged: "Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government and our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies[.]" *Immigration & Naturalization Serv v Chadha*, 462 US 919, 944; 103 S Ct 2764; 77 L Ed 2d 317 (1983).

courts: cooperation, communication, and accommodation between trial courts and their funding units in their exercise of shared responsibility to the public. The philosophical underpinnings of the separation of powers doctrine, Michigan case law, and common sense all point toward such cooperation."). However, "[t]he constitutionality of an act must rest on the provisions of the act itself, and not on the compensating actions of those affected by the act." *Id*.

Put simply—one branch's acquiescence, however affirmative, cannot render an unconstitutional act constitutional.[8] That the commission has historically worked to reach an accommodation with the Legislature in the enactment and subsequent amendments of SERA to facilitate cooperation among different branches of government does not strip it of the ability to object to the challenged provisions of 2011 PA 264. Mere acquiescence *cannot* cure a violation of the separation of powers doctrine. If pensions do fall within the commission's sphere of authority, the commission cannot have the ability to waive their *constitutional grant of plenary authority*.[9] Although the majority suggests that the commission would itself violate the separation of powers doctrine by directing the Legislature to exercise its legislative powers in striking the chal-

[8] Justice MCCORMACK finds it meaningful that the commission, "as the affected constitutional actor," is not party to this lawsuit and has not officially objected to the Legislature's actions. *Ante* at 345. However, because the commission and the Legislature cannot acquiesce to a violation of the Michigan Constitution and thereby cure it, I do not believe this distinction is of any importance in my analysis.

[9] I also note that Civ Serv R 5-13 is a thin reed upon which to hang a constitutional waiver. If the Legislature's enactment of the challenged provisions of 2011 PA 264 are indeed unconstitutional as a violation of the separation of powers doctrine, they would not properly be benefits "as provided by law," given that our Constitution is considered part of Michigan law.

lenged provisions of 2011 PA 264, I respectfully disagree. Instead, I would conclude that plaintiffs are merely requesting that we strike the unconstitutional provisions of the amended SERA, not directing the Legislature to revive a "prior version of the law [that] no longer exists." *Ante* at 334.[10]

Because the challenged provisions of 2011 PA 264 constitute violations of the separation of powers doctrine, I would hold that they are not properly part of SERA.

III. CONDITION OF EMPLOYMENT

While the majority assumes without deciding that pensions are a condition of employment as that phrase is understood in Const 1963, art 11, § 5, Justice KELLY would uphold 2011 PA 264 on the basis that it does not regulate conditions of employment. I respectfully disagree with Justice KELLY's conclusion. I believe that pensions are a condition of employment.

Justice KELLY argues that the plain language of the Constitution indicates that the phrase "conditions of employment" was not intended as a broad catchall, and is instead limited to internal matters. However, I believe this reading fails to account for this Court's prior pronouncement that the commission has the authority "to regulate employment-related activity involving internal matters *such as* job specifications, compensation, grievance procedures, discipline, collective bargaining and job performance, *including* the power to prohibit activity during working hours which is found to interfere with satisfactory job perfor-

[10] This characterization of plaintiffs' requested relief runs counter to this Court's holding in *Judicial Attorneys Ass'n*, 459 Mich at 304, in which the challenged provisions alone were found to be unconstitutional and thus struck.

mance." *Council No 11*, 408 Mich at 406-407 (emphasis added).[11] Certainly a broad definition of the phrase "conditions of employment" need be employed in order to tie together such disparate concepts as disciplinary procedures and collective bargaining. Furthermore, this Court continued by stating that "it is within contemplation that off-duty political involvement may adversely affect a classified employee's performance at work. If and when it does, the commission is empowered to deal with such circumstances on a case-by-case basis." *Id*. at 407. A definition that embraces off-duty political involvement is a broad one that can also encompass pensions, which are arguably easier to square away as employment-related activity involving internal matters.

Justice KELLY also notes that, by the time the 1963 Constitution was ratified, SERA had been in effect for 20 years; by keeping the same grant of authority found in the 1908 Constitution, the ratifiers thus did not intend to eliminate the Legislature's authority to enact and amend SERA. In support of this proposition, Justice KELLY cites a comment that suggests the ratifiers intended that pension plans not be diminished or impaired. But as stated earlier, this supposed intention shines no light on whether the commission can properly challenge legislative incursion into its sphere of authority. I agree that the ratifiers did not intend to proscribe the Legislature's ability to enact or amend SERA, but this did not change the underlying presumption that the commission maintained the constitutional authority to regulate pensions; that the commission did not challenge the enactment or amendment of SERA prior to the ratification of the

[11] I believe that the use of the phrases "such as" and "including" suggests that this was not meant as an exhaustive list.

1963 Constitution only indicates that it did not believe that the Legislature had yet overstepped its bounds.[12]

Justice KELLY finally notes that the challenged provisions of 2011 PA 264 only affect the accrual of future pension benefits; because such benefits are only payable to individuals upon leaving the classified civil service, pension benefits *follow* employment, and are not conditions *of* employment. The constitutional difference wrought by this change in preposition appears to hang on two observations: first, that pension benefits are payable in the future, and second, that a certain retirement election allowance is not required for continued employment.

As to the first, there is nothing in the plain language of the Constitution that suggests that a "condition of employment" is limited in scope to those internal matters that are present during a particular time period. This Court has previously stated that grievance procedures are unquestionably within the commission's grant of authority, *Council No 11*, 408 Mich at 406, and one hopes that grievance procedures are not part of everyday reality for most employees in the classified civil service. Indeed, the ability to plan ahead for expected future outcomes is part and parcel of the internal, employment-related activity that constitutes conditions *of* employment. See *Wescott v Civil Serv Comm*, 298 Mich App 158, 164; 825 NW2d 674 (2012) (holding that the commission does not need to consider disability decisions rendered by other state agencies in making a determination on a request for long-term

[12] *Myers v United States*, 272 US 52, 171; 47 S Ct 21; 71 L Ed 160 (1926) ("When instances which actually involve the question are rare, or have not in fact occurred, the weight of the mere presence of acts on the statute book for a considerable time, as showing general acquiescence in the legislative assertion of questioned power, is minimized.").

disability benefits); *Mich State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152, 163-164; 365 NW2d 93 (1984) (holding that it is the constitutional duty of the commission to establish discharge procedures in accordance with due process). The very motivation for the creation of the classified civil service points to the same conclusion: a merit-based system was memorialized in our Constitution out of a fear of a patronage system, which could result in the *future* termination of otherwise qualified employees upon a change in political fortune. See *Mich State Employees Ass'n*, 421 Mich at 159-160. As to the second, a condition of employment is not defined by whether a classified civil service employee is required to behave a certain way in order to maintain employment. This definition is not broad enough to encompass "job specifications, compensation, grievance procedures, discipline, collective bargaining and job performance," *Council No 11*, 408 Mich at 406, which are all unquestionably part of the commission's grant of plenary authority.

Because I conclude that pensions are a condition of employment under Const 1963, art 11, § 5, I would hold that the challenged provisions of 2011 PA 264 improperly intrude on the commission's constitutional grant of plenary authority.

IV. CONCLUSION

I would hold that pensions fall under the commission's plenary authority over conditions of employment under Const 1963, art 11, § 5. Because the commission has not acquiesced to the Legislature's intrusion into its constitutional sphere of authority, I would hold that the challenged provisions of 2011 PA 264 constitute a violation of the separation of powers doctrine. Accordingly, I would affirm the decision of the Court of Appeals.

PEOPLE v LOCKRIDGE

Docket No. 149073. Argued January 15, 2015 (Calendar No. 7). Decided July 29, 2015. Certiorari denied 577 US ___; 136 S Ct 590.

Rahim Omarkhan Lockridge was convicted of involuntary manslaughter for the death of his wife, MCL 750.321, following a jury trial in the Oakland Circuit Court. His minimum sentence range calculated under the sentencing guidelines, MCL 777.1 *et seq*., was 43 to 86 months. The court, Nanci J. Grant, J., concluded that there were factors not accounted for in scoring the guidelines, including a probation violation, killing his wife in front of their three children, leaving the children at home with their mother dead on the floor, and prior domestic violence. Citing these as substantial and compelling reasons to depart from the minimum sentence range, MCL 769.34(3), the court sentenced defendant to a term of 8 years (96 months) to 15 years (the statutory maximum sentence). Defendant appealed, challenging both the scoring of the guidelines and the trial court's decision to exceed the guidelines minimum sentence range. While his case was pending in the Court of Appeals, the United States Supreme Court decided *Alleyne v United States*, 570 US ___; 133 S Ct 2151 (2013), which extended the rule of *Apprendi v New Jersey*, 530 US 466 (2000), and held that a fact that increases either end of a defendant's sentencing range must have been admitted by the defendant or found by the jury beyond a reasonable doubt. After allowing defendant to file a supplemental brief challenging the guidelines scoring on *Alleyne* grounds, the Court of Appeals, BECKERING, P.J., and O'CONNELL and SHAPIRO, JJ., affirmed defendant's sentence in three separate opinions and rejected the *Alleyne* challenge. Judge O'CONNELL stated in the lead opinion that the panel was bound by *People v Herron*, 303 Mich App 392 (2013), which had rejected the same argument based on *Alleyne*. Judge BECKERING stated in her concurring opinion that had she not been bound by *Herron*, she would have held that requiring judicial fact-finding to set the guidelines mandatory minimum sentence range violated *Alleyne* and that the guidelines should be made advisory to cure the constitutional problem. In his concurring opinion, Judge SHAPIRO stated that he would have held that *Alleyne* only bars requiring judicial fact-finding to set the bottom of the minimum sentence

range under the guidelines, so only the bottom of the range needed to be made advisory to cure the constitutional flaw. 304 Mich App 278 (2014). Defendant sought leave to appeal, and the Supreme Court granted his application to address the constitutional question presented by defendant's *Alleyne* challenge. 496 Mich 852 (2014).

In an opinion by Justice MCCORMACK, joined by Chief Justice YOUNG and Justices KELLY, VIVIANO, and BERNSTEIN, Supreme Court *held*:

The *Apprendi* rule, as extended by *Alleyne*, applies to Michigan's sentencing guidelines and renders them unconstitutional to the extent that they require judicial fact-finding beyond facts admitted by the defendant or found by the jury beyond a reasonable doubt to score offense variables that increase the floor of the guidelines minimum sentence range. To remedy the constitutional violation, MCL 769.34(2) must be severed to the extent that it makes mandatory a minimum sentence range calculated on the basis of facts not admitted by the defendant or found by the jury. It was also necessary to strike down the requirement in MCL 769.34(3) that a sentencing court that departs from the applicable range must articulate a substantial and compelling reason for doing so. A guidelines minimum sentence range calculated in violation of *Apprendi* and *Alleyne* is advisory only, but a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence. Appellate courts must review for reasonableness any sentences that depart from the guidelines range.

1. *Apprendi* held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be admitted by the defendant or submitted to a jury and proved beyond a reasonable doubt and that failing to do so violated a defendant's constitutional rights to due process, notice, and trial by jury. Following *Apprendi* and its progeny, all of which addressed determinate sentencing schemes, the Michigan Supreme Court held in *People v Drohan*, 475 Mich 140 (2006), that the rule did not apply to Michigan's indeterminate sentencing scheme, reasoning in part that the sentencing court's power to impose a sentence always derives from the jury's verdict because the jury's verdict authorizes the maximum sentence set by statute. *Alleyne*, however, concluded that mandatory minimum sentences were equally subject to the *Apprendi* rule, holding that a fact that increases either end of the sentence range produces a new penalty and constitutes an ingredient of the offense.

2. Defendant argued that because *Alleyne* extended the *Apprendi* rule from statutory maximum sentences to mandatory minimum sentences, the rule applied to Michigan's sentencing guidelines. A scheme of mandatory minimum sentencing violates the Sixth Amendment if it constrains the discretion of the sentencing court by compelling an increase in the mandatory minimum sentence beyond that authorized by the jury's verdict alone. Michigan's sentencing guidelines do so to the extent that the floor of the guidelines range compels a court to impose a mandatory minimum sentence beyond that authorized by the jury's verdict. Stated differently, to the extent that the floor of the guidelines range is increased by scoring offense variables (OVs) using facts that the court found by a preponderance of the evidence, rather than facts admitted by the defendant or necessarily found by the jury, the procedure violates the Sixth Amendment. Because *Herron* held to the contrary, it must be overruled.

3. Remedying the violation requires that the sentencing guidelines be advisory only. Accordingly, MCL 769.34(2) must be severed to the extent that it makes mandatory the minimum sentence range as scored on the basis of facts beyond those admitted by the defendant or found by the jury. The requirement in MCL 769.34(3) of a substantial and compelling reason to depart from that range must also be struck down. When OVs have been scored on the basis of facts not admitted by the defendant or found beyond a reasonable doubt by the jury, the sentencing court may depart from the resulting minimum sentence range without articulating substantial and compelling reasons for doing so. An appellate court must review for reasonableness a sentence that departs from the applicable range, and resentencing will be required when a sentence is determined to be unreasonable. Sentencing courts must continue to consult the applicable guidelines range, however, and take it into account when imposing a sentence. Further, sentencing courts must justify the sentence imposed in order to facilitate appellate review.

4. Because defendant did not object to the scoring of the OVs at sentencing on *Apprendi*/*Alleyne* grounds, the appropriate review in his case was for plain error affecting substantial rights. Defendant received a minimum sentence that was an upward departure that did not rely on the minimum sentence range from the improperly scored guidelines, and the sentencing court stated on the record its reasons for departure, as it was required to do. Therefore, defendant could not show prejudice from any error in scoring the OVs in violation of *Alleyne*. Defendant's guidelines minimum sentence range was irrelevant to the upward departure

sentence he ultimately received. Accordingly, he could not show the prejudice necessary to establish plain error and was not entitled to resentencing.

5. With respect to the cases held in abeyance for this case, for those in which (1) facts admitted by the defendant and (2) facts found by the jury were sufficient to assess the minimum number of OV points necessary for the defendant's guidelines score to fall in the cell of the sentencing grid under which he or she was sentenced, that defendant suffered no prejudice from any error. Accordingly, no plain error occurred in those cases, and no further inquiry will be required.

6. For cases held in abeyance in which facts admitted by the defendant or found by the jury's verdict were insufficient to assess the minimum number of OV points necessary for the defendant's guidelines score to fall in the cell of the sentencing grid under which he or she was sentenced, an unconstitutional constraint impaired that defendant's Sixth Amendment right. Those defendants (1) who can demonstrate that their guidelines minimum sentence range was actually constrained by the violation of the Sixth Amendment and (2) whose sentences were not subject to an upward departure can establish a threshold showing of the potential for plain error sufficient to warrant a remand to the sentencing court for further inquiry. *United States v Crosby*, 397 F3d 103 (CA 2, 2005), set forth an analysis under which it was generally appropriate to remand cases on direct review for the limited purpose of permitting the sentencing court to determine whether to resentence under the new sentencing regime and, if so, to resentence. Essentially, a sentence imposed under a mistaken perception of the requirements of law will satisfy plain-error analysis if the sentence imposed under a correct understanding would have been materially different. Accordingly, cases in which the defendant's minimum sentence was established by applying Michigan's sentencing guidelines in violation of the Sixth Amendment should be remanded to the sentencing court for it to determine whether it would have imposed a materially different sentence but for the constitutional error and resentencing if the court so concluded.

7. *Crosby* remands are warranted only in cases involving sentences imposed on or before July 29, 2015, the date of the decision in this case. For defendants sentenced after this decision, traditional plain-error review will apply if the error was unpreserved. On a *Crosby* remand, the sentencing court should first allow the defendant an opportunity to inform the court that he or she will not seek resentencing. If notification is not received in a

timely manner, the court (1) should obtain the views of counsel in some form, (2) may but is not required to hold a hearing on the matter, and (3) need not have the defendant present when it decides whether to resentence the defendant, but (4) must have the defendant present, as required by law, if it decides to resentence the defendant. Further, in determining whether the court would have imposed a materially different sentence but for the unconstitutional constraint, the court should consider only the circumstances existing at the time of the original sentence.

Defendant's sentence affirmed; Michigan sentencing guidelines statutes struck down in part as unconstitutional and severed in part.

Justice MARKMAN, joined by Justice ZAHRA, dissenting, concluded that Michigan's sentencing system did not offend the Sixth Amendment. Under Michigan's indeterminate sentencing guidelines, a defendant's maximum sentence is prescribed by statute, and upon a guilty verdict, the defendant is subject to serving this maximum sentence. Accordingly, the jury's verdict authorizes punishment of the defendant to the maximum extent allowed by the statute under which he or she was convicted. The sentencing court has no influence over this authority and no authority to usurp it. At sentencing, the judge's exercise of judgment is limited to selecting a minimum sentence from within a recommended minimum sentence range that is calculated on the basis of the defendant's prior record variables and offense variables. This minimum sentence, however, merely establishes the defendant's earliest parole eligibility date and has no effect on the punishment imposed on the defendant as a result of the jury's verdict. The defendant has no legal right to be released before the statutory maximum to which he or she has been made subject by the jury's determination, and the defendant has no constitutional right to parole. As a result, an increase in a defendant's minimum parole eligibility date does not expose the defendant to a greater punishment than that authorized by the jury's verdict, and the sentencing court's exercise of judgment in establishing that date does not infringe the jury's authority, as the United States Supreme Court recognized in *Blakely v Washington*, 542 US 296 (2004), with respect to indeterminate sentencing systems. Furthermore, Michigan's indeterminate sentencing guidelines do not produce mandatory minimum sentences. A mandatory minimum sentence is one that requires the sentencing court to impose a statutorily fixed minimum term of incarceration for a particular crime when certain statutory criteria have been satisfied. While some statutes do require a true mandatory minimum, defendants

in Michigan generally receive a minimum sentence as a function of a guidelines calculation of prior record and offense variables that produce a recommended minimum sentence range, and that minimum sentence represents only the earliest time at which a defendant can petition for release on parole. Because *Alleyne* only applies to facts that increase mandatory minimum sentences, *Alleyne* does not apply to Michigan's sentencing guidelines. Justice MARKMAN further observed how deeply ironic it was that under the majority's holding, two decisions of the United States Supreme Court that were intended to limit encroachment of the judicial power on the jury's authority, foster predictability and certainty in criminal sentencing, protect defendants' rights, and produce fairness in the sentencing process, among other things, will lead to entirely opposite results. Justice MARKMAN would have affirmed the judgment of the Court of Appeals.

SENTENCES — SENTENCING GUIDELINES — UNCONSTITUTIONALITY — REMEDY.

The sentencing guidelines, MCL 777.1 *et seq*., are unconstitutional under *Alleyne v United States*, 570 US ___; 133 S Ct 2151 (2013), to the extent that they require judicial fact-finding beyond facts admitted by the defendant or found by the jury beyond a reasonable doubt to score offense variables that increase the floor of the guidelines minimum sentence range; MCL 769.34(2), part of the general sentencing statute, is severed to the extent that it makes the minimum sentence range calculated on that basis mandatory; the requirement in MCL 769.34(3) that a sentencing court departing from the applicable range articulate a substantial and compelling reason for doing so is struck down; a guidelines minimum sentence range calculated in violation of *Alleyne* is advisory only, but a sentencing court must continue to determine the applicable guidelines range and take it into account when imposing a sentence; appellate courts must review for reasonableness any sentence that departs from the guidelines threshold.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Chief, Appellate Division, and *Danielle Walton*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Brett DeGroff*, *Desiree Ferguson*, and *Michael L. Mittlestat*) for defendant.

Amici curiae:

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Linus Banghart-Linn*, Assistant Attorney General, for the Attorney General.

Kym L. Worthy, Prosecuting Attorney, and *Timothy A. Baughman*, Chief, Research, Training, and Appeals, for the Wayne County Prosecuting Attorney.

Bradley R. Hall for Criminal Defense Attorneys of Michigan.

MCCORMACK, J. This case presents the question whether the Michigan sentencing guidelines violate a defendant's Sixth Amendment fundamental right to a jury trial. We conclude that the rule from *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), as extended by *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), applies to Michigan's sentencing guidelines and renders them constitutionally deficient. That deficiency is the extent to which the guidelines *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range, i.e., the "mandatory minimum" sentence under *Alleyne*.

To remedy the constitutional violation, we sever MCL 769.34(2) to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory. We also strike down the requirement in MCL 769.34(3) that a sentencing court that departs from the applicable guidelines range must articulate a substantial and

compelling reason for that departure.[1]

Consistently with the remedy imposed by the United States Supreme Court in *United States v Booker*, 543 US 220, 233; 125 S Ct 738; 160 L Ed 2d 621 (2005), we hold that a guidelines minimum sentence range calculated in violation of *Apprendi* and *Alleyne* is advisory only and that sentences that depart from that threshold are to be reviewed by appellate courts for reasonableness. *Booker*, 543 US at 264. To preserve as much as possible the legislative intent in enacting the guidelines, however, we hold that a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence. *Id*.

In this case the defendant's guidelines minimum sentence range was irrelevant to the upward departure sentence he ultimately received. Accordingly, we hold that he cannot show the prejudice necessary to establish plain error under *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999), and we affirm his sentence.[2]

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The defendant was convicted by a jury of involuntary manslaughter for his wife's death. At sentencing, defense counsel agreed with scoring OV 3 (physical

[1] To the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down as necessary.

[2] Our order granting leave to appeal did not limit our consideration of the issues presented to the *Alleyne* question. *People v Lockridge*, 496 Mich 852 (2014). With respect to the defendant's other argument that the trial court did not present sufficient substantial and compelling reasons to depart from the sentencing guidelines, we agree with the Court of Appeals that the reasons articulated by the trial court adequately justified the minimal (10-month) departure above the top of the guidelines minimum sentence range.

injury to victim)[3] at 25 points and OV 5 (psychological injury to member of victim's family)[4] at 15 points; counsel did not mention OV 6 (offender's intent to kill or injure another individual),[5] for which 10 points were assessed. Counsel did challenge the scoring of OV 9 (number of victims)[6] and OV 10 (exploitation of a vulnerable victim),[7] but both only on the ground that the facts of the case did not support the number of points assessed by a preponderance of the evidence. The trial court felt otherwise and kept the score of both variables at 10 points.

With his prior record variable score of 35 points, the defendant's resulting guidelines minimum sentence range was 43 to 86 months,[8] but the trial court exceeded the guidelines and imposed a minimum sentence of 8 years (96 months) and a maximum sentence of 15 years (180 months, the statutory maximum).[9] As substantial and compelling reasons justifying the departure, the trial court cited that defendant had violated probation orders that forbade him from being where he was when he killed his wife, that he killed his wife in front of their three children as they struggled to stop him from doing so, and that he left the children at home with their mother dead on the floor without concern for their physical or emotional well-being, which were not factors already accounted for in scoring the guidelines. Furthermore, the court said, the extent of the defendant's prior domestic violence was not considered in the guidelines.

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[3] MCL 777.33(1)(c).

[4] MCL 777.35(1)(a).

[5] MCL 777.36(1)(c).

[6] MCL 777.39(1)(c).

[7] MCL 777.40(1)(b).

[8] MCL 777.16p; MCL 777.64.

[9] MCL 750.321.

The defendant appealed by right in the Court of Appeals, challenging the scoring of the guidelines and the trial court's decision to exceed the guidelines minimum sentence range. While this case was pending in the Court of Appeals, the United States Supreme Court decided *Alleyne*, and defense counsel moved to file a supplemental brief challenging the scoring of the guidelines on *Alleyne* grounds. The Court of Appeals granted that motion. In a published opinion, the Court of Appeals affirmed the defendant's sentence and rejected his *Alleyne* challenge to the scoring of guidelines, adhering to its recent decision in *People v Herron*, 303 Mich App 392; 845 NW2d 533 (2013), which had rejected that same argument.[10] *People v Lockridge*, 304 Mich App 278, 284; 849 NW2d 388 (2014) (opinion by O'CONNELL, J.). Judge BECKERING and Judge SHAPIRO filed concurring opinions agreeing with Judge O'CONNELL's lead opinion that the panel was bound by *Herron*, but disagreeing with the outcome reached in *Herron*. If not bound by *Herron*, Judge BECKERING would have held that requiring judicial fact-finding to set the guidelines mandatory minimum sentence range violated *Alleyne*. *Id*. at 285 (opinion by BECKERING, P.J.). She would have made the guidelines advisory to cure the constitutional problem. *Id*. at 286. Judge SHAPIRO would have held that *Alleyne* only bars requiring judicial fact-finding to set the *bottom* of the minimum sentence range, so only the bottom of the range need be made advisory to cure the constitutional flaw. *Id*. at 311, 315-316 (opinion by SHAPIRO, J.).

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[10] The defendant in *Herron* subsequently filed an application for leave to appeal in this Court, and that application is being held in abeyance pending the outcome of this case. *People v Herron*, 846 NW2d 924 (Mich, 2014).

The defendant filed an application for leave to appeal in this Court. We granted leave to appeal to address the significant constitutional question presented.[11] *People v Lockridge*, 496 Mich 852 (2014).

II. LEGAL BACKGROUND

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation . . . . [US Const, Am VI.]

The right to a jury trial is a fundamental one, with a long history that dates back to the founding of this country and beyond. *Duncan v Louisiana*, 391 US 145, 148-154; 88 S Ct 1444; 20 L Ed 2d 491 (1968) (discussing the fundamental nature of the right and its long history).

The question presented in this case relates specifically to whether the procedure involved in setting a mandatory sentence infringes a defendant's Sixth Amendment right to a jury trial. One key to this inquiry is whether the pertinent facts that must be

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[11] Our grant order specifically directed the parties to address

> (1) whether a judge's determination of the appropriate sentencing guidelines range, MCL 777.1, *et seq*., establishes a "mandatory minimum sentence," such that the facts used to score the offense variables must be admitted by the defendant or established beyond a reasonable doubt to the trier of fact, *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013); and (2) whether the fact that a judge may depart downward from the sentencing guidelines range for "substantial and compelling" reasons, MCL 769.34(3), prevents the sentencing guidelines from being a "mandatory minimum" under *Alleyne*, see *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005).

found are an element of the offense or a mere sentencing factor. See, e.g., *Jones v United States*, 526 US 227, 232; 119 S Ct 1215; 143 L Ed 2d 311 (1999) ("Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt."). The first United States Supreme Court case warranting specific mention here is *McMillan v Pennsylvania*, 477 US 79; 106 S Ct 2411; 91 L Ed 2d 67 (1986).

In *McMillan*, the Supreme Court held that the visible possession of a firearm, which the Pennsylvania statute at issue used as a fact increasing the defendant's mandatory sentence, did not constitute an element of the crimes enumerated in its mandatory sentencing statute. Rather, it "instead is a sentencing factor that comes into play only after the defendant has been found guilty of one of those crimes beyond a reasonable doubt." *Id*. at 86. Accordingly, the *McMillan* Court rejected the defendant's argument that Pennsylvania's mandatory minimum sentencing act was unconstitutional.

Things began to change dramatically with *Jones*, however. In that case, the Court held that the fact of whether a victim suffered serious bodily injury, which authorized an increase in the defendant's sentence from 15 to 25 years, was an element of a federal statute prohibiting carjacking or aiding and abetting carjacking that must be found by a jury. Although *Jones* was decided on statutory rather than constitutional grounds, the Court concluded that treating the fact of bodily injury as a mere sentencing factor "would raise serious constitutional questions." *Jones*, 526 US at 251. Justices Stevens and Scalia wrote concurring

opinions in *Jones* that presaged the constitutional rule that would be established a year later in *Apprendi*. *Id*. at 252-253 (Stevens, J., concurring); *id*. at 253 (Scalia, J., concurring).

In *Apprendi*, the United States Supreme Court announced the general Sixth Amendment principle at issue in this case: "Other than the fact of a prior conviction, *any fact that increases the penalty for a crime* beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 US at 490 (emphasis added).[12] The Court struck down as unconstitutional a statute that provided for a possible increase in the maximum term of imprisonment from 10 to 20 years if the trial court found, by a preponderance of the evidence, that the defendant "acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Id*. at 469, quoting NJ Stat Ann 2C:44-3(e). The Supreme Court rejected the lower courts' conclusions that the statute was constitutional because the finding of intent to intimidate was a mere "sentencing factor" under *McMillan*. *Id*. at 492.

In *Harris v United States*, 536 US 545, 550; 122 S Ct 2406; 153 L Ed 2d 524 (2002), overruled by *Alleyne*, the Supreme Court was squarely presented with the question "whether *McMillan* stands after *Apprendi*." A majority held that the *Apprendi* rule did not bar judicially found facts altering "mandatory minimum" sentences. But notably, only a plurality of the Court joined the portion of Justice Kennedy's opinion that

[12] The Court had previously recognized an "exceptional departure" from this historical practice in *Almendarez-Torres v United States*, 523 US 224; 118 S Ct 1219; 140 L Ed 2d 350 (1998), for the existence of a prior conviction. *Apprendi*, 530 US at 487-488.

distinguished *Apprendi* from *McMillan*. *Id*. at 556-568. In his concurring opinion, Justice Breyer wrote that he could not "easily distinguish *Apprendi* . . . from this case in terms of logic," but he joined the Court's judgment only because he could not "yet accept [*Apprendi*'s] rule." *Id*. at 569-570 (Breyer, J., concurring in part). The dissenting opinion took notice, observing that "[t]his leaves only a minority of the Court embracing the distinction between *McMillan* and *Apprendi* that forms the basis of today's holding . . . ." *Id*. at 583 (Thomas, J., dissenting).

Next came *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In that case, the Supreme Court addressed a challenge to the state of Washington's "determinate" sentencing scheme and observed that "indeterminate sentencing" does not infringe on the power of a jury. *Id*. at 308. Ultimately, the *Blakely* Court held the Washington scheme unconstitutional to the extent that it allowed the trial court to impose a sentence greater than the "statutory maximum" sentence authorized by the jury verdict on the basis of the court's finding that the defendant had acted with "deliberate cruelty." *Id*. at 303-304. The Court again emphasized that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id*. at 303.

In *Booker*, the Supreme Court addressed the application of *Apprendi* to a "determinate" sentencing scheme similar to Washington's, the federal sentencing guidelines. Two different majorities of the Court held that the guidelines were unconstitutional under *Apprendi* and *Blakely*, *Booker*, 542 US at 226 (opinion by Stevens, J.), and that the proper remedy for the con-

stitutional infirmity was to make the guidelines advisory rather than mandatory, *id*. at 245 (opinion by Breyer, J.).

The ripple effects of *Apprendi*, *Blakely*, and *Booker* have been significant in both state and federal courts. See, e.g., *Duncan v United States*, 552 F3d 442, 445 (CA 6, 2009) (referring to the "*Apprendi* revolution"). The changes in the law wrought by this new rule led this Court to address whether Michigan's sentencing guidelines were susceptible to a Sixth Amendment constitutional violation, first in a footnote in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), and later at greater length in *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006). In both *Claypool* and *Drohan*, this Court concluded that the *Apprendi*/*Blakely* rule did not apply to Michigan's sentencing scheme at all. This Court reached this conclusion on the basis of its determination that the *Apprendi*/*Blakely* rule was inapplicable to our "indeterminate" scheme. We reasoned in part that "the trial court's power to impose a sentence is always derived from the jury's verdict" because the jury's verdict authorized the "statutory maximum" sentence set by statute. *Drohan*, 475 Mich at 161-162.

In *Alleyne*, the Supreme Court overruled *Harris* and for the first time concluded that mandatory minimum sentences were equally subject to the *Apprendi* rule, holding that "a fact increasing *either end of the range* produces a new penalty and constitutes an ingredient of the offense." *Alleyne*, 570 US at ___; 133 S Ct at 2160 (emphasis added). *Alleyne*, like *Harris*, involved a statute that provided for a mandatory minimum sentence of five years, but that mandatory minimum increased to seven years if it was determined that the defendant had "brandished" a firearm. The Court con-

cluded that there was "no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum," *id*. at 2163, but noted that its holding did not restrict fact-finding used to guide judicial discretion in selecting a punishment within the limits fixed by law, *id*. Justice Breyer concurred separately, explaining that while he "continue[d] to disagree with *Apprendi*," he nevertheless believed that it was "highly anomalous to read *Apprendi* as insisting that juries find sentencing facts that *permit* a judge to impose a higher sentence while not insisting that juries find sentencing facts that *require* a judge to impose a higher sentence." *Id*. at 2166-2167 (Breyer, J., concurring).

III. ANALYSIS

A Sixth Amendment challenge presents a question of constitutional law that this Court reviews de novo. *Drohan*, 475 Mich at 146.

The defendant argues that because *Alleyne* extended the *Apprendi* rule from statutory maximum sentences to mandatory minimum sentences, Michigan's sentencing guidelines are no longer immune from that rule. We agree. From *Apprendi* and its progeny, including *Alleyne*, we believe the following test provides the proper inquiry for whether a scheme of mandatory minimum sentencing violates the Sixth Amendment: Does that scheme constrain the discretion of the sentencing court by compelling an increase in the mandatory minimum sentence beyond that authorized by the jury's verdict alone? Michigan's sentencing guidelines do so to the extent that the floor of the guidelines range compels a trial judge to impose a mandatory minimum sentence beyond that authorized by the jury verdict. Stated differently, to the extent that OVs scored on the

basis of facts not admitted by the defendant or necessarily found by the jury verdict increase the floor of the guidelines range, i.e., the defendant's "mandatory minimum" sentence, that procedure violates the Sixth Amendment.

The pertinent language in *Alleyne* supports this conclusion. "Elevating the low-end of a sentencing range heightens the loss of liberty associated with the crime: the defendant's 'expected punishment has increased as a result of the narrowed range' and 'the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish.' " *Alleyne*, 570 US at ___; 133 S Ct at 2161, quoting *Apprendi*, 530 US at 522 (Thomas, J., concurring). Similarly, by virtue of the fully scored sentencing guidelines, a judge is required to "impose a higher punishment than he might wish." Just as the judge's finding that there was "brandishing" in *Alleyne* aggravated the penalty in that case by increasing the floor of the range prescribed by law,[13] the OV scoring judges must do as part of our system increases the bottom of the mandatory guidelines range used to set the minimum sentence.

In criticizing the *Alleyne* majority's extension of the *Apprendi* rule, Chief Justice Roberts's dissenting opinion also had language supporting this conclusion. He wrote:

> Under the rule in place until today, *a legislature could tell judges that certain facts carried certain weight, and require the judge to devise a sentence based on that weight—so long as the sentence remained within the range authorized by the jury*. Now, in the name of the jury right that formed a barrier between the defendant and the State, the majority has erected a barrier between judges

[13] *Alleyne*, 570 US at ___; 133 S Ct at 2160, 2163.

> and legislatures, establishing that discretionary sentencing is the domain of judges. Legislatures must keep their respectful distance. [*Alleyne*, 570 US at ___; 133 S Ct at 2170-2171 (Roberts, C.J., dissenting) (emphasis added).]

In other words, unrestrained judicial discretion within a broad range is in; legislative constraints on that discretion that increase a sentence (whether minimum or maximum) beyond that authorized by the jury's verdict are out.

In *Herron*, the Court of Appeals found no constitutional flaw in our sentencing guidelines, reasoning in part that judicial fact-finding in our guidelines scheme is permissible because it is used only to "inform the trial court's sentencing discretion within the maximum determined by statute and the jury's verdict." *Herron*, 303 Mich App at 403.[14] We reject this analysis because it ignores two key aspects of the *Apprendi* rule as extended by *Alleyne*: (1) the fact-finding is used to *constrain*, not merely inform, the court's sentencing discretion by increasing the mandatory minimum sentence and (2) because *Alleyne* now prohibits increasing the *minimum* as well as the maximum sentence in this manner, it is insufficient to say that the guidelines scheme is constitutional because the *maximum* is set by statute and authorized by the jury's verdict.

Consider this example: a defendant with no prior record who is convicted of kidnapping, MCL 750.349, a Class A offense, MCL 777.16q, which carries a statutory maximum sentence of life in prison. Assume further that no facts necessary to score any of the OVs are admitted by the defendant or necessarily found by

[14] To the extent that the *Herron* panel's analysis rested on its determination that the sentencing guidelines do not establish a "mandatory minimum" sentence, we reject it for the reasons discussed in Part III(C) of this opinion.

the jury as part of the verdict. Under our sentencing guidelines, that defendant would be subject to a minimum sentence of no less than 21 months (the bottom of the applicable guidelines range)[15] and a maximum sentence of life (the statutory maximum).[16] If this were the end of the road and the trial court were free to sentence the defendant anywhere within this range, we would agree that no Sixth Amendment impediment exists.

But there is more. MCL 777.21(1)(a) and MCL 777.22(1) direct courts to score OVs 1 through 4, 7 through 14, 19, and 20 for crimes against a person, a designation that applies to kidnapping, MCL 777.16q. Under this hypothetical situation, a trial court could find facts not found by a jury or admitted by the defendant that could potentially increase the floor of the defendant's minimum sentence from 21 months to as much as 108 months. MCL 777.62. Those facts are "fact[s] increasing either end of the range" of penalties to which a defendant is exposed, *Alleyne*, 570 US at ___; 133 S Ct at 2160, and therefore the process violates the Sixth Amendment.

The example provided by the *Blakely* Court of what differentiated a constitutionally permissible "indeterminate" sentencing scheme from an impermissible one, which the *Drohan* Court quoted and the dissent here also quotes, further illustrates this point:

> In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the

[15] MCL 777.62. Because the top of the guidelines range does not implicate the Sixth Amendment, it is not relevant to this hypothetical and we therefore do not discuss it.

[16] MCL 750.349.

> burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury. [*Blakely*, 542 US at 309.]

Michigan's sentencing scheme is not like the first example, in which a court has unfettered discretion to impose a sentence within a range authorized by the jury's verdict. Rather, it is more akin to the latter example. Guidelines scored solely on a defendant's admissions and prior convictions set a baseline minimum sentence (i.e., 10 years in the *Blakely* example or 21 months in our hypothetical example), with additional time added by aggravating factors (such as possession or use of a gun, as in the *Blakely* example): the OVs, which are generally scored on the basis of facts found by the court rather than a jury. The sentencing court's authority to score the OVs is constrained by law.[17] A defendant's possible minimum sentence is increased as a result of that scoring, and the court is constrained to impose a minimum sentence in conformity with the applicable guidelines range that is increased by the scoring of those OVs. Thus, Michigan does indeed have a system that punishes an offense with a baseline minimum sentence of no less than X months, with the potential for Y months to be added for the use of a gun, Z months to be added for killing a victim, and so forth. This reality could be ignored when *Drohan* was decided because the *Apprendi* rule applied only to "statutory maximums" and scoring the sentencing guidelines and establishing the guidelines minimum sentence range does not alter the

[17] See, e.g., MCL 777.31(1) (directing that the OV be scored by "determining which of the following [circumstances] apply and by assigning the number of points attributable to the one that has the highest number of points"); *People v Houston*, 473 Mich 399, 407; 702 NW2d 530 (2005).

maximum sentence. But that analysis is no longer sustainable in light of *Alleyne*'s extension of the *Apprendi* rule to minimum sentences.

In *Drohan*, this Court analyzed the evolution of the *Apprendi* rule and concluded that the "statutory maximum" sentence in Michigan for *Apprendi/Blakely* purposes is generally the maximum sentence set by the statute setting forth the elements of the offense at issue. *Drohan*, 475 Mich at 164. Accordingly, because at that time the *Apprendi* rule only applied to *maximum* sentences, not minimums, and judicial fact-finding to set the guidelines range only affected *minimum* sentences, we held that Michigan's sentencing guidelines scheme did not violate the Sixth Amendment. On this point, *Drohan* necessarily relied on *Harris*'s holding that the *Apprendi* rule did not apply to minimum sentences. *Harris*, 536 US at 568.

Alleyne changed that. In *Alleyne*, the United States Supreme Court overruled *Harris* and held for the first time that the *Apprendi* rule applied with equal force to minimum sentences. *Alleyne*, 570 US at ___; 133 S Ct at 2155. With minimum sentences now also relevant to the Sixth Amendment analysis, the statutory authority of the court *can* infringe the constitutional authority of the jury because the guidelines used to set the minimum sentence require a court to increase a defendant's minimum sentence beyond the minimum sentence authorized by the jury's verdict alone. To the extent that *Drohan* asserted that our sentencing scheme is constitutional because the jury verdict always authorizes the maximum sentence provided by law, that analysis is no longer sufficient to complete the constitutional analysis in light of *Alleyne*; rather, under *Alleyne*, the Legislature may not require judicial fact-finding that results in a mandatory increase in

either the minimum or maximum sentence beyond the range set by the jury verdict.

Therefore, a straightforward application of the language and holding in *Alleyne* leads to the conclusion that Michigan's sentencing guidelines scheme violates the Sixth Amendment. The prosecution and amici curiae do not dispute the holding in *Alleyne*, but instead advance three arguments in an attempt to sidestep it. First, it is asserted that just as we concluded in *Drohan*, the *Apprendi* rule (as now extended by *Alleyne*) does not apply to Michigan's sentencing scheme because that scheme is "indeterminate." Second, Michigan's sentencing guidelines do not violate the Sixth Amendment because the minimum sentences they set merely establish a parole eligibility date rather than an absolute prison release date and there is no constitutional right to parole. Third, the minimum sentence set by the sentencing guidelines is not a "mandatory minimum" sentence for purposes of *Alleyne*. For the reasons that follow, we reject each of these arguments.

A. MICHIGAN'S "INDETERMINATE" SENTENCING SCHEME

The prosecution and the dissent rely primarily on their conclusion that the *Apprendi* rule does not apply to "indeterminate" sentencing schemes like Michigan's to dismiss the defendant's constitutional claim. It is certainly correct that the United States Supreme Court has repeatedly distinguished between "determinate" and "indeterminate" sentencing systems and referred to the latter as not implicating Sixth Amendment concerns and that *Alleyne* did nothing to alter or undermine that distinction. Because we are bound by the United States Supreme Court's decisions interpreting the Sixth Amendment such as *Apprendi* and *Al-*

leyne, however, it is critical to understand exactly what those terms mean in that context rather than in the abstract. And significantly, Michigan's sentencing scheme is not "indeterminate" as the United States Supreme Court has ever applied that term.[18]

In *Blakely*, in responding to the dissent, the majority stated, without defining its terms, that "indeterminate" sentencing schemes would not violate the *Apprendi* rule. In quoted language relied on heavily by the prosecution and the dissent in this case, the Court asserted:

> By reversing the judgment below, we are not, as the State would have it, "find[ing] determinate sentencing schemes unconstitutional." This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment. . . .
>
> JUSTICE O'CONNOR argues that, because determinate-sentencing schemes involving judicial fact-finding entail less judicial discretion than indeterminate schemes, the constitutionality of the latter implies the constitutionality of the former. This argument is flawed on a number of levels. First, the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. *Indeterminate sentencing does not do so.* It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial fact-finding, in that a judge (like a parole board) may implicitly rule on those facts he deems

[18] In *Drohan*, we cited the definition of "indeterminate sentence" from *Black's Law Dictionary* (8th ed): a sentence "of an unspecified duration, such as one for a term of 10 to 20 years." *Drohan*, 475 Mich at 153 n 10. *Drohan* was correct to say that Michigan has an indeterminate sentencing scheme under that definition of the term.

> important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has *a legal right to a lesser sentence*—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. [*Blakely*, 542 US at 308-309 (citations omitted) (emphasis added).]

The *Blakely* dissent, however, identified states with both indeterminate and determinate (as *Drohan* understood those terms) sentencing schemes as ones that *Blakely* cast "constitutional doubt" over because they had "guidelines systems." *Id*. at 323 (O'Connor, J., dissenting). Michigan was among the states listed. *Id*. Legal commentators have also noted that the United States Supreme Court has never referred to Michigan's sentencing scheme as "indeterminate" for constitutional purposes and that Justice O'Connor's *Blakely* dissent suggested the opposite; rather, the Court's focus in discussing "indeterminate" schemes has been on the absence of mandatory constraints placed on a court's discretion when sentencing a defendant within a range of possible sentences. See Hall, *Mandatory Sentencing Guidelines by Any Other Name: When "Indeterminate Structured Sentencing" Violates* Blakely v Washington, 57 Drake L Rev 643, 669 & n 139 (2009) (hereinafter, *Mandatory Sentencing Guidelines*) (stating that "in *Blakely*, the Supreme Court understood an indeterminate sentencing regime to be one in which the sentencing judge enjoys 'unfettered discretion' within statutory and constitutional limits, and that a mandatory sentencing guidelines system, *even when used in conjunction with a parole board*, is fundamentally inconsistent with this definition of indeterminate sentencing") (emphasis added); Ball, *Heinous, Atrocious, and Cruel:* Apprendi, *Indeterminate Sentencing, and the Meaning of Punishment*, 109 Colum L Rev 893, 907 (2009) (observing that the United States Supreme

Court has used " 'indeterminate' to mean 'advisory' and 'determinate' to mean 'binding' (i.e., determinative of the outcome)"); see also *Cunningham v California*, 549 US 270, 291-292; 127 S Ct 856; 166 L Ed 2d 856 (2007) ("Merely advisory provisions, recommending but not requiring the selection of particular sentences in response to differing sets of facts . . . would not implicate the Sixth Amendment."), quoting *Booker*, 543 US at 233 (quotation marks omitted); *Alleyne*, 133 S Ct at 2165 (Sotomayor, J., concurring) (observing that the United States Supreme Court has "applied *Apprendi* to strike down *mandatory sentencing systems* at the state and federal levels") (emphasis added).[19] At least one other court has also recognized that the United States Supreme Court has used the term "indeterminate" "imprecisely." *Commonwealth v Yuhasz*, 592 Pa 120, 133 n 4; 923 A2d 1111 (2007).[20] And at no time has the

[19] The United States Supreme Court cases that refer to "indeterminate sentencing" and then immediately stress the exercise of vast judicial discretion within broad sentencing ranges as the centerpiece of such a system are too numerous to cite here. For but a few additional examples, see *Almendarez-Torres*, 523 US at 245-246 (discussing how judges "have typically exercised their discretion within broad statutory ranges" and then citing a source discussing the "history of indeterminate sentencing"); *Mistretta v United States*, 488 US 361, 363; 109 S Ct 647; 102 L Ed 2d 714 (1989) (discussing the federal government's longstanding practice of indeterminate sentencing as one in which "[s]tatutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long"); *Jones*, 526 US at 271 (Kennedy, J., dissenting) (contrasting "a system of indeterminate sentencing *or a grant of vast discretion to the trial judge*" and "a regime in which there are more uniform penalties, prescribed by the legislature") (emphasis added). To the extent that the dissent criticizes our analysis on this point as "entirely speculative," and unsupported by binding authority, it simply ignores this footnote and cases cited in the accompanying text.

[20] Crucially, the *Yuhasz* Court cited this imprecision as a reason to hold that the fact that its guidelines scheme is advisory, not its indeterminate nature, made the scheme constitutionally sound.

Supreme Court specifically defined its use of the term or defined it by reference to *Black's Law Dictionary*.

Accordingly, the relevant distinction between constitutionally permissible "indeterminate" sentencing schemes and impermissible "determinate" sentencing schemes, as the United States Supreme Court has used those terms, turns not on whether the sentences produced by them contain one or two numbers;[21] rather, it turns on whether judge-found facts are used to curtail judicial sentencing discretion by *compelling* an increase in the defendant's punishment. If so, the system violates the Sixth Amendment. Michigan's sentencing guidelines do just that.

Because Michigan's sentencing scheme is not "indeterminate" as that term has been used by the United States Supreme Court, our sentencing guidelines scheme cannot be exempt from the *Apprendi* and *Alleyne* rule on that basis. And the escape hatch that *Harris* provided for *Drohan*—that *Apprendi* applied only to maximum sentences and the statutory maximums in Michigan are set by law and therefore never increased based on judge-found facts—has been sealed by *Alleyne*.

B. NO CONSTITUTIONAL RIGHT TO PAROLE

In a permutation of its "indeterminate" sentencing argument, the dissent also contends that Michigan's sentencing scheme does not violate *Alleyne* because a defendant's minimum sentence merely determines when that defendant is eligible for parole consider-

[21] Indeed, to reach that conclusion would be to ignore *Alleyne*'s clear acknowledgment that there could be *two* constitutionally significant sentences: a mandatory minimum and a statutory maximum. That only one number might exist in a given case seems of little relevance to the analysis.

ation and there is no constitutional entitlement to parole. This argument was not raised by the prosecution, but was advanced instead by the Attorney General in an amicus curiae brief. We have no quarrel with the general proposition that a defendant has no constitutional entitlement to be paroled, as that proposition is well established by *Greenholtz v Inmates of Nebraska Penal & Correctional Complex*, 442 US 1, 7; 99 S Ct 2100; 60 L Ed 2d 668 (1979), but we do not see its relevance here. The right at issue includes the Sixth Amendment right to a jury trial, not just the due-process right to be free of deprivation of one's liberty that was at issue in *Greenholtz*.[22] And that right includes the right to have a "jury determination" of all the pertinent facts used in *increasing the prescribed range of penalties, including both the minimum and the maximum sentences*. The violation of *that* right occurs well before a defendant even begins serving that sentence. *Alleyne*, 570 US at ___; 133 S Ct at 2160 (noting that "a fact increasing either end of the range produces *a new penalty* and constitutes an ingredient of the offense" that must be found by a jury). The failure to have the jury find an element establishing "a distinct and aggravated crime," *id*. at ___; 133 S Ct at 2163, not the resulting sentence, is the constitutional deficiency, *id*. at ___; 133 S Ct at 2162 (observing that "if a judge were to find a fact that increased the statutory maximum sentence, such a finding would violate the Sixth Amendment, *even if the defendant*

[22] We do not dispute the dissent's correct contention that *Apprendi* and *Alleyne* stated that they implicate both the Sixth Amendment right to a jury trial and the Fourteenth Amendment right to due process. *Post* at 438 n 25. But it is for the very reason that *both* of these rights are implicated that *Greenholtz* and other cases involving only the latter necessarily cannot answer the question before us. Rather, it is *Apprendi* and *Alleyne*, cases that implicate *both* rights, that are "highly relevant to the analysis."

ultimately received a sentence falling within the original sentencing range") (emphasis added). Accordingly, the assertion that a defendant has no constitutional right to serve less than his or her maximum sentence is entirely correct, but also entirely beside the point. King & Applebaum, Alleyne *on the Ground: Factfinding That Limits Eligibility for Probation or Parole Release*, 26 Fed Sent Rep 287, 289 (2014) ("The minimum sentence that matters in *Alleyne* is the floor of the *range available to the sentencing judge*, the penalty 'affixed to the crime,' not the sentence that might *actually be served* by the offender. That a paroling authority may ultimately decide not to release the defendant when he first becomes eligible is irrelevant."). Neither the dissent nor the Attorney General cites any other case for the novel proposition that application of the *Apprendi* rule hinges on whether a defendant is entitled to immediate release upon completion of the sentence at issue or whether the defendant is simply eligible for release or to be paroled.[23]

Finally, it is worth noting that this argument is not supported by other state court decisions applying *Alleyne* to their sentencing schemes. See, e.g., *State v Soto*, 299 Kan 102; 322 P3d 334 (2014) (rejecting as unconstitutional under *Alleyne* a statute that provided for a prison sentence of life with 50 years before the *possibility of parole*). And at bottom, what this argument ignores is that in *Alleyne*, the Supreme Court held that like a maximum sentence, a minimum sentence enhanced by judicial fact-finding also implicates

[23] The dissent briefly cites *Wolff v McDonnell*, 418 US 539; 94 S Ct 2963; 41 L Ed 2d 935 (1974), and *Morrissey v Brewer*, 408 US 471; 92 S Ct 2593; 33 L Ed 2d 484 (1972), but both of those cases involve a criminal defendant's rights in parole proceedings. Thus, they are as inapposite here as *Greenholtz*.

the Sixth Amendment jury-trial protection. It is therefore no answer to say that *Alleyne* is inapplicable here because a defendant has no constitutional right to parole.

C. "MANDATORY MINIMUM" SENTENCES UNDER *ALLEYNE*

The prosecution and the dissent's final basis for concluding that *Alleyne* does not apply to our sentencing guidelines scheme is that the guidelines do not produce "mandatory minimum" sentences for *Alleyne* purposes. We again disagree.

First, this argument seems to assume that *Alleyne* applies only to what one might consider traditional mandatory minimums, statutes that provide that upon conviction of an offense, the court "*shall* sentence the defendant to a term of imprisonment of *not less* than" x number of years. This fails to account for the broad nature of the *Apprendi* rule generally that " 'facts that increase *the prescribed range of penalties* to which a criminal defendant is exposed' " must be established by proof beyond a reasonable doubt. *Apprendi*, 530 US at 490, quoting *Jones*, 526 US at 252-253 (emphasis added). While *Alleyne* applied this rule to a mandatory minimum sentence, and therefore necessarily spent a great deal of time articulating how the mandatory minimum sentence in that case violated *Apprendi*, it also reemphasized that the Sixth Amendment applies to facts used to set the *range* of sentences to which a defendant is exposed. *Alleyne*, 570 US at ___; 133 S Ct at 2160 ("[B]ecause the legally prescribed range *is* the penalty affixed to the crime, . . . it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense."). Thus, *Alleyne* cannot be dismissed as inapplicable simply because

the statute at issue in that case looks different from our statutory guidelines scheme or because *Alleyne* only applies to the traditional mandatory minimum sentences mentioned previously. As long as the minimum sentence is "mandatory," i.e., required by law, *Alleyne* applies.

More importantly, the core argument that the guidelines do not produce "mandatory" minimum sentences is itself incorrect. The guidelines minimum sentence range *is* binding on trial courts, absent their articulating substantial and compelling reasons for a departure. The dissent notes that MCL 769.34(4)(a) labels the guidelines ranges as "recommended minimum sentence ranges," but elsewhere the same statute states that "the minimum sentence imposed by a court of this state . . . *shall* be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed." MCL 769.34(2) (emphasis added). As we have stated many times, "shall" indicates a *mandatory* directive. *Fradco, Inc v Dep't of Treasury*, 495 Mich 104, 114; 845 NW2d 81 (2014). This is precisely the analysis the United States Supreme Court engaged in in *Booker*, when it invalidated the federal sentencing guidelines because it concluded they were mandatory. *Booker*, 543 US at 233-234 ("The Guidelines as written, however, are not advisory; they are mandatory and binding on all judges. While subsection (a) of § 3553 of the sentencing statute lists the Sentencing Guidelines as one factor to be considered in imposing a sentence, subsection (b) directs that the court '*shall* impose a sentence of the kind, and within the range' established by the Guidelines, subject to departures in specific, limited cases."). Accordingly, Michigan's guidelines produce sentences that are just as mandatory as those at issue in *Alleyne*.

But, the dissent asserts, the availability of a sentence departure from the guidelines renders them not truly mandatory. This argument must necessarily reject language from *Booker* that specifically stated that the availability of a departure "does not avoid the constitutional issue . . . ." *Id*. at 234; see also *Blakely*, 542 US at 305 n 8 (stating that that a judge "cannot make that judgment [that compelling reasons exist to depart from the guidelines] without finding some facts to support it beyond the bare elements of the offense" and that "[w]hether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence"). Much of the dissent's basis for rejecting the *Booker* language, however, hinges on its earlier erroneous conclusion that *Alleyne* does not apply to our "indeterminate" sentencing scheme.[24] To the extent that the dissent's rejection of this language rests on *Drohan*, we see nothing in that opinion to indicate that the *Drohan* Court rejected or even considered this language in reaching its decision. For these reasons, we conclude that Michigan's sentencing guidelines produce a "mandatory minimum" sentence to which *Alleyne* applies.[25]

Because the rule from *Alleyne* applies, the Sixth Amendment does not permit judicial fact-finding to

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[24] See *post* at 444 ("[A]nything the Supreme Court has said about upward departures in a determinate system cannot reflexively be applied to an indeterminate system.").

[25] The dissent implies that 11 federal courts of appeal have rendered decisions to the contrary. We do not agree. First, to be clear, none of those courts has rendered a decision on whether *Michigan's* sentencing guidelines produce "mandatory minimum" sentences. Second, to the extent that those courts have held that "judicial fact-finding does not implicate *Alleyne* if there is no 'mandatory minimum' sentence involved," *post* at 446, we agree with them. But to say that those decisions support the dissent's analysis simply begs the question: Do Michigan's sentencing guidelines produce a "mandatory minimum" sentence?

score OVs to increase the floor of the sentencing guidelines range. The right to a jury trial is "a fundamental reservation of power in our constitutional structure," *Blakely*, 542 US at 306, and therefore one that cannot be restricted in this manner.

IV. REMEDY

Having concluded that Michigan's sentencing guidelines violate the Sixth Amendment rule from *Apprendi*, as extended by *Alleyne*, we must determine the appropriate remedy for the violation. We consider three options.

First, the defendant asks us to require juries to find the facts used to score all the OVs that are not admitted or stipulated by the defendant or necessarily found by the jury's verdict. We reject this option. The constitutional violation can be effectively remedied without burdening our judicial system in this manner, which could essentially turn sentencing proceedings into mini-trials. And the United States Supreme Court in *Booker* expressly rejected this remedy because of the profound disruptive effect it would have in every case. *Booker*, 543 US at 248 ("It would affect decisions about whether to go to trial. It would affect the content of plea negotiations. It would alter the judge's role in sentencing.").[26] We agree.

Second, we consider the remedy suggested in Judge SHAPIRO's concurring opinion in this case, which would render advisory only the floor of the applicable guide-

[26] In asserting that in *Alleyne* the "narrow" remedy imposed was "that facts increasing the minimum sentence must be submitted to the jury" and suggesting that we adopt that remedy, the dissent is effectively proposing that we should do just this. For the reasons given, we do not see this remedy as "narrow" given its potential for disruptive effects, which the dissent does not acknowledge.

lines range. *Lockridge*, 304 Mich App at 316 (opinion by SHAPIRO, J.). While we believe that this is a less disruptive remedy that is fairly closely tailored to the constitutional violation, we decline to adopt it because it would require us to significantly rewrite MCL 769.34(2), which provides in part:

> Except as otherwise provided in this subsection or for a departure from the appropriate minimum sentence range provided for under subsection (3), *the minimum sentence imposed by a court of this state for a felony enumerated in* [MCL 777.11 through MCL 777.19] *committed on or after January 1, 1999 shall be within the appropriate sentence range* under the version of those sentencing guidelines in effect on the date the crime was committed. [Emphasis added.]

The legislative intent in this provision is plain: the Legislature wanted the applicable guidelines minimum sentence range to be mandatory in all cases (other than those in which a departure was appropriate) at both the top and bottom ends. Opening up only one end of the guidelines range, even if curing the constitutional violation, would be inconsistent with the Legislature's expressed preference for equal treatment. See *Booker*, 543 US at 248 ("In today's context—a highly complex statute, interrelated provisions, and a constitutional requirement that creates fundamental change—*we cannot assume that Congress, if faced with the statute's invalidity in key applications, would have preferred to apply the statute in as many other instances as possible*.") (emphasis added). And it would require a significant rewrite of the statutory language to maintain the mandatory nature of the guidelines ceiling but render the guidelines floor advisory only. Accordingly, we decline to limit the remedy for the constitutional infirmity to the floor of the guidelines range.

Third, the prosecution, in turn, asks us to *Booker*-ize the Michigan sentencing guidelines, i.e., render them advisory only. We agree that this is the most appropriate remedy. First, it is the same remedy adopted by the United States Supreme Court in *Booker*.[27] Second, it requires the least judicial rewriting of the statute, as we need only substitute the word "may" for "shall" in MCL 769.34(2) and remove the requirement in MCL 769.34(3) that a trial court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure.

Like the Supreme Court in *Booker*, however, we conclude that although the guidelines can no longer be mandatory, they remain a highly relevant consideration in a trial court's exercise of sentencing discretion. Thus, we hold that trial courts "must consult those Guidelines and take them into account when sentencing." *Booker*, 543 US at 264. Such a system, while "not the system [the legislature] enacted, nonetheless continue[s] to move sentencing in [the legislature's] preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Id*. at 264-265.

Accordingly, we sever MCL 769.34(2) to the extent that it is mandatory and strike down the requirement of a "substantial and compelling reason" to depart from the guidelines range in MCL 769.34(3). When a defendant's sentence is calculated using a guidelines minimum sentence range in which OVs have been scored on

[27] Thus, to the extent that the Constitution requires a certain degree of precision to remedy the constitutional violation, adopting the *Booker* remedy most carefully ensures that we remain faithful to its dictates. Accordingly, while it is unfortunate that the dissent finds the reasons for our adoption of this remedy unpersuasive, for this and our other reasons stated we believe it to be the most prudent course under the circumstances.

the basis of facts not admitted by the defendant or found beyond a reasonable doubt by the jury,[28] the sentencing court may exercise its discretion to depart from that guidelines range without articulating substantial and compelling reasons for doing so. A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness. *Booker*, 543 US at 261. Resentencing will be required when a sentence is determined to be unreasonable. Because sentencing courts will hereafter not be *bound* by the applicable sentencing guidelines range, this remedy cures the Sixth Amendment flaw in our guidelines scheme by removing the unconstitutional constraint on the court's discretion. Sentencing courts must, however, continue to consult the applicable guidelines range and take it into account when imposing a sentence. Further, sentencing courts must justify the sentence imposed in order to facilitate appellate review. *People v Coles*, 417 Mich 523, 549; 339 NW2d 440 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644; 461 NW2d 1 (1990).

V. APPLICATION TO THIS DEFENDANT

The defendant did not object to the scoring of the OVs at sentencing on *Apprendi/Alleyne* grounds, so our review is for plain error affecting substantial rights. *Carines*, 460 Mich at 763, 774.[29] To establish entitle-

[28] Our holding today does nothing to undercut the requirement that the highest number of points possible *must be* assessed for all OVs, whether using judge-found facts or not. See MCL 777.21(1)(a) (directing that the offense variables applicable to the offense category at issue be scored); see also, e.g., MCL 777.31(1) (directing that the "highest number of points" possible be scored); MCL 777.32(1) (same); etc.

[29] The United States Supreme Court has applied plain-error review to unpreserved *Apprendi* errors. See *United States v Cotton*, 535 US 625;

ment to relief under plain-error review, the defendant must establish that an error occurred, that the error was plain, i.e., clear or obvious, and that the plain error affected substantial rights. *Id*. at 763. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id*. Finally, even if a defendant satisfies those three requirements, an appellate court must exercise its discretion in deciding whether to reverse. *Id*. Reversal is warranted only when the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings independently of the defendant's innocence. *Id*. at 763-764.

The defendant received a total of 70 OV points and had 35 points assessed for prior record variables, placing him in the D-V cell of the sentencing grid for Class C offenses. MCL 777.64. That cell calls for a minimum sentence of 43 to 86 months. The defendant concedes that the jury verdict necessarily established the factual basis to assess 25 points for OV 3 and 10 points for OV 6. Assuming arguendo that the facts necessary to score OV 5 at 15 points and OV 9 and OV 10 at 10 points each were not established by the jury's verdict or admitted by the defendant, and yet those facts were used to increase the defendant's mandatory minimum sentence, violating the Sixth Amendment,[30]

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122 S Ct 1781; 152 L Ed 2d 860 (2002). It has also held that *Apprendi* errors are not structural errors, *Washington v Recuenco*, 548 US 212; 126 S Ct 2546; 165 L Ed 2d 466 (2006), so to the extent that "our caselaw suggests that a plain structural error satisfies the third *Carines* prong," *People v Vaughn*, 491 Mich 642, 666; 821 NW2d 288 (2012), it is not implicated here.

[30] For the reasons explained in Part III(B) of this opinion, the right at issue is a procedural one, i.e., the right to have a "jury determination" of all the pertinent facts used in increasing the prescribed range of penalties, including both the minimum and the maximum sentence.

the defendant nevertheless is not entitled to resentencing. Because he received an upward departure sentence that did not rely on the minimum sentence range from the improperly scored guidelines (and indeed, the trial court necessarily had to state on the record its reasons for *departing* from that range), the defendant cannot show prejudice from any error in scoring the OVs in violation of *Alleyne*. See note 31 of this opinion.

VI. APPLICATION TO OTHER DEFENDANTS

Although we have held that the defendant in this case cannot satisfy the plain-error standard, we nevertheless must clarify how that standard is to be applied in the many cases that have been held in abeyance for this one. This analysis is particularly important because, given the recent origin of *Alleyne*, virtually all of those cases involve challenges that were not preserved in the trial court.

First, we consider cases in which (1) facts admitted by the defendant and (2) facts found by the jury were sufficient to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced. In those cases, because the defendant suffered

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Thus, a constitutional error occurs regardless of whether the error has a substantive effect on the defendant's sentence. *Alleyne* makes this plain. *Alleyne*, 570 US at ___; 133 S Ct at 2162-2163 ("[I]f a judge were to find a fact that increased the statutory maximum sentence, such a finding would violate the Sixth Amendment, *even if the defendant ultimately received a sentence falling within the original sentencing range* (*i.e.*, the range applicable without that aggravating fact). . . . The essential point is that the aggravating fact produced a higher range . . . . [T]here is no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum.") (emphasis added).

Thus, whether that error *actually* increases the floor of a defendant's minimum sentence range under the guidelines is only relevant to the question of whether the defendant has suffered any prejudice.

no prejudice from any error, there is no plain error and no further inquiry is required.

Second, we consider the converse: cases in which facts admitted by a defendant or found by the jury verdict were *insufficient* to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced. In those cases, it is clear from our previous analysis that an unconstitutional constraint actually impaired the defendant's Sixth Amendment right. The question then turns to which of these defendants is entitled to relief, i.e., which can show plain error.

We conclude that all defendants (1) who can demonstrate that their guidelines minimum sentence range was actually constrained by the violation of the Sixth Amendment and (2) whose sentences were not subject to an upward departure[31] can establish a threshold showing of the potential for plain error sufficient to warrant a remand to the trial court for further inquiry. We reach this conclusion in part on the basis of our agreement with the following analysis from *United States v Crosby*, 397 F3d 103, 117-118 (CA 2, 2005):

> Some might suppose that the only choice for an appellate court in a case presenting a procedural error in imposing a sentence is between disregarding the error and

[31] In cases such as this one that involve a minimum sentence that is an upward departure, a defendant necessarily cannot show plain error because the sentencing court has already clearly exercised its discretion to impose a *harsher* sentence than allowed by the guidelines and expressed its reasons for doing so on the record. It defies logic that the court in those circumstances would impose a lesser sentence had it been aware that the guidelines were merely advisory. Thus, we conclude that as a matter of law, a defendant receiving a sentence that is an upward departure cannot show prejudice and therefore cannot establish plain error.

requiring a new sentencing. However, the choice is not so limited. . . . Bearing in mind the several considerations outlined above that shape the context in which a disposition decision is to be made, we conclude that the "further sentencing proceedings" generally appropriate for pre-*Booker*/*Fanfan*[32] sentences pending on direct review will be a remand to the district court, not for the purpose of a required resentencing, but only *for the more limited purpose of permitting the sentencing judge to determine whether to resentence, now fully informed of the new sentencing regime, and if so, to resentence*. . . .

A remand for determination of *whether* to resentence is appropriate in order to undertake a proper application of the plain error and harmless error doctrines. Without knowing whether a sentencing judge would have imposed a materially different sentence, . . . an appellate court will normally be unable to assess the significance of any error that might have been made. . . .

Obviously, any of the errors in the procedure for selecting the original sentence discussed in this opinion would be harmless, and not prejudicial under plain error analysis, if the judge decides on remand, in full compliance with now applicable requirements, that under the post-*Booker*/*Fanfan* regime the sentence would have been essentially the same as originally imposed. Conversely, a district judge's decision that the original sentence would have differed in a nontrivial manner from that imposed will demonstrate that the error in imposing the original sentence was harmful and satisfies plain error analysis.

In short, a sentence imposed under a mistaken perception of the requirements of law will satisfy plain error analysis if the sentence imposed under a correct understanding would have been materially different. [Some emphasis added.][33]

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[32] Fanfan was one of the respondents in *Booker*.

[33] The United States Court of Appeals for the Ninth Circuit has also adopted the *Crosby* remand procedure. See *United States v Ameline*, 409 F3d 1073 (CA 9, 2005). Further, the United States Court of Appeals for the Seventh Circuit and the United States Court of Appeals for the

Thus, in accordance with this analysis, in cases in which a defendant's minimum sentence was established by application of the sentencing guidelines in a manner that violated the Sixth Amendment, the case should be remanded to the trial court to determine whether that court would have imposed a materially different sentence but for the constitutional error. If the trial court determines that the answer to that question is yes, the court shall order resentencing. *Id*. at 118.

A few comments on the proper procedures for trial courts to follow on so-called *Crosby* remands are in order to ensure consistency and stability. First, consistently with *Crosby*, we hold that *Crosby* remands are warranted only in cases involving sentences imposed on or before July 29, 2015, the date of today's decision. Accordingly, for defendants sentenced after our decision today, the traditional plain-error review from *Carines* will apply. See *id*. at 116 ("In cases involving review of sentences imposed *after* the date of *Booker*/*Fanfan*, we would expect to apply these prudential doctrines [including plain-error review] in the customary manner.").

District of Columbia have adopted a similar remand procedure, although modifying it so that "the appellate court retains jurisdiction throughout the limited remand, and thus it is the *appellate court* that will 'vacate the sentence upon being notified by the judge that he would not have imposed it had he known that the guidelines were merely advisory.' " *United States v Coles*, 365 US App DC 280, 286; 403 F3d 764 (2005), quoting *United States v Paladino*, 401 F3d 471, 484 (CA 7, 2005). Other circuits have taken different approaches, creating a circuit split on the issue that more resembles a chasm. See, e.g., Nall, United States v Booker: *The Presumption of Prejudice in Plain Error Review*, 81 Chi-Kent L Rev 621, 635 (2006) (noting that "[e]ach of the twelve circuits has taken a slightly different tack in dealing with direct review of *Booker* error . . . ."). But as of yet, despite multiple petitions for certiorari asking it to address the issue, the United States Supreme Court has declined to clarify the proper approach. See, e.g., *Rodriguez v United States*, 545 US 1127; 125 S Ct 2935; 162 L Ed 2d 866 (2005).

Second, we conclude that a trial court considering a case on a *Crosby* remand should first and foremost "include an opportunity for a defendant to avoid resentencing by promptly notifying the [trial] judge that resentencing will not be sought." *Id*. at 118. If the defendant does not so notify the court, it "should obtain the views of counsel, at least in writing, but 'need not' require the presence of the Defendant," in "reaching its decision (with or without a hearing) whether to resentence." *Id*. at 120. Upon making that decision, the trial court shall "either place on the record a decision not to resentence, with an appropriate explanation, or vacate the sentence and, with the Defendant present, resentence in conformity with" this opinion. *Id*.

Stated differently, on a *Crosby* remand, a trial court should first allow a defendant an opportunity to inform the court that he or she will not seek resentencing. If notification is not received in a timely manner, the court (1) should obtain the views of counsel in some form, (2) may but is not required to hold a hearing on the matter, and (3) need not have the defendant present when it decides whether to resentence the defendant, but (4) must have the defendant present, as required by law,[34] if it decides to resentence the defendant. Further, in determining whether the court would have imposed a materially different sentence but for the unconstitutional constraint, the court should consider only the "circumstances existing at the time of the original sentence." *Id*. at 117; see also *United States v Ferrell*, 485 F3d 687, 688 (CA 2, 2007) (holding that the trial court's failure to consider the circumstances as they existed at the time of the resentencing hearing, including evidence of the defendant's post-

[34] MCR 6.425.

judgment prison rehabilitation, did not violate the defendant's due process rights).

VII. CONCLUSION

Because Michigan's sentencing guidelines scheme allows judges to find by a preponderance of the evidence facts that are then used to compel an increase in the mandatory minimum punishment a defendant receives, it violates the Sixth Amendment to the United States Constitution under *Alleyne*. We therefore reverse the judgment below and overrule the Court of Appeals' decision in *Herron*. To remedy the constitutional flaw in the guidelines, we hold that they are advisory only.

To make a threshold showing of plain error that could require resentencing, a defendant must demonstrate that his or her OV level was calculated using facts beyond those found by the jury or admitted by the defendant and that a corresponding reduction in the defendant's OV score to account for the error would change the applicable guidelines minimum sentence range. If a defendant makes that threshold showing and was not sentenced to an upward departure sentence, he or she is entitled to a remand to the trial court for that court to determine whether plain error occurred, i.e., whether the court would have imposed the same sentence absent the unconstitutional constraint on its discretion. If the trial court determines that it would not have imposed the same sentence but for the constraint, it must resentence the defendant.

We reverse the judgment of the Court of Appeals in part and affirm the defendant's sentence.

YOUNG, C.J., and KELLY, VIVIANO, and BERNSTEIN, JJ., concurred with MCCORMACK, J.

MARKMAN, J. (*dissenting*). Following a jury trial, defendant was convicted of involuntary manslaughter under MCL 750.321, which carries a statutory maximum sentence of 15 years. The trial court sentenced defendant to a term of 8 to 15 years after departing upward from the statutory sentencing guidelines range of 43 to 86 months for defendant's minimum sentence. The court calculated the range by scoring various offense and prior record variables under a preponderance of the evidence standard. Defendant appealed his sentence, asserting that it was imposed contrary to the United States Supreme Court's decision in *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), because his minimum sentence had been determined on the basis of facts that were not found by the jury beyond a reasonable doubt. The Court of Appeals affirmed defendant's sentence, and this Court granted leave to appeal to determine whether Michigan's "indeterminate" sentencing system, which allows a trial court to set a criminal defendant's minimum sentence, i.e., his or her parole eligibility date, on the basis of factors determined by a preponderance of the evidence, is in violation of the Sixth Amendment of the United States Constitution. The majority holds today that our state's sentencing system does, in fact, violate the Sixth Amendment. Because I respectfully disagree with this holding and do not believe our sentencing system violates the Constitution, I dissent.

I. FACTS AND HISTORY

The victim in this case, Ms. Kenyatta Lockridge, and defendant were married and had a history of domestic violence. This history resulted in defendant's being placed on probation, a condition of which was that he

not have contact with Ms. Lockridge or visit her residence. Defendant, however, continued to have contact with Ms. Lockridge and continued to live at her residence. On September 19, 2011, Ms. Lockridge accused defendant of stealing money from her purse and an argument ensued. The argument eventually turned violent when Ms. Lockridge punched defendant in the face twice. In response, defendant placed his arm around Ms. Lockridge's neck and proceeded to place her in a choke hold. Once Ms. Lockridge stopped resisting, defendant dropped her on the floor in front of their three daughters and left the house. Ms. Lockridge was declared dead at the hospital, the cause of her death being asphyxiation due to neck compression.

Defendant was charged with one count of open murder, MCL 750.316, and on May 4, 2012, the jury found defendant guilty of involuntary manslaughter, MCL 750.321. At sentencing, the trial court scored defendant's offense variables and prior record variables and determined that his offense variable level was 70 points and his prior record variable level was 35 points. See footnote 10 of this opinion. These figures placed defendant in the D-V cell of the Class C sentencing grid, which contains a recommended minimum guidelines range of 43 to 86 months. MCL 777.16p; MCL 777.64. The trial court further held that there were substantial and compelling reasons to depart upward from the guidelines range by 10 months, ultimately sentencing defendant to a term of 8 to 15 years. The trial court justified its departure by citing offense variables that assertedly failed adequately to take into account the psychological injury suffered by the victim's children, while also referring to defendant's willful disregard for the conditions of his probation.

Defendant appealed his sentence in the Court of Appeals. Pending that court's consideration, the Su-

preme Court decided *Alleyne v United States*, which held that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." *Alleyne*, 570 US at ___; 133 S Ct at 2155. Defendant claimed that he had been sentenced to a term of incarceration that had been unconstitutionally enhanced by *judicial*, not by the required *jury*, fact-finding, and the Court of Appeals allowed him to add an additional claim under *Alleyne* to his appeal. Ultimately, the Court of Appeals denied defendant's claim, citing *People v Herron*, 303 Mich App 392; 845 NW2d 533 (2013), for the proposition that our indeterminate sentencing system does not offend the Sixth Amendment and noting that the panel was required to follow *Herron*. *People v Lockridge*, 304 Mich App 278, 284; 849 NW2d 388 (2014) (opinion by O'CONNELL, J.); *id*. at 285 (opinion by BECKERING, P.J.); *id*. at 311 (opinion by SHAPIRO, J.).

II. STANDARD OF REVIEW

The issue in this case is whether Michigan's sentencing system operates in violation of the Sixth Amendment of the United States Constitution by permitting a criminal defendant's minimum sentence to be determined on the basis of facts not proved to the jury beyond a reasonable doubt. A Sixth Amendment challenge presents a question of constitutional law that we review de novo. *People v Nutt,* 469 Mich 565, 573; 677 NW2d 1 (2004). Furthermore, a constitutional challenge to a statute presents a question of law that is also reviewed de novo. *McDougall v Schanz,* 461 Mich 15, 23; 597 NW2d 148 (1999). In analyzing constitutional challenges to statutes, this Court's "authority to invalidate laws is limited and must be predicated on a clearly apparent demonstration of unconstitutional-

ity." *People v Harris*, 495 Mich 120, 134; 845 NW2d 477 (2014). We require a challenge to meet such a high burden because "[s]tatutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014), citing *Taylor v Gate Pharm*, 468 Mich 1, 6; 658 NW2d 127 (2003).

III. ANALYSIS

A. SIXTH AMENDMENT

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation . . . . [US Const, Am VI.]

This amendment pertains to one of the most fundamental elements of our equal rule of law—the right to a trial by jury.[1] The fundamental purpose of the right to a trial by jury is indisputably "to prevent oppression by the Government." *Duncan v Louisiana*, 391 US 145, 155; 88 S Ct 1440; 20 L Ed 2d 491 (1968), citing *Singer v United States*, 380 US 24, 31; 85 S Ct 783; 13 L Ed 2d 630 (1965). "Given this purpose, the essential feature of a jury obviously lies in the interposition between the

[1] "The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; Or if there is any difference between them it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government." Federalist, No. 83 (Alexander Hamilton) (Cooke ed, 1961), p 562.

accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." *Williams v Florida*, 399 US 78, 99; 90 S Ct 1893; 26 L Ed 2d 446 (1970).[2] Stated another way, the "Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged . . . ."[3] *United States v Gaudin*, 515 US 506, 511; 115 S Ct 2310; 132 L Ed 2d 444 (1995).

B. SIXTH AMENDMENT AND SENTENCING

The Sixth Amendment requires "a jury determination that [a defendant] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Id*. at 510. In defining the protections afforded

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[2] Justice Joseph Story wrote that this constitutional guarantee was "generally understood to mean . . . a trial by a jury of *twelve* men, impartially selected, who must *unanimously* concur in the guilt of the accused before a legal conviction can be had." 2 Story, Commentaries on the Constitution of the United States (4th ed) (Boston: Little, Brown & Company, 1873), p 541 n 2.

[3] It is important at the outset to understand that the Sixth Amendment right to a jury trial cannot be fully understood in isolation from the Due Process Clause of the Fifth and Fourteenth Amendments because it is only in conjunction that "these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.' " *Apprendi v New Jersey*, 530 US 466, 476; 120 S Ct 2348; 147 L Ed 2d 435 (2000), citing *Gaudin*, 515 US at 510. This is because the Sixth Amendment guarantees a criminal defendant "the right to have the jury, rather than the judge, reach the requisite finding of 'guilty,' " and the Due Process Clause requires the government to prove each and every element of a crime "beyond a reasonable doubt." *Sullivan v Louisiana*, 508 US 275, 277; 113 S Ct 2078; 124 L Ed 2d 182 (1993); see also *Patterson v New York*, 432 US 197, 210; 97 S Ct 2319; 53 L Ed 2d 281 (1977); *In re Winship*, 397 US 358, 368; 90 S Ct 1068; 25 L Ed 2d 368 (1970). Accordingly, it is the *combination* of these rights that gives rise to the constitutional right that is the subject of the instant case.

by this right, the United States Supreme Court has held that any fact that constitutes an "element" of the crime must be determined by the jury, not by the court, beyond a reasonable doubt. *Apprendi v New Jersey*, 530 US 466, 494; 120 S Ct 2348; 147 L Ed 2d 435 (2000). The breadth of this right therefore depends on "the proper designation of the facts that are elements of the crime." *Alleyne*, 570 US at ___; 133 S Ct at 2156. To ensure that the right to a jury trial is properly safeguarded, the United States Supreme Court has set out to explain what exactly constitutes an "element" of a crime for purposes of the Sixth Amendment, so that the necessary elements will be submitted to the jury for its consideration and determination.[4] In its efforts to explain what constitutes an "element" of a crime, the Supreme Court has identified several sentencing practices that operated in violation of the Sixth Amendment.

The Supreme Court first addressed the Sixth Amendment implications that arise when judicially ascertained facts are used to enhance a criminal defendant's sentence in *McMillan v Pennsylvania*, 477 US 79; 106 S Ct 2411; 91 L Ed 2d 67 (1986). *McMillan* involved a Pennsylvania statute that imposed a five year "mandatory minimum" sentence when the trial court determined by a preponderance of the evidence that the defendant "visibly possessed a firearm" during

[4] At the same time, the Supreme Court has held that mere "sentencing factors" may be ascertained by a judge using a preponderance of the evidence standard, as these factors are not subject to the Constitution's indictment, jury, and proof requirements. *Jones v United States*, 526 US 227, 232; 119 S Ct 1215; 143 L Ed 2d 311 (1999) ("Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt.").

the course of committing an enumerated felony. *Id*. at 81. In a 5-4 decision, the Court upheld the Pennsylvania statute, concluding that it

> neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm. [*Id*. at 87-88.]

Because the imposition of the mandatory minimum sentence had not altered the maximum penalty authorized by the jury's verdict, the Court sustained the statute, rejecting a Sixth Amendment challenge.

While *McMillan* sanctioned the use of judicial factfinding to establish a mandatory *minimum* sentence, a decade later in *Jones v United States*, 526 US 227, 239; 119 S Ct 1215; 143 L Ed 2d 311 (1999), the Supreme Court cautioned that the use of such facts to increase the *maximum* sentence presented "grave and doubtful constitutional questions." (Quotation marks and citation omitted.) In *Jones*, the defendant was convicted of violating a carjacking statute, which called for a 15-year maximum sentence. 18 USC 2119. This sentence, however, could be increased to 25 years if the judge determined by a preponderance of the evidence that the victim had suffered serious bodily injury, or to life in prison if the victim had died. 18 USC 924(c). Three tiers of sentencing were provided under the statute. The trial court imposed the 25-year sentence after it found that the victim had suffered serious bodily injury. *Jones*, 526 US at 231. The Supreme Court, however, vacated the sentence in a 5-4 decision, holding that the defendant's Sixth Amendment right to a jury trial was violated because the judge had determined by a preponderance of the evidence that the

victim suffered "serious bodily injury," rather than the jury's having determined the same question beyond a reasonable doubt. *Id*. at 252.

In *Jones*, the jury found all the elements necessary to incarcerate the defendant for 15 years and *that* finding conferred on him not only the legal *obligation* of potentially having to serve a sentence of that length, but also a concomitant legal *right* to a sentence not exceeding that length.[5] By its finding of facts that resulted in an increase in this level of punishment by 10 years, the trial court deprived the defendant of his legal right to a sentence that did not exceed 15 years, i.e., his legal right to a sentence that did not exceed the maximum term allowed by the jury's verdict. The Court held that this type of judicial fact-finding violated the Sixth Amendment.

The following term in *Apprendi v New Jersey*, 530 US 466, the Supreme Court elaborated on its analysis in *Jones*. In *Apprendi*, the defendant pleaded guilty to one count of possessing a weapon for an unlawful purpose, which was punishable by a term of imprisonment between 5 and 10 years. *Id*. at 468-469. New Jersey, however, had a statutory "hate crime" law that

[5] Although I describe this right throughout as a "legal" right, it would be equally accurate to describe it as a "constitutional" right. I characterize it as the former only to render our description consistent with that in *Blakely Washington*, 542 US 296, 309; 124 S Ct 2531; 159 L Ed 2d 403 (2004), in which it was asserted that the Sixth Amendment prohibits a judge from depriving a criminal defendant of his or her "legal *right* to a lesser sentence." The specific "legal right" that is the subject of this opinion is variously described, as the context requires, as "the legal right to a sentence not to exceed that determined by the jury"; "the legal right to a lesser sentence"; "the legal right to freedom from incarceration"; and "the legal right to freedom from incarceration after having served the maximum sentence." Each of these is intended generally to describe the Sixth Amendment right identified in the Supreme Court decisions of *Apprendi* and *Alleyne*.

provided for an extended term of imprisonment between 10 and 20 years when the trial court found by a preponderance of the evidence that the defendant had acted with "racial bias." The trial court in *Apprendi* found the requisite "racial bias" by a preponderance of the evidence and consequently sentenced the defendant to an enhanced 12-year term. *Id*. at 471. In yet another 5-4 decision, the Supreme Court held that New Jersey's practice of enhancing a criminal defendant's sentence on the basis of judicial fact-finding was unconstitutional. *Id*. at 490. The Court held:

> "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. . . . [S]uch facts must be established by proof beyond a reasonable doubt." [*Id*., quoting *Jones*, 526 US at 252-253 (first alteration in original).]

Stated another way, judicially ascertained facts were used by the trial court to deprive the defendant of his constitutional right to a criminal sentence not exceeding that authorized by the jury's verdict. The Court was not persuaded by the statute's characterization of a "biased purpose" as a mere "sentencing enhancement" because the Court believed instead that this "biased purpose" constituted an element of the crime. *Apprendi*, 530 US at 495-496. The Court again stated:

> "[The Constitution requires that] any fact (other than a prior correction) that increases the maximum penalty for a crime must . . . be submitted to the jury and proved beyond a reasonable doubt." [*Id*. at 476, quoting *Jones*, 526 US at 243 n 6.]

Accordingly, any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict," constitutes an "element" of the crime

that must be presented to the jury and proven beyond a reasonable doubt.[6] *Apprendi*, 530 US at 494.

After *Apprendi*, which addressed the constitutional implications of judicially ascertained facts used to increase statutory *maximum* sentences, the United States Supreme Court addressed the Sixth Amendment implications of judicially ascertained facts used to increase "mandatory minimum" sentences. *Harris v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002), overruled by *Alleyne*, 570 US at ___; 133 S Ct at 2155. In *Harris*, the defendant was found guilty of violating various federal drug and firearms laws after he sold illegal narcotics out of his pawnshop while in possession of an unconcealed pistol. *Harris*, 536 US at 550. One of the statutes under which the defendant was convicted required an increase in the "mandatory minimum" sentence from 5 years to 7 years when the judge determined by a preponderance of the evidence that the defendant had "brandished" a weapon. 18

[6] Justice O'Connor wrote for four justices in dissent in *Apprendi*. In her view, the majority had crafted a new constitutional rule that was "unsupported by the history and case law it cites" and this fact alone is "reason enough to reject such a substantial departure from our settled jurisprudence." *Apprendi*, 530 US at 539 (O'Connor, J., dissenting). She also characterized the majority's opinion as "a watershed change in constitutional law," and went on to note that the majority "casts aside our traditional cautious approach and instead embraces a universal and seemingly bright-line rule limiting the power of Congress and state legislatures to define criminal offenses and the sentences that follow from convictions thereunder." *Id*. at 525. Justice Breyer also wrote in dissent on behalf of himself and Chief Justice Rehnquist, noting that the

> real world of criminal justice cannot hope to meet any such ideal [as that adopted by the majority]. It can function only with the help of procedural compromises, particularly in respect to sentencing. And those compromises, which are themselves necessary for the fair functioning of the criminal justice system, preclude implementation of the procedural model that today's decision reflects. [*Id*. at 555 (Breyer, J., dissenting).]

USC 924(c)(1)(A). Although the defendant's indictment made no mention of any "brandishing," the trial court concluded that he had indeed done so and sentenced him to a 7-year mandatory minimum term. *Harris*, 536 US at 551.

In a plurality opinion, the Supreme Court upheld the defendant's sentence, concluding that the requirement of "brandishing" constituted a sentencing factor that could be found by the trial court and not an "element" that could be found only by the jury. *Id*. at 556. The Court also reaffirmed *McMillan*, holding that it was constitutional for a trial court to find by a preponderance of the evidence facts that increased the minimum punishment as long as the resulting punishment did not exceed the statutory maximum. *Id*. at 562. The Court opined that "[o]nce the jury finds all those facts, . . . the defendant has been convicted of the crime; the Fifth and Sixth Amendments have been observed; and the Government has been authorized to impose any sentence below the maximum." *Id*. at 565.

Two years after *Harris*, the Supreme Court was presented with a Sixth Amendment challenge to Washington's "determinate" sentencing guidelines in *Blakely v Washington* and took it as an opportunity to further clarify the meaning of a "statutory maximum" for purposes of *Apprendi*.[7] *Blakely v Washington*, 542

[7] A determinate sentence is a sentence "of a specified duration." *Black's Law Dictionary* (10th ed), p 1569. This is in contrast to an "indeterminate" sentence, which is a sentence "of an unspecified duration, such as one for a term of 10 to 20 years." *Id*. at 1570. Thus, a determinate system is a sentencing system in which the defendant receives a certain and fixed sentence and is subject to serving that precise sentence. An indeterminate system is a sentencing system in which the defendant receives a singular maximum sentence, and, in some systems such as Michigan's, may be released on parole before serving that maximum.

US 296, 298; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *Blakely*, the defendant had been convicted of second-degree kidnapping, a Class B felony, and Washington law provided for a maximum sentence of 10 years for this crime. *Id*. at 298-299. However, Washington's sentencing reform act provided a specific sentence range for a defendant's conviction of second-degree kidnapping with a firearm, providing a "standard range" of 49 to 53 months. The act also permitted a court to impose a sentence longer than the standard range if the judge found "substantial and compelling reasons justifying an exceptional sentence." The trial court departed upward from the standard range by 37 months and sentenced the defendant to 90 months' imprisonment for the second-degree-kidnapping conviction after finding that he had acted with "deliberate cruelty." *Id*. at 300.

The state of Washington contended that its sentencing scheme did not violate *Apprendi* because the defendant's relevant "statutory maximum" was not 53 months, but the 10-year maximum for Class B felonies. *Id*. at 303. The Supreme Court disagreed and by a 5-4 majority concluded that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant," which for purposes of the second-degree-kidnapping conviction was 53 months. *Id*. at 304. The Court elaborated:

> In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment." [*Id*. at 303-304 (citation omitted).]

Thus, the Court noted that the finding of "deliberate cruelty" had to be undertaken by a jury or else admitted by the defendant, and in the absence of these circumstances a sentence based on "deliberate cruelty" would operate in violation of the Sixth Amendment. *Id*. at 308.

In reaching this decision, the Supreme Court made clear that the Sixth Amendment does not prohibit judicial fact-finding per se, as the Court explicitly stated its approval of systems of "indeterminate" sentencing:

> By reversing the judgment below, we are not, as the State would have it, "find[ing] determinate sentencing schemes unconstitutional." This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment. . . .
>
> JUSTICE O'CONNOR argues that, because determinate-sentencing schemes involving judicial fact-finding entail less judicial discretion than indeterminate schemes, the constitutionality of the latter implies the constitutionality of the former. This argument is flawed on a number of levels. First, the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. *Indeterminate sentencing does not do so.* It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial fact-finding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has *a legal right to a lesser sentence*—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every

> burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is entitled to no more than a 10-year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury. [*Id*. at 308-309 (citations omitted) (some emphasis added) (alteration in original).]

From this passage, it is apparent that the Supreme Court looked favorably on indeterminate sentencing systems. A majority of the Court did not believe that indeterminate sentencing offended the Sixth Amendment, even if it involved relatively broad exercises in judicial fact-finding, because fact-finding in an indeterminate system does not "pertain to whether the defendant has a legal right to a lesser sentence." *Id*. at 309.

Following *Blakely*, the Supreme Court was faced with a challenge to the "determinate" federal sentencing guidelines in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005). In *Booker*, the defendant challenged the federal guidelines as unconstitutional because they allowed for the enhancement of sentences on the basis of facts determined by the trial court by a preponderance of the evidence. *Id*. at 226. The Supreme Court agreed and held that the guidelines violated the rule in *Apprendi*. Just as with the state of Washington's sentencing system in *Blakely*, the Court by a 5-4 majority concluded that the federal sentencing system was mandatory, that it imposed binding requirements on sentencing courts, and again as in *Blakely*, that " 'the jury's verdict alone [did] not sufficiently authorize the sentence. . . . The judge acquire[d] that authority only upon finding some additional fact.' " *Id*. at 235, quoting *Blakely*, 542 US at 305. The Court elaborated:

> If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. . . . [W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant. [*Booker* 543 US at 233.]

However, the determinate federal guidelines were not advisory, but mandatory and binding, and therefore were unconstitutional. Once a trial court ascertained a particular aggravating fact, it was required to increase a defendant's sentence accordingly and this resulted in a deprivation of the "legal right to a lesser [jury-determined] sentence." *Id*.

C. MICHIGAN'S SENTENCING GUIDELINES

After *Blakely* and *Booker* were decided, several defendants contended that Michigan's indeterminate sentencing guidelines violated the Sixth Amendment. Specifically, they argued that the use of judicially ascertained facts to calculate Michigan's indeterminate sentencing guidelines increases the level of permitted punishments beyond the range authorized by the jury's verdict and that the Sixth Amendment as interpreted by *Blakely* is therefore violated. This argument was squarely rejected by this Court in *People v Drohan*, 475 Mich at 140, 164; 715 NW2d 778 (2006).

To fully understand this Court's prior analysis regarding Sixth Amendment challenges to our sentencing system, it is necessary to examine how this system

operates.[8] It is a sentencing system fundamentally different from the determinate sentencing systems at issue in *Apprendi*, *Blakely*, and *Booker* because in Michigan the great majority of all convicted criminals are given indeterminate sentences.[9] As this Court has pertinently explained:

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[8] Michigan initially had a purely indeterminate sentencing system, in which the judge possessed unfettered judgment to sentence a defendant anywhere between no jail time and imprisonment in the amount of the statutory maximum. Over time, this Court came to disfavor the sentencing disparities that resulted from this type of unrestricted judgment. To narrow these disparities, this Court enacted judicial sentencing guidelines in 1984 by administrative order. Administrative Order No. 1984-1, 418 Mich lxxx (1984); Administrative Order No. 1985-2, 420 Mich lxii (1985). Under these judicial guidelines, a recommended minimum sentence range was produced by scoring a defendant's prior record variables and offense variables; once a recommended minimum sentence range was calculated in this manner, the judge could only depart outside this range if he or she articulated specific reasons for the departure on the record. *People v Broden*, 428 Mich 343, 352; 408 NW2d 789 (1987). A second edition of the judicial guidelines was issued in 1988, and application of these modified guidelines was required for certain offenses, although the actual imposition of minimum sentences within the guidelines ranges themselves was not also required. Michigan Sentencing Guidelines (2d ed) (1988), p 7. The purpose of the guidelines was to provide sentencing norms, to promote judicial consistency, and to minimize sentencing disparities without altogether eliminating the court's exercise of judgment. *People v Coles*, 417 Mich 523; 339 NW2d 440 (1983). The citizens of this state were apparently still dissatisfied with remaining sentencing disparities, and the Legislature enacted the statutory guidelines in 1998. Similarly to the judicial guidelines, the statutory guidelines structured and constrained the exercise of judgment by the trial court without entirely eliminating it. Unlike the judicial guidelines, however, the statutory guidelines generally *required* trial courts to sentence within the guidelines, and they could not depart from the prescribed range without stating "substantial and compelling" reasons for the specific departure on the record. MCL 769.34(3).

[9] The majority agrees that the rules of *Apprendi* and *Alleyne* do not apply to "indeterminate" sentencing schemes, yet it applies these rules to Michigan's indeterminate sentencing system. To justify this application, the majority holds that "Michigan's sentencing scheme is not 'indeterminate' as that term has been used by the United States Supreme Court[.]"

An indeterminate sentence is one of an unspecified duration, such as one for a term of 10 to 20 years. In other

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To hold thusly, the majority relies on the *dissent* of Justice O'Connor in *Blakely* and two law review articles. These sources suggest that the Supreme Court's genuine intention in referring to "indeterminate" sentencing was to discuss indeterminate sentencing systems in which there is an "absence of mandatory constraints placed on a court's discretion when sentencing a defendant," and because Michigan has mandatory constraints, ours is not an "indeterminate" system in the way that term is used by the United States Supreme Court. I disagree. Michigan has an "indeterminate" sentencing system in which the jury finds all facts necessary for the imposition of punishment, Const 1963, art 4, § 45; *Drohan*, 475 Mich at 163, and consequently the rule of *Apprendi* is inapplicable. The majority's is an invented distinction that *Apprendi* is applicable only to some asserted *subcategory* of "indeterminate" sentencing systems—a subcategory whose very obviousness one might have thought would have compelled a more nuanced analysis by the Court had it genuinely intended some number of "indeterminate" systems to be treated distinctively from other "indeterminate" systems—and is therefore a distinction that should hardly serve as a basis for upending the entire sentencing system of our state on the grounds of a supposed lack of constitutionality. In *Blakely*, the United States Supreme Court spoke in *general* terms concerning indeterminate sentencing systems and held that "indeterminate" systems do not offend the Sixth Amendment. *Blakely*, 542 US at 308-309. Any assertion that the Court intended something different and more nuanced is entirely speculative, as evidenced by the fact that the majority cites no source of *binding* authority to support its conclusion in the face of inhospitably explicit statements by the Court.

Furthermore, the majority's artificial distinction between types of indeterminate systems holds little weight when one examines the specific statements the United States Supreme Court has made regarding indeterminate sentencing. The Court stated, for example, in *Blakely*:

> [T]he Sixth Amendment by its terms is . . . a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but *not at the expense of the jury's traditional function of finding facts essential to lawful imposition of the penalty*. [*Id.* (emphasis added).]

Under *either* subcategory of indeterminate sentencing identified by the majority, any judicial discretion at sentencing is not at the "expense of the jury's traditional function of finding facts essential to the lawful

> words, while a defendant may serve a sentence of up to 20 years, the defendant may be released from prison at the discretion of the parole board at any time after the defendant serves the ten-year minimum. [*Drohan*, 475 Mich at 153 n 10 (quotation marks and citations omitted).]

A determinate sentence, on the other hand, is

> [a] sentence for a fixed length of time rather than an unspecified duration. Such a sentence can either be for a fixed term from which the trial court cannot deviate . . . or can be imposed by the trial court within a certain range. [*Id*. (quotation marks and citations omitted) (alteration in original).]

Under Michigan's indeterminate sentencing guidelines, a criminal defendant's maximum sentence is

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imposition of the penalty." Rather, the jury is responsible for finding all facts *essential* to authorize the statutory maximum penalty. Whether the Legislature chooses to allow judicial discretion with respect to the selection of a parole eligibility date after the jury has exercised this authority is irrelevant. In noting that indeterminate sentencing schemes do not offend the Sixth Amendment, the United States Supreme Court focused only on whether the judicial power infringes the jury's authority to find facts essential to authorize the maximum penalty. The extent of judicial discretion *after* the jury finds those facts is never mentioned by the Court. It is clear that the Court in *Blakely* was referring *generally* to indeterminate sentencing as it showed no concern with the amount of discretion given to courts as long as that discretion did not enable the judge to interfere with the prerogative of the jury. There is thus no indication that the Court referred to indeterminate sentencing in either a casual or imprecise manner.

As for the majority's reliance on Justice O'Connor's *Blakely* dissent, she asserted that as a result of *Blakely* all sentencing schemes that have guidelines might be constitutionally suspect. Yet at the same time, she stated that *Blakely* is "not a constitutional prohibition on guideline schemes," *Blakely*, 542 US at 318, and nowhere asserted that the Michigan system is a "determinate system." Further, *this Court* has also exercised its own constitutional judgment post-*Blakely* as the court most familiar with Michigan's sentencing system and held that it does not violate the Sixth Amendment. *Drohan*, 475 Mich at 164. Apparently, the United States Supreme Court did not believe this conclusion to be in error. *Drohan v Michigan*, 549 US 1037 (2006) (denying certiorari).

prescribed by statute, and upon a guilty verdict the defendant is made subject to serving this maximum sentence. *Drohan*, 475 Mich at 163. That is, the jury's guilty verdict authorizes punishment of a criminal defendant to the maximum extent allowed by the statute under which he or she has been convicted. At sentencing, the judge's exercise of judgment is limited solely to selecting a minimum sentence, i.e., a sentence establishing the defendant's earliest *parole eligibility* date from within a "recommended minimum sentence range" that is calculated by reference to the defendant's statutory "prior record variables" and "offense variables." The range produced is meant to guide the court in selecting a criminal defendant's minimum parole eligibility date,[10] and it has *no* effect on the

[10] Take the instant defendant, for example. He was found guilty of committing involuntary manslaughter, which is a "crime against a person," MCL 777.16p, and MCL 777.21(1)(a) and MCL 777.22(1) require the court to score Offense Variables 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 19 and 20 for this type of crime. At sentencing, the trial court assessed 25 points for Offense Variable 3 (physical injury to victim) under MCL 777.33(1)(c). Because a homicide was involved, the trial court also assessed 15 points for Offense Variable 5 (psychological injury to member of victim's family) under MCL 777.35(1)(a) and 10 points for Offense Variable 6 (intent to kill or injure another individual) under MCL 777.36(1)(c). The court assessed 10 points for Offense Variable 9 (number of victims) under MCL 777.39(1)(c) and 10 points for Offense Variable 10 (exploitation of a vulnerable victim) under MCL 777.40(1)(b). This amounted to a total of 70 offense variable points. In addition to this determination, defendant had several prior criminal convictions, which led to the scoring of additional points. The court assigned 25 points under MCL 777.51(1)(c) for Prior Record Variable 1 for having one prior high severity felony conviction, 5 points under MCL 777.55(1)(d) for Prior Record Variable 5 for having two prior misdemeanor convictions or prior misdemeanor juvenile adjudications, and 5 points under MCL 777.56(1)(d) for Prior Record Variable 6 for being on probation during the instant offense. This amounted to a total of 35 prior record variable points. The crime that defendant was convicted of is a Class C offense under MCL 777.16p, and thus, the 70 offense variable points and the 35 prior record variable points placed him in the

criminal "punishment" imposed on a defendant as a result of the jury's verdict. MCL 769.34; MCL 791.238.

Once the judge determines the recommended minimum sentence range for a criminal defendant, it may either impose a sentence within that range or choose to depart upward or downward from that range if the judge sets forth on the record "substantial and compelling reasons" justifying that departure. MCL 769.34(3). Once the judge selects a minimum sentence, the defendant must serve that amount of time before he or she can petition the Parole Board for early release, but the defendant has no legal right to be released even a day sooner than the statutory maximum to which he or she has been made subject by the jury's determination. See *Drohan*, 475 Mich at 163. As a result, an increase in a defendant's minimum parole eligibility date does not "expose the defendant to a greater punishment than that authorized by the jury's verdict[.]" *Apprendi*, 530 US at 494.

By contrast, in the determinate sentencing systems at issue in *Apprendi*, *Blakely*, and *Booker*, the judge was authorized as a function of the jury's verdict to impose an ancillary or supplemental sentence by which the judge, and not the jury, ultimately determined a defendant's exposure to criminal punishment. That is, the judge is charged with deciding how much punishment to impose on a criminal defendant, rather than merely deciding how long the defendant must wait before he or she can petition for early release from the punishment imposed upon him by the jury's verdict. If the judge imposes punishment in excess of that authorized by the jury's verdict, the defendant's Sixth

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D-V cell of the sentencing grid for Class C offenses, which contains a "recommended minimum sentence range" of 43 to 86 months, MCL 777.64.

Amendment rights have been violated because judges cannot "expose the defendant to a greater punishment than that authorized by the jury's verdict[.]" *Id*.

D. MICHIGAN PRE-*ALLEYNE*

With this understanding of our state's sentencing guidelines, this Court has held that the decisions of the United States Supreme Court regarding criminal sentencing in *Apprendi*, *Blakely*, and *Booker* do not apply to Michigan's indeterminate sentencing system because the authority of the judge never infringes upon the authority of the jury in Michigan.[11] *Drohan*, 475 Mich at 163. While there are considerable elements of sentencing judgment within our criminal justice system, the paramount authority in setting the maximum exposure to punishment that a criminal defendant faces remains with the jury, and *that* is what is dispositive under the Sixth Amendment and the Due

[11] Once again, in Michigan, the judge does not have the authority to determine a defendant's maximum sentence, and as a result cannot deprive a defendant of his or her "legal *right* to a lesser sentence." Rather, the judge assigns a defendant a minimum parole eligibility date, which represents the earliest possible date on which the defendant may petition the Parole Board for early release. The assignment of a parole eligibility date is not a constitutionally mandated function of the court, but rather is a product of an entirely statutory system in which the Legislature has afforded criminal defendants an opportunity to demonstrate that they are rehabilitated or otherwise deserving of release. If the Parole Board concurs with the defendant, it has the option to release a defendant from prison *before* the expiration of the maximum sentence. By this process, a Michigan judge never *enhances* the maximum penal consequences of the jury's determination of guilt when setting the parole eligibility date. This process does not affect the *punishment* imposed on the defendant because a criminal defendant released on parole is treated as if he or she is still serving the sentence, MCL 791.238, and because a defendant has no constitutional right to an early release on parole, *Greenholtz v Inmates of Nebraska Penal & Correctional Complex*, 442 US 1, 11; 99 S Ct 2100; 60 L Ed 2d 668 (1979).

Process Clause jurisprudence of the United States Supreme Court.

This Court first addressed the various challenges to Michigan's sentencing system under *Apprendi* and *Blakely* (but preceding *Booker*) in *People v Claypool*, 470 Mich at 715; 684 NW2d 278 (2004). In that case, we were faced with a challenge regarding a downward departure from the guidelines, and we took the opportunity to opine on *Blakely*. We noted that *Blakely* did not affect Michigan's "indeterminate" sentencing system because the Supreme Court had been clear that its decisions only affected "determinate" sentencing systems, and not "indeterminate" ones. *Id*. at 730 n 14 ("[T]he majority in [*Blakely*] made clear that the decision did not affect indeterminate sentencing systems."). We stated further:

> Michigan, in contrast, has an indeterminate sentencing system in which the defendant is given a sentence with a minimum and a maximum. The maximum is not determined by the trial judge but is set by law. MCL 769.8. The minimum is based on guidelines ranges as discussed in the present case and in [*People v*] *Babcock* [469 Mich 247; 666 NW2d 231 (2003)]. The trial judge sets the minimum but can never exceed the maximum (other than in the case of a habitual offender, which we need not consider because *Blakely* specifically excludes the fact of a previous conviction from its holding). [*Id*.]

Because the minimum indeterminate sentence selected by the judge can never exceed the maximum set by law, the "Michigan system is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by the jury in violation of the Sixth Amendment." *Id*.

Two terms later, we were faced with a direct challenge to Michigan's sentencing system in *Drohan*, 475

Mich at 142-143, in which this Court considered "whether Michigan's indeterminate sentencing system, which allows a trial court to set a defendant's minimum sentence on the basis of factors determined by a preponderance of the evidence, violates the Sixth Amendment . . . ." This Court concluded that it did not, emphasizing that the jury's verdict authorizes the maximum sentence in Michigan's indeterminate sentencing system. We further observed that the "Sixth Amendment ensures that a defendant will not be incarcerated for a term longer than that authorized by the jury upon a finding of guilt beyond a reasonable doubt." *Id*. at 163. Accordingly, "a defendant does not have a right to anything less than the maximum sentence authorized by the jury's verdict, and therefore, judges may make certain factual findings to select a specific minimum sentence from within a defined range." *Id*. at 159.

> [I]n all but a few cases, a sentence imposed in Michigan is an indeterminate sentence. The maximum sentence is not determined by the trial court, but rather is set by law. Michigan's sentencing guidelines, unlike the Washington guidelines at issue in *Blakely,* create a range within which the trial court must set the minimum sentence. However, a Michigan trial court may not impose a sentence greater than the statutory maximum. While a trial court may depart from the minimum guideline range on the basis of "substantial and compelling reason[s]," MCL 769.34(3); *Babcock*, [469 Mich] at 256-258, such departures, with one exception, are limited by statute to a minimum sentence that does not exceed "2/3 of the statutory maximum sentence." MCL 769.34(2)(b). *Thus, the trial court's power to impose a sentence is always derived from the jury's verdict* . . . . [*Id*. at 161-162 (emphasis added) (second alteration in original).]

Not only did this Court recognize that a Michigan judge's exercise of discretion at sentencing is always

derived from the jury's verdict, but it observed that the date chosen by the judge as the "minimum sentence" is merely a parole eligibility date:

> [T]here is no guarantee that an incarcerated person will be released from prison after the person has completed his or her minimum sentence. Ultimately, the parole board retains the discretion to keep a person incarcerated up to the maximum sentence authorized by the jury's verdict. Accordingly, because a Michigan defendant is always subject to serving the maximum sentence provided for in the statute that he or she was found to have violated, that maximum sentence constitutes the "statutory maximum" as set forth in *Blakely*. Therefore, we reaffirm our statement from *Claypool*, [470 Mich] at 730 n 14, that "the Michigan system is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by the jury in violation of the Sixth Amendment." [*Id*. at 163-164.]

Thus under *Drohan*, as long as a defendant has received a sentence within the statutory maximum, "a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Id*. at 164.

This position is fully consistent with United States Supreme Court precedent: throughout all of that Court's decisions addressing the Sixth Amendment implications of judicial fact-finding at sentencing, it has *never* invalidated an indeterminate sentencing system or found that any indeterminate sentence was imposed in an unconstitutional manner on the basis of *Apprendi* or *Alleyne* considerations. Rather, it has expressly noted that indeterminate sentencing does not offend the Sixth Amendment. *Blakely*, 542 US at 308-309 (noting that in an indeterminate system, judicial fact-finding does not "pertain to whether the de-

fendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned").

Thus both the United States Supreme Court and this Court have recognized that the distinction between indeterminate and determinate sentencing systems is not only consequential, but dispositive, in its Sixth Amendment implications for criminal sentencing. *Id*. This is because in an indeterminate system a criminal defendant is always subject to the statutory maximum punishment triggered by the jury's guilty verdict and as a result is restored to his or her "legal right" to freedom from incarceration only upon serving the entirety of that statutory maximum. The judge's exercise of judgment at sentencing is limited to assigning a minimum parole eligibility date, and even if a defendant is released on the very date he or she becomes eligible for parole, the defendant is still serving the punishment authorized by the jury's verdict. As a result, the judge's authority to fashion a minimum parole eligibility date does not affect the punishment imposed on a criminal defendant because it can never "expose the defendant to a greater punishment than that authorized by the jury's verdict[.]" *Apprendi*, 530 US at 494.

In sum, Michigan has bifurcated the role of the judge and the jury; the jury is exclusively responsible—consistently with the Sixth Amendment—for determining at what moment a defendant will be fully restored to his or her "legal right" to freedom from incarceration. Once the jury decides that the elements have been proved beyond a reasonable doubt, a defendant is subject to serving the statutory maximum because he or she has no "legal right" to freedom from incarceration any

sooner.[12] The Sixth Amendment affords a defendant no more, for it is not a panacea for the correction of all wrongs that some perceive within our sentencing system; recourse for some wrongs must be had through appeals to the people and their representatives in the Legislature. A sentence in Michigan is an indeterminate sentence in all but a few circumstances,[13] and as a result we have correctly held that our sentencing system is compatible with the Sixth Amendment. *Drohan*, 475 Mich at 143.

E. *ALLEYNE*

In 2013, the United States Supreme Court was called upon to revisit its holding in *Harris*, and once again it was faced with the question whether judicially ascertained facts that increase a "mandatory minimum" sentence should be encompassed within the rule of *Apprendi*. In *Alleyne*, the Supreme Court was faced with the same statute with which it had been earlier presented in *Harris*, but now reached a contrary conclusion about the statute's constitutionality, holding

[12] "[A] defendant does not have a [constitutional] right to anything less than the maximum sentence authorized by the jury's verdict," and the Sixth Amendment only "ensures that a defendant will not be incarcerated for a term longer than that authorized by the jury upon finding of guilt beyond a reasonable doubt." *Drohan*, 475 Mich at 159, 163.

[13] Some examples of Michigan's "mandatory minimum" type of sentence include MCL 769.12(1)(a) (requiring a mandatory minimum sentence for a felon who has been convicted of certain felonies on three or more occasions), MCL 750.520b (requiring a mandatory minimum of 25 years for certain defendants convicted of first-degree criminal sexual conduct), MCL 750.227b (requiring a 2-year mandatory sentence for criminals who use firearms to commit or attempt to commit a felony), and MCL 750.316 (requiring a sentence of life without parole for persons convicted of first-degree murder). None of these statutes is at issue in this case.

that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." *Alleyne*, 570 US at ___; 133 S Ct at 2155. In reaching this holding, the Supreme Court achieved two things: it overruled *Harris* and it extended the rule of *Apprendi* to judicially ascertained facts that increase "mandatory minimum" sentences.

Alleyne, like *Harris*, involved a defendant convicted of using or carrying a firearm while committing a violent crime in violation of 18 USC 924(c). This crime was punishable by a mandatory minimum sentence of five years, but if it was found that a defendant had "brandished" the weapon, the mandatory minimum sentence was to be increased to seven years. Although the jury itself was given the option to find "brandishing," it did not so find. *Id*. at ___; 133 S Ct at 2156. The judge, however, *did* find by a preponderance of the evidence that the defendant had "brandished" the weapon and consequently imposed a mandatory seven-year sentence. *Id*. at ___; 133 S Ct at 2156.

The Supreme Court held that such judicial fact-finding violated the Sixth Amendment. *Id*. at ___; 133 S Ct at 2155. The Court extended the rule of *Apprendi* to facts that increase "mandatory minimum" sentences because "there is no basis in principle or logic to distinguish facts that raise the maximum from those that increase the [mandatory] minimum . . . ." *Id*. at ___; 133 S Ct at 2163.

> It is indisputable that a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal defendant is exposed. . . . And because the legally prescribed range *is* the penalty affixed to the crime, it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense.

> It is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime. Indeed, criminal statutes have long specified both the floor and ceiling of sentence ranges, which is evidence that both defined the legally prescribed penalty. . . . A fact that increases a sentencing floor, thus, forms an essential ingredient of the offense.
>
> Moreover, it is impossible to dispute that facts increasing the legally prescribed floor *aggravate* the punishment. Elevating the low-end of a sentencing range heightens the loss of liberty associated with the crime: the defendant's "expected punishment has increased as a result of the narrowed range" and "the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish." [*Id*. at ___; 133 S Ct at 2160-2161 (citations omitted).]

In reaching this conclusion, the Court was careful to note that its holding did not prohibit "factfinding used to guide judicial discretion in selecting a 'punishment within the limits fixed by law.' " *Id*. at ___ n 2; 133 S Ct at 2161 n 2.

> Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment. See, *e.g*., . . . *Apprendi*, 530 U.S., at 481 ("[N]othing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute"). This position has firm historical roots as well. . . . Our decision today is wholly consistent with the broad discretion of judges to select a sentence within the range authorized by law. [*Id*. at ___; 133 S Ct at 2163 (citations omitted) (alteration in original).]

The Court noted that the rule of *Apprendi* applies with equal force to facts that increase mandatory minimum

sentences because such judicial fact-finding alters the range of criminal punishment to which a criminal defendant is exposed and thus implicates the constitutional apportionment of authority between judge and jury. *Id*. at ___; 133 S Ct at 2163. In reaching this conclusion, the Court asserted that the *Apprendi* definition of criminal "elements" necessarily includes facts that increase the floor of the sentence. The Court stated that "[b]oth kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment [in violation of the Sixth Amendment]."[14] *Id*. at ___; 133 S Ct at 2158.

F. DEFENDANT'S ARGUMENT

Now that the United States Supreme Court has extended *Apprendi* to facts that increase "mandatory minimum" sentences, Michigan's sentencing system is once again challenged as unconstitutional under the Sixth Amendment. Specifically, defendant contends

[14] Chief Justice Roberts wrote in dissent on behalf of himself and two other justices. In his view, the majority erred by transforming the Sixth Amendment into "a protection for judges from the power of the legislature" even though the "Framers envisioned the Sixth Amendment as a protection for defendants from the power of the Government." *Alleyne*, 570 US at ___; 133 S Ct at 2168 (Roberts, C.J., dissenting). The dissent concluded that "the jury's verdict fully authorized the judge to impose a sentence of anywhere from five years to life in prison," and thus "[n]o additional finding of fact was 'essential' to any punishment . . . ." *Id*. at ___; 133 S Ct at 2169. Because "[t]he jury's verdict authorized the judge to impose the sentence he imposed for the precise factual reason he imposed it," the dissent believed the Sixth Amendment was not implicated. *Id*. at ___; 133 S Ct at 2170. Justice Alito also wrote in dissent, asserting that the majority erred by overruling "well-entrenched precedent with barely a mention of *stare decisis*." *Id*. at ___; 133 S Ct at 2172 (Alito, J., dissenting). He proceeded to counsel that "[i]f the Court is of a mind to reconsider existing precedent, a prime candidate should be *Apprendi* . . . ." *Id*. at ___; 133 S Ct at 2172.

that *Alleyne* renders Michigan's indeterminate sentencing guidelines unconstitutional because a criminal defendant's minimum sentence, i.e., his or her parole eligibility date, is determined in part on the basis of facts not found beyond a reasonable doubt by the jury. Although the majority is persuaded by this argument, I believe it is without merit. Accordingly, I would again sustain the Michigan sentencing guidelines as constitutional.

Initially, it is important to reiterate that Michigan's guidelines are a product of statute and consequently that this Court has a duty to presume their constitutionality, unless the lack of constitutionality is clearly apparent. *Taylor*, 468 Mich at 6. In this regard, I would emphasize that, in my view, today's decision is not compelled by the Sixth Amendment and Due Process Clause decisions of the United States Supreme Court, yet it overturns the specific will of the people of this state by negating *their* judgments, as reflected by the enactments of *their* Legislature, that the sentencing system of *their* state should be characterized by sentencing guidelines of an indeterminate character.[15] Striking down statutes that reflect such a considered judgment of the people and their representatives is something to be done only when the incompatibility of a state law with the federal or state Constitution is

[15] Indeed, Michigan amended its most recent Constitution to specifically enable indeterminate sentencing. See Const 1963, art 4, § 45 ("The legislature may provide for indeterminate sentences as punishment for crime and for the detention and release of persons imprisoned or detained under such sentences."); *Ughbanks v Armstrong*, 208 US 481, 485; 28 S Ct 372; 52 L Ed 582 (1908) ("An act providing for an indeterminate sentence was first passed in Michigan on July 1, 1889, and was declared unconstitutional . . . . A constitutional amendment was subsequently adopted (1901), which authorized the legislature to provide for an indeterminate sentence law, as punishment for crime, on conviction thereof.") (citations omitted).

manifest and our duty to preserve and maintain these charters of government is therefore directly and necessarily implicated. *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004) ("We exercise the power to declare a law unconstitutional with extreme caution . . . ."). That is precisely why we presume statutes to be constitutional and why we require a challenging party to demonstrate that a statute's lack of constitutionality is clearly apparent. *Cady v Detroit*, 289 Mich 499, 505; 286 NW 805 (1939).

Such a showing, in my judgment, has simply not been made in the present challenge. Defendant's position effectively seeks to have this Court recognize a new constitutional right to parole eligibility, a right so abstract and tentative that it can only be characterized as a "mere hope" to be released under the Sixth Amendment and the Due Process Clause. *Greenholtz v Inmates of Nebraska Penal & Correctional Complex*, 442 US 1, 11; 99 S Ct 2100; 60 L Ed 2d 668 (1979). The United States Constitution does not command that this Court recognize such a right, and consequently the will of the people with respect to criminal sentencing should *not* be overturned in this regard by the Court.[16]

The majority has erred, I believe, for two reasons. First, Michigan's sentencing system does not offend the Sixth Amendment, for reasons already stated, simply because ours is an "indeterminate" sentencing system. As noted, in Michigan the jury is always required to find the elements of a crime as a prerequisite to the imposition of criminal punishment, and as a

[16] It should be emphasized that defendant has not raised a challenge under our state Constitution, choosing not to argue that it affords any greater or distinctive rights than the United States Constitution. Accordingly, our analysis here is confined to the latter, and I offer no opinion concerning the requirements of Michigan's own Constitution.

result the authority of the judge in sentencing a criminal defendant to a term of incarceration within the limits of the statutory maximum for that crime does not infringe the authority of the jury. See *Blakely*, 542 US at 308 ("[The Sixth Amendment] limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury"). Second, Michigan's sentencing system does not offend the Sixth Amendment because the guidelines simply do not produce anything resembling a "mandatory minimum" sentence. Because of this, *Alleyne* is simply inapplicable and adds nothing of relevance to the *Apprendi* and *Blakely* analyses, under which our sentencing system is altogether constitutional.

1. INDETERMINATE SENTENCING AND *ALLEYNE*

In *Drohan*, this Court made clear that Michigan's sentencing system does not offend the Sixth Amendment because it is an "indeterminate" sentencing system in which the authority of the judge cannot infringe upon the authority of the jury. *Drohan*, 475 Mich at 163. As a result, we held that the rule of *Apprendi* is inapplicable to Michigan's sentencing system. *Id*. Since *Drohan*, the only thing that has changed is the United States Supreme Court's issuance of *Alleyne*, and *Alleyne* does not in any way undermine this Court's holding in *Drohan*. Because *Alleyne* merely extended *Apprendi* to a new realm of criminal sentences that are largely nonexistent in Michigan, our sentencing system remains constitutional for the same reason that we held it to be constitutional in *Drohan*—it is an indeterminate sentencing system.[17]

[17] Michigan still has an "indeterminate" sentencing system in which a judge cannot infringe the constitutional authority of the jury. Const 1963, art 4, § 45; *Drohan*, 475 Mich at 163. The jury is charged with

A cursory review of *Alleyne* may lead some to believe that the distinction between indeterminate and determinate sentencing systems is no longer relevant in Sixth Amendment sentencing jurisprudence because the Supreme Court did not expressly refer to such a distinction in *Alleyne*. However, this overlooks that *Alleyne* merely extended the rule of *Apprendi*, a rule that *only* applies to determinate sentencing systems. *Blakely*, 542 US at 308-309; *Drohan*, 475 Mich at 160. As a result, the distinction between indeterminate and determinate sentencing systems remains relevant under the Sixth Amendment because, in a determinate system, the judge's sentence, and not the jury's verdict, determines a defendant's exposure to punishment, while in an indeterminate system, only the jury's verdict determines the defendant's exposure to punishment. Furthermore, in an indeterminate system such as Michigan's, the minimum sentence determined by the judge merely creates a right to a parole hearing—a right that it is not even protected by the Constitution and therefore cannot form the predicate for a Sixth Amendment violation, as the majority believes. See *Greenholtz*, 442 US at 11.

Thus, the fundamental distinction between indeterminate and determinate sentencing systems remains relevant for Sixth Amendment purposes after *Alleyne*, and the absence of any express reference to the distinction in that case is neither here nor there. *Blakely*, 542 US at 308-309. There is simply no compelling reason why the Supreme Court would have thought it necessary in *Alleyne* to restate a distinction thoroughly

finding each of the elements necessary to ultimately determine at what moment a defendant's "legal right" to freedom from incarceration will be restored. The Sixth Amendment affords a criminal defendant nothing more.

addressed in its earlier decisions. The Court had already made it abundantly clear that

> the Sixth Amendment by its terms is not a limitation on judicial power, but *a reservation of jury power*. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. *Indeterminate sentencing does not do so.* [*Blakely*, 542 US at 308-309 (emphasis added).]

If it had been the intention of *Alleyne* to alter or undermine an analysis previously set forth in *Apprendi* and *Blakely*, one would presume that *Alleyne* would have affirmatively stated its intentions to *alter* what had been made clear in *Apprendi* and *Blakely* concerning the Sixth Amendment significance of indeterminate sentences. There is simply nothing in *Alleyne* that logically undermines the Supreme Court's earlier-stated distinction between determinate and indeterminate sentences, much less anything that so *clearly* obviates these already-stated distinctions, that *silence* on the part of the Court should now reasonably be understood as effecting a major change in the constitutional treatment of the sentencing systems of a significant number of states of the Union.[18] There is simply no reasonable understanding of *Alleyne* that would place a burden on the Court to affirmatively articulate an intention to *sustain* an existing constitutional rule if that was the Court's intention, as I believe

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[18] In 1996, according to the Bureau of Justice Statistics (BJS), 36 states, including Michigan, and the District of Columbia had adopted some form of indeterminate sentencing. Bureau of Justice Assistance, *1996 National Survey of State Sentencing Structures* (1998), pp 4-5 <https://www.ncjrs.gov/pdffiles/169270.pdf> (accessed July 21, 2015) [http://perma.cc/34R3-WPYH]. To distinguish between systems with indeterminate and determinate sentencing schemes, the BJS considered whether parole release remained available for a significant fraction of cases. *Id*. at 1-2. The 14 states identified as having determinate sentencing were all states that had eliminated parole release. *Id*. at 1.

it to have been. Indeed, exactly the opposite burden would seem to obtain—a burden on the Court to affirmatively articulate its intention to *repudiate* an existing constitutional rule—before effecting a sea change in the constitutional treatment of state criminal justice practices.

Furthermore, it would make little sense to abandon the distinction between indeterminate and determinate sentencing systems under the Sixth Amendment because the judge in an indeterminate system merely assigns a criminal defendant's parole eligibility date, which does not implicate the Sixth Amendment. This is why the range in a determinate system is the focus of *Apprendi* and *Alleyne* because in those systems, the authority to impose criminal punishment rests with the judge. A judge exercising that power must respect both the top of the range set by the jury's verdict (*Apprendi*) and the bottom of the range set by the jury's verdict (*Alleyne*). In Michigan's indeterminate system, however, the jury's verdict sets a single number—the statutory maximum—and the judge must impose a minimum punishment below the limit set by that number.[19] Although the Legislature mandates that courts be authorized to increase the parole eligibility date, *Alleyne*, like *Apprendi*, concerns the authority flowing from the jury's verdict and not the discretion of

[19] This is identical to the common-law sentencing system discussed favorably in a part of Justice Thomas's opinion in *Alleyne* that only Justices Ginsburg, Sotomayor, and Kagan joined:

> At common law, the relationship between crime and punishment was clear. As discussed in *Apprendi,* "[t]he substantive criminal law tended to be sanction-specific," meaning "it prescribed a particular sentence for each offense." The system left judges with little sentencing discretion: once the facts of the offense were determined by the jury, the "judge was meant simply to impose [the prescribed] sentence." [*Alleyne*, 570 US at ___; 133 S Ct at 2158 (citations omitted) (alterations in original).]

a judge.[20] *Alleyne* makes this clear, as judges are free to find facts as long as it does not alter the range of permissible limits of punishment set by the jury's verdict. *Alleyne*, 570 US at ___; 133 S Ct at 2163.

By implementing a parole system, our Legislature has given a convicted criminal the opportunity for release before serving his or her statutory maximum.

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[20] The majority believes that "after *Alleyne*, the Legislature may not require judicial fact-finding that results in a mandatory increase in *either* the minimum or the maximum sentence beyond the range set by the jury verdict." To support this, it relies on the *Alleyne* dissent of Chief Justice Roberts. First and most obviously, the Chief Justice's comments are in a dissent and thus not controlling. Second, this dissent states that the statute requiring the trial court to raise defendant's minimum sentence from 5 to 7 years if it determines that the defendant brandished a firearm "has no effect on the role of the jury." *Id*. at ___; 133 S Ct at 2168 (Roberts, C.J., dissenting). The majority in *Alleyne* seems to have found this statement to be incorrect given that it reached the opposite conclusion, holding that allowing the trial court to alter the sentence range on the basis of its own factual finding *did* have an "effect on the role of the jury" because while the "range supported by the jury's verdict was five years' imprisonment to life," the statute precluded the trial court from considering that range and instead required it to consider only the range of seven years' imprisonment to life. *Alleyne* held that the *jury* must make all factual findings that authorize the prescribed sentence range and because the statute allowed the *judge* to make findings that altered the range, the defendant's Sixth Amendment right to a jury trial had been violated. Furthermore, *Alleyne* had no apparent difficulty with the legislature's *requiring* the trial court to sentence the defendant to a term of at least 5 years, despite the fact that such a mandatory minimum was what most obviously limited the discretion of the judiciary in the first place. Moreover, the *Alleyne* majority also had no difficulty with the legislature's requiring the trial court to sentence the defendant to at least 7 years when he brandished a firearm. Its only difficulty was with having the trial court, rather than the jury, *find* that the defendant had brandished a firearm. In other words, the majority seemed little concerned that the legislature was requiring the trial court to sentence the defendant to a mandatory minimum and thus curtailing the court's own discretion. Instead, it was concerned only that the court itself had decided a matter that altered the permissible sentence limit set by the jury's verdict and thereby aggravated the punishment.

It is important to note, however, that parole is not a constitutionally mandated procedure and rights or interests assertedly stemming from its operations are not generally viewed as being of constitutional dimension. *Greenholtz*, 442 US at 7 ("There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. . . . A state may . . . establish a parole system, but it has no duty to do so."). To be sure, a delay in the right to a parole hearing might well have considerable effect on the interest of a criminal defendant. Any such interest, however, ultimately reflects a mere *hope* or aspiration that some personal gain or advantage will result from a hearing, and thus the interest has not been viewed as sufficiently concrete or developed to be entitled to constitutional protection under the Due Process Clause. *Id*. at 11 (stating that an asserted interest in the possibility of parole is "no more substantial than an inmate's hope that he will not be transferred to another prison, a hope which is not protected by due process"). While a criminal defendant may understandably view the denial of parole eligibility as part of the "punishment" imposed on him by the court, Michigan law makes clear that this is *not* the case.[21] MCL 791.238. For that reason, a criminal defendant is not entitled under our Constitution to a jury determination of any fact relied on by a judge to set the defendant's parole eligibility date because those facts do not "expose the defendant to a

[21] Further, it would make little sense to hold that an increase in the amount of time a prisoner must wait before becoming eligible for parole constitutes an increase in criminal punishment because that understanding would also require facts found by the Parole Board to deny parole to be instead found by jury. The Supreme Court, however, has squarely rejected this understanding. *Greenholtz*, 442 US at 11.

greater punishment than that authorized by the jury's verdict[.]"[22] *Apprendi*, 530 US at 494.

The United States Supreme Court has held only that an inmate possesses certain due process rights with respect to parole *revocation* procedures—that is, rights arising *after* the inmate has been conditionally granted at least some freedom from incarceration. It is only at this time that an individual possesses more than a hope that a benefit will be obtained. Even in this regard, however, there is no right to a jury determination of facts relevant to a decision to *revoke* good-time credits that have presumably already been obtained by, or conferred upon, an inmate.[23] Finally, the Court has not required a jury at any type of parole proceeding, including a parole-revocation proceeding,[24] and it has not required the parole board itself to apply a "beyond a reasonable doubt" standard to the facts on which it is relying. *Greenholtz*, 442 US at 14-15.

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[22] Even if a jury *were* somehow required to determine these facts, they would not have to be proved beyond a reasonable doubt since due process has never been applied to protect a mere "asserted interest in the possibility of parole." *Id*.

[23] *Wolff v McDonnell*, 418 US 539, 556-571; 94 S Ct 2963; 41 L Ed 2d 935 (1974) (holding that although revocation of good-time credits implicates due process because of its depriving an inmate of a cognizable liberty interest, the parole board may revoke good-time credits without impaneling a jury under the Sixth Amendment).

[24] *Morrissey v Brewer*, 408 US 471, 484; 92 S Ct 2593; 33 L Ed 2d 484 (1972) (holding that a criminal defendant has certain due process rights when his or her partial liberty granted through the parole board is revoked). When discussing what specific process is due, the Court required the following:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial

Furthermore, the Court has never required a jury in a parole proceeding because, although parole proceedings can implicate *due process* concerns, they do not implicate a defendant's right to a *jury trial* under the Sixth Amendment.[25] The Sixth Amendment does not

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> officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. [*Id*. at 489.]

It is noteworthy that the Court did not require a jury to determine any fact, or any fact to be proved, beyond a reasonable doubt. This is because a parole proceeding is simply not a "criminal" prosecution, as the Court went on to state:

> We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial. [*Id*.]

[25] The majority views United States Supreme Court decisions addressing parole eligibility as inapplicable to the present analysis because they concern only the Due Process Clause. Because *Alleyne* and *Apprendi* pertain to both the Sixth Amendment and the Due Process Clause, the majority believes that decisions addressing only one of these rights are irrelevant. Under this rationale, any decision addressing more than a single constitutional right apparently can only provide guidance in a later case addressing the identical combination of constitutional rights. This argument is meritless, in my judgment. The Supreme Court's parole eligibility decisions under the Due Process Clause are relevant to the present analysis for the simple reason that this same Due Process Clause *is again at issue in the present case and in the identical context, the constitutional relevance of the parole decision*. Indeed, the Supreme Court in *Apprendi* framed the issue as one dealing *exclusively* with the Due Process Clause. *Apprendi*, 530 US at 469 ("The question presented is whether the *Due Process Clause* of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt.") (emphasis added). The majority's error in choosing to ignore this line of precedent will become increasingly apparent when this Court must specifically *rely* on it precisely to address challenges to parole eligibility that will almost certainly follow in the wake of the present decision. If a judge's increase in a defendant's minimum parole eligibil-

protect a criminal defendant's hopes or aspirations to be released sooner than he or she is lawfully entitled, nor does it require any fact relevant to a parole proceeding to be proved either by a jury or beyond a reasonable doubt.[26] In Michigan in particular, it is beyond debate that the jury is exclusively responsible for determining at what moment a criminal defendant's "legal right" to freedom from punishment will be restored.[27] Any judicial authority relating exclusively to selecting a parole eligibility date, and any right arising from the operation of the parole system, implicates rights that are not protected by the Sixth Amendment. As far as the Sixth Amendment is concerned, a criminal defendant in Michigan has been given everything to which the defendant is constitutionally entitled after a jury of his or her peers has returned a

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ity date constitutes an increase in "punishment," as the majority now asserts, so too seemingly is the parole board's decision to deny parole. Contra *Greenholtz*, 442 US at 11; *Morrissey*, 408 US at 484. Furthermore, it is clear the Supreme Court *did* impliedly give consideration to the Sixth Amendment in its parole decisions, as it stated that the decision to delay or deny parole *can* be made by a "neutral and detached hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers." *Morrissey*, 408 US at 489.

[26] See *Greenholtz*, 442 US at 7 ("Decisions of the Executive Branch, however serious their impact, do not automatically invoke due process protection; there simply is no constitutional guarantee that all executive decisionmaking must comply with standards that assure error-free determinations. . . . This is especially true with respect to the sensitive choices presented by the administrative decision to grant parole release."); *Morrissey*, 408 US at 489 (holding that due process at parole revocation proceedings requires "a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers").

[27] A defendant is only legally entitled to be freed from punishment upon serving the statutory maximum sentence. The defendant may be released from the punishment imposed pursuant to the jury's verdict sooner than this date, but the decision to free a prisoner from his or her punishment remains always a discretionary decision within the authority of the Parole Board.

verdict and subjected the defendant to serve the statutory maximum punishment. The jury is exclusively responsible for authorizing the limits of criminal punishment, and the judge cannot infringe that power. Thus, the process of scoring prior record and offense variables to set the minimum parole eligibility date constitutes a valid exercise of judicial authority that does not violate or even implicate the Sixth Amendment.

2. "MANDATORY MINIMUM" SENTENCES

Michigan's sentencing guidelines also fall outside the scope of *Alleyne* because they simply do not give rise to the "mandatory minimum" sentences that are the focus of that opinion. Again, the critical holding of *Alleyne* is that any fact that increases the mandatory minimum constitutes an "element" that must be determined by the jury. *Alleyne*, 570 US at ___; 133 S Ct at 2155. By its straightforward terms, *Alleyne* only pertains to facts that increase "mandatory minimum" sentences.

A "mandatory minimum" sentence is one that requires a sentencing court to impose a statutorily fixed minimum term of incarceration for a particular crime when certain statutory criteria have been satisfied. Concerning these types of sentences, "[t]he offender's personal background, the facts of his case, and all other details become [otherwise] irrelevant." Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J Crim L & Criminology 25, 66-67 (2005). For example, the defendant in *Alleyne* was sentenced under a statute with a 5-, 7-, or 10-year "mandatory minimum" sentence, providing as follows:

> (c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by

> any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--
>
> (i) be sentenced to a term of imprisonment of *not less than 5 years*;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of *not less than 7 years*; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of *not less than 10 years*. [18 USC 924 (emphasis added).]

Michigan *does* have several genuinely "mandatory minimum" sentences, but we do not have a single statute that operates in the fashion of the statute in *Alleyne*. See note 13 of this opinion. Of the very few "mandatory minimum" sentences in Michigan, none allows judicial fact-finding to increase the "mandatory minimum" sentence established by the statute and none, of course, is at issue in the present case.

Outside these few statutes, criminal defendants in Michigan are given a minimum sentence as a function of a guidelines calculation of prior record and offense variables, and that minimum sentence represents the earliest time at which a defendant can petition the Parole Board for release. The defendant has no "legal right" to freedom from incarceration before serving the statutory maximum sentence. *Drohan*, 475 Mich at 163-164; *Greenholtz*, 442 US at 7 ("There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."). The guidelines are in place largely to assist the judge in establishing an appropriate parole eligibility date in the individual case. MCL 791.233.

If a criminal defendant in Michigan is charged under a statute that has a "mandatory minimum," the judge cannot depart below that sentence. MCL 769.34. Because a "mandatory minimum" cannot be departed from, no matter what aggravating or mitigating circumstances may be presented to the court, it is clear that a "mandatory minimum" sentence and a "guidelines minimum" sentence are two very distinct sanctions in our justice system, for the simple reason that one is mandatory and the other is not.[28] Under MCL 769.34, guidelines ranges are formally labeled as "recommended minimum sentence ranges," not "mandatory minimum" sentences, and "mandatory minimum" sentences are generally referred to as such.[29] Because "recommended minimum sentence ranges" are not the equivalent of "mandatory minimum" sentences in

[28] This distinction has been acknowledged by justices of the United States Supreme Court. See, e.g., *Harris*, 536 US at 570-571 (Breyer, J., dissenting) ("Unlike Guideline sentences, statutory mandatory minimums generally deny the judge the legal power to depart downward, no matter how unusual the special circumstances that call for leniency.").

[29] MCL 769.34(2)(a), for example, provides:

> If a statute *mandates a minimum sentence* for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose sentence in accordance with that statute. Imposing a *mandatory minimum* sentence is not a departure under this section. If a statute *mandates a minimum sentence* for an individual sentenced to the jurisdiction of the department of corrections and the statute authorizes the sentencing judge to depart from that *minimum sentence*, imposing a sentence that exceeds the recommended sentence range but is less than the *mandatory minimum* sentence is not a departure under this section. If the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, *mandates a minimum* sentence for an individual sentenced to the jurisdiction of the department of corrections and the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, authorizes the sentencing judge to impose a sentence that is less than that *minimum sentence*, imposing a sentence that exceeds the recommended sentence range but is less than the *mandatory minimum* sentence is not a departure under this section. [Emphasis added.]

Michigan, judicial fact-finding employed to score the guidelines is permissible under the Sixth Amendment.[30]

Defendant urges this Court to abandon this traditional distinction in light of the United States Supreme Court's statements in *Booker* regarding sentencing departures. In *Booker*, the Court rejected the prosecution's argument that, because the statute in that case permitted a maximum sentence beyond the guidelines range, the determinate federal guidelines range in dispute did not produce a "statutory maximum" under *Apprendi*. The Court rejected this argument, stating:

> The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself. The Guidelines permit departures from the prescribed sentencing range in cases in which the judge "finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b)(1) (2000 ed., Supp. IV). At first glance, one might believe that the ability of a district judge to depart from the Guidelines means that she is bound only by the statutory maximum. Were this the case, there would be no *Apprendi* problem. *Importantly, however, departures are not available in every case*, and in fact are unavailable in most. In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is

[30] Thus, fact-finding by a Michigan judge fits within the "broad sentencing discretion" belonging to that judge that does not violate the Sixth Amendment. See *Alleyne*, 570 US at ___; 133 S Ct at 2163 (" '[E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things.' Our decision today is wholly consistent with the broad discretion of judges to select a sentence within the range authorized by law.") (citations omitted) (alteration in original).

> bound to impose a sentence within the Guidelines range. [*Booker*, 543 US at 284 (emphasis added).]

It is argued here that this language, coupled with *Alleyne*, renders the Michigan guidelines unconstitutional. I do not agree.

First of all, anything the Supreme Court has said about upward departures in a determinate system cannot reflexively be applied to an indeterminate system. A departure in a determinate system *can* result in a criminal defendant being deprived of his or her "legal *right* to a lesser sentence." This is because the judge ultimately has the authority to choose at what moment this "legal right" to freedom from incarceration will be restored, and if the judge chooses a date beyond that authorized by the jury's verdict, the defendant is necessarily deprived of his or her legal right to a maximum sentence determined by the jury's verdict.[31] This is not true in an indeterminate system because the judge in such a system does not have the authority to determine at what moment a defendant's "legal right" to freedom from incarceration will be restored, nor does the judge have any authority to extend the minimum parole eligibility date beyond the statutory maximum sentence.

Second, this same argument was made in *Drohan* regarding the "statutory maximum" under *Blakely* and

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[31] Take the defendant in *Jones*, for example. He was found guilty of a crime that carried a 15-year maximum sentence. *Jones*, 526 US at 231. When the judge found an additional fact—that the victim had suffered substantial bodily injury—it was required to sentence the defendant to a 25-year term. *Id*. Thus, the judge was able to sentence the defendant beyond the limit authorized by the jury's verdict and accordingly could deprive him of his "legal *right* to a lesser sentence." This simply cannot happen in an indeterminate system because a defendant is always subject to serving the maximum sentence and the judge can never interfere with this imposition of criminal punishment.

Apprendi, and this Court rejected it on the grounds that our system is indeterminate and thus distinct from those at issue in *Apprendi* and *Blakely*. *Drohan*, 475 Mich at 163-164. If the above passage from *Booker* was not read at that time to render our guidelines unconstitutional under *Apprendi*, it surely cannot now be read to render our system unconstitutional under *Alleyne*, as *Alleyne* merely extended *Apprendi* to a new category of sentences into which the instant sentence does not fall. Reliance on *Booker* in the instant case is misplaced for the identical reasons that this Court has already explained in *Drohan*:

> Defendant asserts that the "maximum-minimum" under the guidelines constitutes the "statutory maximum" for *Blakely* purposes because a trial court is required to depart on the basis of a finding of aggravating factors that, as a practical matter, will subject the defendant to an increase in the actual time the defendant will be required to serve in prison. However, defendant's interpretation is inconsistent with the nature of the protection afforded by the Sixth Amendment. At common law, a jury's verdict entitled a defendant to a determinate sentence. During the 19th century, American courts began moving away from such sentencing by according trial courts the discretion to determine a defendant's sentence. However, this new discretion was limited by fixed statutory or constitutional limits. In other words, while a trial court could impose a sentence *less than* the maximum authorized by the jury's verdict, the court could not impose a sentence greater than that allowed by the statute that the defendant had been convicted of violating. In short, the Sixth Amendment ensures that a defendant will not be incarcerated for a term longer than that authorized by the jury upon a finding of guilt beyond a reasonable doubt. However, the Sixth Amendment does not entitle a defendant to a sentence *below* that statutory maximum. Rather, under the Sixth Amendment, the jury effectively sets the outer limits of a sentence and the trial court is then permitted "to exercise discretion—taking into consideration various

> factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute."
>
> When defendant, a third-offense habitual offender, committed third-degree criminal sexual conduct, he did so knowing that he was risking 30 years in prison. When defendant was, in fact, sentenced to a maximum of 30 years in prison, he received all the protections he was entitled to under the Sixth Amendment. Therefore, the trial court's exercise of discretion in imposing a sentence greater than the "maximum-minimum," but within the range authorized by the verdict, fully complies with the Sixth Amendment. [*Drohan*, 475 Mich at 162-163 (citations omitted).]

For each of these reasons, it seems clear that Michigan's sentencing guidelines do not produce "mandatory minimum" sentences and therefore are unaffected by *Alleyne*.

It may also be relevant to note that I am not alone in reaching this conclusion. Each of the 11 federal courts of appeals to rule on this issue has held that judicial fact-finding does not implicate *Alleyne* if there is no "mandatory minimum" sentence involved.[32] And

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[32] See *United States v Ibrahim,* 529 F Appx 59, 64 (CA 2, 2013) ("Because the Sentencing Guidelines are advisory rather than mandatory, application of guidelines enhancements that do not increase the statutory maximum or minimum penalty neither implicates nor violates a defendant's Sixth Amendment right to a jury trial.") (citation omitted); *United States v Tuma*, 738 F3d 681, 693 (CA 5, 2013) ("[Defendant's] sentence did not expose him to a mandatory minimum sentence and was well within the sentencing discretion of the district court; therefore, *Alleyne* is inapplicable."); *United States v Johnson,* 732 F3d 577, 583-584 (CA 6, 2013) (holding that judicial fact-finding of crack cocaine quantity does not violate *Alleyne* rule because it does not alter a mandatory minimum sentence); *United States v Baum,* 542 F Appx 724, 727 (CA 10, 2013) (holding that the district court's fact-finding for guidelines purposes, without altering the mandatory minimum, was permissible under *Alleyne*); *United States v Ramírez-Negrón*, 751 F3d 42, 49 (CA 1, 2014) ("We flatly reject the proposition that all drug quantity calculations made under the advisory Guidelines must be

in each of these cases, the court has found *Alleyne*

submitted to a jury. . . . No *Alleyne* error occurs when a defendant's sentence is based entirely on Guidelines considerations without changing the applicable mandatory minimum."); *United States v Robinson*, 556 F Appx 68, 70 (CA 3, 2014) (holding that the district court "retained the ability to make factual findings necessary to calculate [the defendant's] advisory Sentencing Guidelines range" without submitting those questions to a jury); *United States v Holder*, 549 F Appx 214, 215 (CA 4, 2014) ("[A]lthough judicially determined facts are no longer relevant after *Alleyne* to deciding the applicable mandatory minimum, the factual findings needed to calculate a defendant's advisory Guidelines range are still within the district court's province."); *United States v Valdez*, 739 F3d 1052, 1054 (CA 7, 2014) (holding that when "[t]here is no indication . . . that the district judge thought her sentencing discretion was cabined by a higher statutory minimum" than that supported by the drug quantities charged or admitted by the defendant, the district court's calculation of "a greater drug quantity solely for purposes of determining [the defendant's] Guideline range" did not violate *Alleyne* rule); *United States v Battle*, 774 F3d 504, 516 (CA 8, 2014) (stating that "[i]n applying the [sentencing] enhancement, the court neither exceeded the statutory maximum nor increased a statutory mandatory minimum" and "[t]hus the court did not err in conducting its own fact-finding for the purposes of applying the enhancement"); *United States v Lizarraga-Carrizales*, 757 F3d 995, 998 (CA 9, 2014) (" '*Alleyne,* by its terms, applies to facts that "increase[ ] the mandatory minimum." [The defendant] suggests that *Alleyne* applies more broadly . . . . We do not read *Alleyne* so expansively. A fact that precludes safety-valve relief does not trigger or increase the mandatory minimum, but instead prohibits imposition of a sentence below a mandatory minimum already imposed as a result of the guilty plea or jury verdict.' "), quoting *United States v Harakaly*, 734 F3d 88, 98 (CA 1, 2013) (alterations in original); *United States v Cassius*, 777 F3d 1093, 1099 (CA 10, 2015) (upholding a district court's imposition of a mandatory minimum sentence when "the court made clear elsewhere at sentencing . . . that only one count required a mandatory minimum," stating that "[m]ost importantly, the Court explicitly discussed *Alleyne* at sentencing [and] noted that it *only applied where mandatory minimum sentences were increased due to judicial fact-finding*") (emphasis added); *United States v Charles*, 757 F3d 1222, 1225 (CA 11, 2014) (holding that "a district court may continue to make guidelines calculations based upon judicial fact findings and may enhance a sentence—so long as its findings do not increase the statutory maximum or [mandatory] minimum authorized by facts determined in a guilty plea or jury verdict"). While I recognize that these are federal cases and none, of course, deals specifically with

inapplicable when judicial fact-finding is merely used to score guidelines and does not result in an increased "mandatory minimum" sentence. Although the courts of appeals have sometimes overturned sentences under *Alleyne*, on each occasion it was done because the statute under which the defendant was convicted allowed judicially ascertained facts to justify an increase in the statutory "mandatory minimum," as in *Alleyne* itself.[33] No court of appeals has held *Alleyne* to be applicable to judicial fact-finding used to score guidelines.

In summary, the trial court in the instant case did not violate the Sixth Amendment by scoring defendant's offense variables under a "preponderance of the evidence" standard. As *Alleyne* made clear:

> Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial fact-finding, does not violate the Sixth Amendment. [*Alleyne*, 570 US at ___; 133 S Ct at 2163.]

Because a Michigan trial court's exercise of judgment at sentencing falls within the "broad sentencing discretion, informed by judicial fact-finding," defendant here is not entitled to be resentenced because his sentence fully comported with the requirements of the Sixth Amendment.

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an application of *Alleyne* to Michigan's sentencing system, each circuit has simply examined whether there was a mandatory minimum in the traditional sense, and when it was determined that there was no such mandatory minimum, that was the end of the analysis.

[33] See e.g., *United States v Lara-Ruiz*, 721 F3d 554 (CA 8, 2013) (remanding for resentencing when judicially found facts were used to increase a mandatory minimum sentence from 5 to 7 years under 18 USC 924(c)); *United States v Hackett*, 762 F3d 493 (CA 6, 2014); *United States v Lira*, 725 F3d 1043 (CA 9, 2013).

IV. RESPONSE TO THE MAJORITY

The majority believes that *Alleyne* altered the Sixth Amendment landscape established by *Apprendi* by holding merely that the "*Apprendi* rule applied with equal force to minimum sentences." Michigan's sentencing guidelines thereby fail under *Apprendi* because the "guidelines used to set the minimum sentence require a court to increase a defendant's minimum sentence beyond the minimum sentence authorized by the jury's verdict alone." As a result, "under *Alleyne*, the Legislature may not require judicial fact-finding that results in a mandatory increase in *either* the minimum or maximum sentence beyond the range set by the jury verdict." This is because the right to a jury trial includes "the right to have a 'jury determination' of all the pertinent facts used in *increasing the prescribed range of penalties*."

Although I agree that trial judges in our state find facts that increase a prescribed range and do so in a manner that can be considered "mandatory," this cannot be the end of the analysis. *Alleyne* indeed extended the rule of *Apprendi* to mandatory minimum sentences, and thus we must apply that rule to our sentencing system to determine whether the judge is finding "elements" that must be found by the jury and found beyond a reasonable doubt. The majority, however, does not actually apply *Apprendi* to our sentencing system, and it does not actually explain why an increase in the guidelines range somehow increases the "punishment" imposed on a criminal defendant. By simply assuming that *Apprendi* applies to our system because it is "mandatory," and then by further assuming that an extension of the period before a defendant first becomes eligible for parole is tantamount to an

increase in "punishment," the majority errs, in my view, by concluding that our sentencing system is unconstitutional.

The instant case involves the right to a jury trial, and this right is the product of both the Sixth Amendment and the Due Process Clause. Whether our sentencing system is constitutional cannot be answered by this Court exclusively on the basis of the text of these provisions. Rather, we must rely on the analyses set forth in two lines of United States Supreme Court decisions: the first is the line of cases including *Apprendi* and its progeny and the second is the line of cases encompassing the Court's analysis of the constitutional implications of parole under the Due Process Clause. This scope of analysis should not come as a surprise in light of the explicit recognition in *Apprendi* and *Alleyne* that the *Alleyne* rule is a function of both the Sixth Amendment and the Due Process Clause.[34]

The majority finds inapplicable the latter line of cases because they do not also involve the Sixth Amendment. See note 25 of this opinion. This holding cuts directly against the Supreme Court's Due Process precedents, for if an increase in a defendant's minimum parole eligibility date constitutes an increase in "punishment," so too does a denial of parole by the Parole Board. Criminal defendants as a result of to-

[34] "At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,' [US Const] Amdt. 14, and the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury, [US Const] Amdt. 6.' " *Apprendi*, 530 US at 476-477(second alteration in original). "The Sixth Amendment provides that those 'accused' of a 'crime' have the right to a trial 'by an impartial jury.' This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt." *Alleyne*, 570 US at ___; 133 S Ct at 2156.

day's decision will soon be proceeding en masse to challenge any denial or delay of parole as a violation of their "*Lockridge*" rights, and when they do, the majority will again have to decide whether Supreme Court decisions such as *Greenholtz*[35] and *Morrissey*[36] are relevant in ruling on those appeals. Only then will it become apparent how critical these decisions are, not only for the *Lockridge* cases of tomorrow, but also for the *Lockridge* case that is before us today. The majority has dismissed *Greenholtz* and *Morrissey* in today's case, but they will not be able to dismiss them tomorrow when today's decision must be given application in the context of countless individual appeals.

In the Supreme Court's Due Process Clause jurisprudence, there is a line of cases addressing constitutional rights associated with parole and parole eligibility. Because judges in Michigan, in implementing our sentencing guidelines, bear the responsibility of setting a defendant's earliest parole eligibility date, it is obvious that this line of Supreme Court cases would not only not be *instructive* in applying the rule of *Apprendi*, but would be *particularly* instructive for this purpose. This is because a judge's extension of the period before a defendant first becomes eligible for parole is the equivalent of a parole board's finding facts that operate to deny parole.[37] If the Supreme Court believed that a parole-eligibility determination by the trial judge constituted an increase in a defendant's "punishment," the Court would also have required facts relied on by a parole board to make this same determination to be found instead by a jury. This is

[35] *Greenholtz*, 442 US 1.

[36] *Morrissey*, 408 US 471.

[37] Each decision results in a convicted person being required to serve a greater or lesser part of his or her overall punishment in prison.

emphatically not the case, however, because the Supreme Court has held that a person has no due process rights with respect to parole eligibility, and it has rejected the argument that a parole board must empanel a jury to determine whether to grant or deny parole. *Greenholtz*, 442 US at 11; *Morrissey*, 408 US at 489. From these holdings, it is apparent that the Court does not view decisions concerning a defendant's parole eligibility as tantamount to an increase in "punishment."

From the *defendant's* perspective, we may be able to understand this distinctive sense of "punishment" served while incarcerated and "punishment" served while on parole. But the relevant perspective for this Court is not that of the defendant but that of the Constitution, and the Supreme Court has made clear that under the Constitution, a defendant has no right to parole and serves his or her "punishment" both while in prison and while on parole. *Greenholtz*, 442 US at 11. Because a defendant might well prefer to spend a part of his or her overall punishment on parole rather than in prison does not mean that a judicial increase in the period before the defendant becomes eligible to serve that punishment on parole constitutes an increase in the "punishment" authorized by the jury's verdict. The Supreme Court has never treated the denial or delay in parole eligibility as the equivalent of an increase in punishment, and the majority's conclusion that judicial fact-finding increases the defendant's *exposure* to criminal punishment can only be reached by disregarding the United States Supreme Court's line of Due Process Clause cases.

If the majority is correct and judges in our system are finding facts "essential to the punishment" by finding facts that extend the period before a defendant

becomes eligible for parole, then it must in the interests of consistency also resolve that facts found by a parole board that operate to deny parole are facts "essential to the punishment" and must therefore also be ascertained by a jury. Yet the Supreme Court has made clear that this is not the case. *Greenholtz*, 442 US at 11. Indeed, not only has the Court never required a jury to find facts relevant to the denial of parole in that context, but it has stated that those facts may be found by members of the parole board, who are neither jurors nor judges. *Morrissey*, 408 US at 489.

Parole is a mere "permit" to serve a part of one's criminal sentence outside prison. MCL 791.238. Just as a criminal defendant might prefer to spend the part of his or her punishment served in prison in minimum security rather than maximum security, and just as the defendant might have 1,001 other preferences and objections concerning the environment within which the prison part of that punishment is served, he or she might also prefer to spend a part of that punishment on parole. But again, the preference and perspective of the defendant is not what determines what is "punishment." Both Michigan law and precedent and United States Supreme Court precedent clearly answer the dispositive question whether a judge in our state increases a defendant's "punishment" when he or she finds facts that operate to delay parole eligibility. Yet the majority strikes down Michigan's sentencing system on the basis of a contrary answer to this same question.

The majority declares that *Alleyne* has altered the legal landscape to the extent that our sentencing scheme is now unconstitutional under *Apprendi*, but the only part of that landscape that has changed is that *Apprendi* now applies to both maximum and manda-

tory minimum sentences. Yet the landscape constructed by *Apprendi*, which *Alleyne* did nothing to alter, only applied to determinate sentencing systems.[38] As a result, the majority has applied in error a constitutional rule that was inapplicable in the first place. Under *Apprendi*, a fact must be submitted to the jury only if it *increases the punishment*. In Michigan, however, the process of scoring offense variables to compute a minimum parole eligibility date does not increase the punishment to which a defendant is exposed. Once a jury finds a defendant guilty, the jury has at that point authorized criminal punishment up to the statutory maximum and the judge has no ability to sentence beyond that limit. Thus, the judge can alter only the parole eligibility date, which, as explained, bears no *constitutional* significance, whatever the obvious differences in character between incarceration and parole.

In other words, Michigan's system is virtually identical to the common-law system that Justice Thomas, in a part of his opinion joined only by Justices Ginsburg, Sotomayor, and Kagan, described approvingly in *Alleyne*:

> At common law, the relationship between crime and punishment was clear. As discussed in *Apprendi,* "[t]he substantive criminal law tended to be sanction-specific," meaning "it prescribed a particular sentence for each

[38] Before *Alleyne*, the judge could unilaterally increase the bottom end of this sentence range authorized by the jury's verdict. Thus, the judge could increase the range from 3 to 10 years to 5 to 10 years. *Alleyne* clearly stands for the proposition that *both* ends of this range are constitutionally significant and that judges can no longer alter either end of the range produced by the jury's verdict. What the majority fails to recognize is that the constitutional problem identified in *Alleyne* does not exist in systems in which the jury's verdict establishes a single number and not a sentence range.

> offense." The system left judges with little sentencing discretion: once the facts of the offense were determined by the jury, the "judge was meant simply to impose [the prescribed] sentence." [*Alleyne*, 570 US at ___; 133 S Ct at 2158 (citations omitted) (alterations in original).]

In Michigan, our criminal law is also "sanction-specific," meaning that it prescribes a particular sentence for each offense. The jury finds the facts relevant to the imposition of criminal punishment, and once the facts of the offense are determined by the jury, the judge simply imposes the prescribed sentence.[39]

The plurality part of *Alleyne* then proceeded to recognize the transition from the common law toward determinate sentencing systems in which general facts found by the jury produce a range of permissible sentences and particular and more specific facts, if also found by the jury, increase this range:

> While some early American statutes provided *ranges* of permissible sentences, K. Stith & J. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 9 (1998), the ranges themselves were linked to particular facts constituting the elements of the crime. *E.g., Lacy v. State*, 15 Wis. 13 (1862) (discussing arson statute that provided for a sentence of 7 to 14 years where the house was occupied at the time of the offense, but a sentence of 3 to 10 if it was not); Ga. Penal Code §§4324–4325 (1867) (robbery "by open force or violence" was punishable by 4 to 20 years' imprisonment, while "[r]obbery by intimidation, or without

[39] *Unlike* the common law, Michigan law established a parole system that allows prisoners to be released before serving the entirety of the punishment imposed on them as a result of the jury's verdict, but this does not alter the constitutional analysis because criminal defendants have no constitutional right to parole. *Greenholtz*, 442 US at 11. Because defendants have no such right, there is only a single date at sentencing that is constitutionally significant and that is the date resulting from the statutory maximum. As a result, our system mirrors that of the common law for purposes of a constitutional analysis.

> using force and violence," was punishable by 2 to 5 years' imprisonment). This linkage of facts with particular sentence ranges (defined by both the minimum and the maximum) reflects the intimate connection between crime and punishment. [*Id*. at ___; 133 S Ct at 2158.]

This passage specifically describes the type of system that both *Alleyne* and *Apprendi* restrict because the jury no longer authorizes a specific sentence in these systems; rather, it authorizes a sentence range. Because the jury's verdict authorizes a range instead of a fixed punishment, judicial alteration of this range is no different from judicial alteration of the fixed common-law sentence that was authorized by the jury's verdict.

For example, in a statutory scheme in which arson is punishable by imprisonment for 7 to 14 years when a residence is occupied at the time of the offense, but a sentence of 3 to 10 years if it is not, it is for the jury to decide which offense the defendant committed. If the jury decides that the house was not occupied, it limits the court's authority to sentence the defendant to a range of 3 to 10 years, and the judge cannot find to the contrary that the house was occupied and then alter the range to 7 to 14 years. To do so would be to find a fact "essential to the punishment sought to be inflicted." The judge would improperly be impinging on the jury's authority in regard to criminal punishments. Michigan's sentencing system does not allow the jury to authorize a range of permissible sentences, and thus our system is identical to the common-law system for purposes of the present constitutional analysis. In our system, arson of a dwelling is punishable by imprisonment for up to 20 years, MCL 750.73, but arson of a structure that is *not* a dwelling is only punishable by up to 10 years, MCL 750.74. When the jury returns a verdict finding the defendant guilty of arson of a building that is not a dwelling, the judge cannot find

that the building was a dwelling and increase the punishment associated with the crime from 10 to 20 years. If the judge were to do this, it would be equivalent to an increase in the sentence range from 3 to 10 years to 7 to 14 years under the previous example. This would violate the defendant's right to a jury trial because the court would by itself have expanded the defendant's maximum exposure to punishment. That is, the judge would be finding facts "essential to the punishment sought to be inflicted" and the power to find those facts reposes exclusively within the domain of juries. See *Apprendi*, 530 US at 510; *Alleyne*, 570 US at ___; 133 S Ct at 2158-2159.

However, it does not violate the defendant's right to a jury trial when the trial court imposes the *precise punishment* the jury has authorized because the Sixth Amendment concerns the authority of the jury. *Blakely*, 542 US at 308-309. If the judge cannot interfere with the authority of the jury to impose criminal punishment, there can be no Sixth Amendment violation. *Id*. It truly is as simple as that, as "the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury." *Id*. Any discretion our judges possess at sentencing cannot be exercised at the "expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty." *Id*. at 309. As a result, our system does not violate, or even implicate, the Sixth Amendment. The majority, I respectfully believe, errs by holding otherwise.

V. IRONY

For the reasons set forth in this opinion, I disagree with the analysis of the majority. However, this dis-

agreement is largely confined to the majority's analysis of what the United States Supreme Court has said is required by the Sixth Amendment of the Constitution. The majority's having reached the conclusion it does—that Michigan's sentencing system is unconstitutional—I cannot fairly hold the majority responsible for the public policy *consequences* of what it believes to be constitutionally required. If Michigan's sentencing system indeed violates the Sixth Amendment, it cannot be maintained and an alternative sentencing system must be established in its place. Nonetheless, in reflecting upon the very substantial practical consequences of today's decision for our state's criminal justice process, I cannot help but view the new reality that has been created by this Court as deeply marked by irony. And such irony does, to my mind, cast further doubt about whether the majority's interpretations of the United States Supreme Court's decisions in *Apprendi* and *Alleyne* are correct. How can there be such a great disparity between the expressed concerns and purposes of the Supreme Court in these decisions and their real-world effect in Michigan? How can there be such a "disconnect" between the constitutional impulses apparently underlying these decisions and the specific dislocations they will cause to our state's criminal justice process?

First, it is ironic that two decisions of the United States Supreme Court intended to limit what that Court viewed as the encroaching power of the *judiciary* on the authority of the *jury* would lead to an *expansion* of the power of the former and a *diminution* in the authority of the latter. Rather than being constrained by a relatively narrow guidelines range that, for example, requires a defendant to be sentenced to a term of 8 to 10 years and allows the court to depart upward or downward from that range *only* upon a showing of

"substantial and compelling circumstances," today's decision empowers the court to sentence that same defendant to *any* term between zero years and the statutory maximum with almost no meaningful appellate review. Not only does this result in a substantial *broadening* of the power of judges, but it also results in a substantial *diminishing* of the authority of juries. While the jury will continue to determine what statutory maximum applies, its decision will no longer determine the choice of the earliest parole date applicable to the conviction offense. From the perspective of a majority that views this parole date as defining a "punishment," this constitutes a considerable curtailment in the breadth of the jury's *constitutional* authority to authorize the terms of punishment, and from the perspective of this dissent, it constitutes a considerable curtailment in the breadth of the jury's *statutory* authority to determine the penal consequences of criminal misconduct.

Second, it is ironic that two decisions of the United States Supreme Court designed to foster predictability and certainty in criminal sentencing, see *Alleyne*, 570 US at ___; 133 S Ct at 2161 ("Defining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment."); *Apprendi*, 530 US at 478-479, would lead to a criminal justice process in which there will be considerably *less* predictability and certainty. This is the result of the nullification of a sentencing guidelines system designed to achieve exactly the kind of predictability referred to in those decisions and its replacement by a system of broad judicial discretion that makes it almost impossible for a defendant, or a prosecutor, to predict with reasonable certainty what sentences will be imposed. Instead, the only thing that

is now "predictable" is that the practical consequences for an intelligent plea-bargaining process are likely to be considerable.

Third, it is ironic that two decisions of the United States Supreme Court intended to protect defendants' rights would lead to an erosion of one of the most important protections afforded defendants by our state's criminal justice system. The Sixth Amendment and Due Process Clause guarantee criminal defendants the right to a jury trial precisely in order to protect them from the abuse of state power. *Duncan*, 391 US at 155. However, in the place of a sentencing system that has effectively *limited* the potential abuse of state power by sharply curtailing the exercise of discretion by judges in determining specific criminal sentences, defendants will now be relegated to a system in which they face nearly unfettered exercises of discretion by judges. A step has been taken backward from the equal rule of the law and toward the discretionary rule of the judge.

Fourth, it is ironic that two decisions of the United States Supreme Court designed to preserve the authority of that most republican of American constitutional institutions, the jury, would lead to an expansion in the power of that least republican of American constitutional institutions, the judge. This expansion of judicial power comes at the direct expense of the people and their representatives, whose contrary judgments in setting binding sentencing guidelines have been overturned. Sentences thus will become *more* a function of the personal attitudes and viewpoints of 586 judges and *less* a function of the perspectives of the citizenry as a whole.

Fifth, it is ironic that two decisions of the United States Supreme Court premised on a defendant's right

to fairness in the sentencing process, grounded in the Sixth Amendment and Due Process Clauses of the Constitution, would lead to the nullification of guidelines predicated on this identical premise. Our Legislature established the sentencing guidelines "intending to reduce unjustified disparities at sentencing." *People v Babcock*, 469 Mich 247, 267 n 21; 666 NW2d 231 (2003). The guidelines were intended to produce a system in which similarly situated defendants would be sentenced in a reasonably similar manner, rather than having one defendant sentenced by Judge Maximum Mike to a 12-year term and another defendant sentenced by Judge Lenient Larry to a 4-year term. This pursuit of sentencing uniformity and consistency as the lodestar of our justice system has now given way to a rule of deference to the widely disparate judgments of 586 judges.

Sixth, it is ironic that although the majority holds that under *Alleyne* the *minimum* end of sentence ranges under our sentencing guidelines impermissibly infringes the jury's authority, the majority has chosen to apply the exceedingly broad remedy of *Apprendi* and *Booker*—cases involving the *maximum* end of sentencing guidelines—that operate to *diminish* the authority of the jury rather than enhance it. In *Booker*, the Supreme Court in support of its *Apprendi* analysis implemented a remedy rendering the guidelines advisory in an effort to protect the authority of the jury in setting a defendant's maximum exposure to punishment. Then, in *Alleyne*, the Supreme Court implemented a narrow remedy and held that facts increasing the minimum sentence must be submitted to the jury in order to protect the jury's authority with respect to a defendant's minimum exposure to punishment. This Court has already recognized in *Drohan* that the constitutional deficiency relating to the *maxi-*

mum sentence does not exist within our system (and the majority does not question this), and as a result the remedy of *Booker* is inapt. Now, the majority holds that there is a constitutional deficiency relating to the *minimum* sentence, and apparently *only* the minimum sentence, yet instead of adopting the narrow remedy of *Alleyne*, the majority adopts the exceedingly broad remedy of *Apprendi* and *Booker*. By applying *this* remedy designed to cure a *different* constitutional deficiency than is identified in the present case, the majority renders the jury irrelevant in determining the minimum sentence while again significantly expanding the power of the judge. The majority adopts without consideration of alternatives an exceedingly broad remedy that might be appropriate for an *Apprendi*/*Booker* violation, but is far less appropriate for an *Alleyne* violation, for which the Supreme Court has crafted a specifically tailored and considerably narrower and more focused remedy.[40]

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[40] Because I conclude that Michigan's sentencing system does not violate the Sixth Amendment, I need not address the appropriate remedy for what I view as a nonexistent violation. Nonetheless, I submit that the majority has not been persuasive in its adoption without modification or significant analysis the so-called *Booker* remedy that renders the sentencing guidelines "advisory only" (meaning that the guidelines no longer have any binding effect) and imposing a "reasonableness" standard of review for sentences that depart from the now-advisory guidelines (meaning that the guidelines no longer have even any presumptive effect). The United States Supreme Court in *Booker* engaged in a lengthy severability analysis that sought to discern and maintain to the extent possible the legislative intentions of the *Congress*. See *Booker*, 543 US at 246 ("We seek to determine what 'Congress would have intended' in light of the Court's constitutional holding."). This Court, on the other hand, by its severability analysis is obligated to discern the legislative intentions of our *Legislature*. By simply importing the *Booker* remedy to Michigan with no particularized analysis of our own Legislature's intentions and no assessment of available alternative approaches to severability, the majority misapprehends its judicial obligations after it has struck down a law of this state. *Booker*, for example, set forth the "reasonableness" standard

VI. CONCLUSION

I conclude that under the Sixth Amendment a crim-

of review for departures from the federal guidelines because the "pre-2003 text [of 18 USC 3742(e)] directed appellate courts to review sentences that reflected an applicable Guidelines range for correctness, but to review other sentences—those that fell 'outside the applicable Guideline range'—with a view toward determining whether such a sentence '*is unreasonable* . . . .' " *Id*. at 261, quoting 18 USC 3742(e)(3). "In other words, the text [of 18 USC 3742(e)(3)] told appellate courts to determine whether the sentence is 'unreasonable' with regard to [18 USC] 3553(a)." *Id*. *Only* for this reason did the United States Supreme Court "read the statute as implying this appellate review standard—a standard consistent with appellate sentencing practice during the last two decades." *Id*. at 261-262. However, in Michigan, before the enactment of the legislative sentencing guidelines, appellate courts reviewed sentences under the judicial guidelines for "proportionality." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1980) ("[A] given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender."). Accordingly, the standard of review summarily imposed in Michigan by the majority is disconnected from any consideration of *this state's* prior standard of review, however irrelevantly consistent it may be with the United States Supreme Court's post-severability analysis standard.

Nor does the majority even acknowledge, much less discuss, Justice Stevens's lengthy dissent in *Booker* (joined by Justices Scalia and Souter), in which he argued that the remedy adopted by the majority in that case (also adopted by the majority in this case) undermined the motivating purpose underlying the guidelines to an unnecessary extent. In enacting the federal guidelines, "Congress revealed both an unmistakable preference for the certainty of a binding regime and a deep suspicion of judges' ability to reduce disparities in federal sentencing." *Booker*, 543 US at 292 (Stevens, J., dissenting in part). When *Booker* made the entire sentencing system "advisory," as the majority does in the instant case, it created a sentencing regime that was "stark[ly]" different from the one Congress had intended. *Id*. at 300. Furthermore, Justice Stevens believed that the majority's decision to modify the guidelines by striking down the portions making them mandatory was an "extraordinary" "exercise of legislative, rather than judicial, power," *id*. at 272, 274, because the guidelines were not facially unconstitutional; that is, the guidelines *could* be constitutionally applied in situations in which the judge did not find facts that increased the

inal defendant is not entitled to a jury determination of facts necessary to establish his or her minimum parole eligibility date. Under Michigan's sentencing system, the jury has the authority to render a defendant subject to the statutory maximum punishment, and the judge has no influence over this authority or any authority to usurp it. The judge's exercise of judgment in establishing a parole eligibility date does not in-

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defendant's punishment, *id*. at 275-276. It was only when the *judge* himself found such facts that the guidelines were *applied* in an unconstitutional manner. Justice Stevens advocated a remedy that did not contemplate a wholesale revision of the guidelines, but rather one that merely prevented judges from finding facts that increased the range of punishment faced by the defendant. He believed this remedy to be the most appropriate because it retained the mandatory character of the guidelines, which in his view constituted the "heart" of the guidelines system, *id*. at 299, and it also left the guidelines intact in all other situations in which a judge does *not* find facts that increase the defendant's punishment or the jury decides those facts. The majority here apparently did not even consider such a remedy despite the fact that, as with the federal guidelines, there is ample evidence that the mandatory character of Michigan's guidelines was also viewed by *our* Legislature as an essential characteristic, particularly in light of the fact that the guidelines were enacted specifically to replace Michigan's nonbinding judicial guidelines. That is, our guidelines could similarly be applied in a constitutional manner as long as the *judge* does not find facts that increase a defendant's punishment, or the *jury* does.

I am also unpersuaded by the majority's assertion that if an *Alleyne* objection is unpreserved and pending on direct appeal, a remand is required "to determine whether [the sentencing] court would have imposed a *materially* different sentence but for the constitutional error." (Emphasis added.) While the majority is correct that the appropriate standard of review for an unpreserved claim of constitutional error is whether a "plain error affected substantial rights," *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), a defendant's "substantial rights" would seem to have been affected by even a few months or weeks or days of unconstitutional incarceration. Why should not *any* defendant whose sentence is pending and who has been adversely affected by the now-defunct sentencing guidelines receive an opportunity for resentencing? Which now-unconstitutional lengthier terms of incarceration are viewed as sufficiently "material" to warrant relief?

fringe the authority of the jury and does not violate the Sixth Amendment of the United States Constitution. Furthermore, Michigan's indeterminate sentencing guidelines do not produce "mandatory minimum" criminal sentences, and because *Alleyne* only applies to facts that increase "mandatory minimum" sentences, *Alleyne* is inapplicable to our state's guidelines. Therefore, I conclude that Michigan's sentencing system does not offend the Sixth Amendment and would therefore affirm the judgment of the Court of Appeals.

ZAHRA, J., concurred with MARKMAN, J.

PEOPLE v SMITH

Docket No. 148305. Argued January 13, 2015 (Calendar No. 3). Decided July 30, 2015.

Feronda Montre Smith was convicted in the Genesee Circuit Court, Joseph J. Farah, J., of armed robbery, MCL 750.529, and first-degree felony murder, MCL 750.316(1)(b), following a jury trial. The charges were related to the death of Larry Pass, Jr., a drug dealer. At trial, two prosecution witnesses claimed to have been present when defendant allegedly shot Pass. Tarence Lard testified for the prosecution as part of a plea agreement for his part in the crime. Mark Yancy maintained his innocence with respect to the shooting but admitted collecting Pass's drugs, helping dispose of the murder weapon, and using cocaine with defendant and Lard after the shooting. At a pretrial hearing, a Federal Bureau of Investigation special agent who led a task force had testified that Yancy was compensated for his assistance in an FBI inquiry into Pass's murder and a suspected criminal enterprise involving defendant. At trial, however, the fact and extent of Yancy's participation in the investigation that led to the prosecution of defendant and the compensation Yancy received for it were not made known to the jury. Instead, Yancy testified that he had not been paid for his cooperation in relation to defendant's case. Defendant appealed his convictions, arguing in part that he had been denied his Sixth Amendment right to a speedy trial by a delay of 41 months and that the prosecutor's failure to correct Yancy's false testimony violated his right to due process and denied him a fair trial. The Court of Appeals, GLEICHER, P.J., and RONAYNE KRAUSE and RIORDAN, JJ., affirmed in an unpublished opinion per curiam, issued October 29, 2013 (Docket No. 304935), because the panel was not persuaded that the prosecutor's failure to correct Yancy's false testimony had made a difference in the jury's estimation of his credibility. The panel also concluded that defendant had not shown prejudice sufficient to constitute a violation of his right to a speedy trial. Defendant applied for leave to appeal, which the Supreme Court granted. 496 Mich 855 (2014).

In an opinion by Justice MCCORMACK, joined in full by Chief Justice YOUNG and Justices MARKMAN and VIVIANO and by Justice BERNSTEIN (except for footnote 5), the Supreme Court *held*:

The prosecution breached its duty to correct the substantially misleading, if not false, testimony of a key witness about his formal and compensated cooperation in the government's investigation. Given the overall weakness of the evidence against defendant and the significance of the witness's testimony, there was a reasonable probability that the prosecution's exploitation of the substantially misleading testimony affected the jury's verdict.

1. The prosecution may not knowingly use false evidence, including false testimony, to obtain a conviction. The prosecution has an affirmative duty to correct false testimony, and the duty specifically applies when the testimony concerns remuneration for a witness's cooperation. The duty applies even if the false testimony goes only to the credibility of the witness. Moreover, the prosecutor's blameworthiness is relevant. While the prosecutor need not correct every instance of mistaken or inaccurate testimony, the effect of a prosecutor's failure to correct false testimony is the crucial inquiry for due-process purposes. A new trial is required if the uncorrected false testimony could in any reasonable likelihood have affected the jury's judgment.

2. Yancy's trial testimony undoubtedly left the jury with the impression that he received no payment of any kind for his participation in this case. That overall impression was false. Instead of rectifying this false impression, the prosecutor capitalized on and exploited it. When Yancy specifically denied during cross-examination that he had been compensated in connection with the investigation of defendant, the prosecutor again did nothing to correct the testimony but instead used it to her advantage in closing argument, urging the jury to credit Yancy's story because he had not received consideration on this case for testifying even though he had received consideration on other task force cases. The prosecutor's repeated emphasis on Yancy's lack of compensation for testifying and her comments at closing argument enhanced the misleading impression that Yancy was a totally independent witness, underscoring the jury's false impression that because Yancy had not been paid to testify, he had no questionable incentive for his participation in this case.

3. Due process required that the jury be accurately apprised of the incentives underlying the testimony of this critical witness and that the prosecution not exploit any confusion relating to this critical topic. No physical evidence connected defendant to the crime, and he was convicted solely on the testimony of two witnesses who had significant credibility issues. The jury knew that Lard testified pursuant to a favorable plea agreement for his role in the crime, and his testimony was inconsistent with Yancy's

version of events. Yancy's account of the crime also had inconsistencies and did not cast him in a favorable light. There was, therefore, a basis for skepticism about both Lard and Yancy. As far as the jury knew, however, Yancy was uniquely credible in one respect: he was the sole lay witness who did not directly benefit from his participation in the case. Had the jury been aware of Yancy's compensation, the prosecution might well have had a more difficult task persuading the jury to believe Yancy. Given the effect that Yancy's uncorrected testimony had on his credibility, the central role that credibility played in securing defendant's convictions, and the dearth of other evidence implicating defendant, there was a reasonable likelihood that the false impression resulting from the prosecutor's exploitation of the testimony affected the jury's judgment. Accordingly, defendant was entitled to a new trial.

4. While the delay before defendant's trial was extraordinary, defendant did not show sufficient prejudice to merit dismissal for a violation of his right to a speedy trial.

Court of Appeals' judgment reversed in part, defendant's convictions vacated, and case remanded for a new trial.

Justice BERNSTEIN, concurring in part and dissenting in part, concurred with the majority except for footnote 5 of its opinion, which concluded that defendant had not shown sufficient prejudice to merit dismissal for a violation of his right to a speedy trial. With respect to defendant's speedy-trial claim, Justice BERNSTEIN instead concurred with Part II of Justice KELLY'S opinion. Accordingly, he would have in addition reversed the judgment of the Court of Appeals with respect to the speedy-trial claim and remanded this case to the trial court for it to consider whether the prosecution overcame the presumption of prejudice to defendant's person and defense.

Justice KELLY, joined by Justice BERNSTEIN with respect to Part II of the opinion only (concerning the speedy-trial issue), concurred in the result of the majority's opinion with respect to Yancy's false testimony. She dissented to the extent that the majority expanded the traditional standard concerning the prosecution's use of false evidence to instead allow a new trial merely on the basis of "substantially misleading" testimony, agreeing with Justice ZAHRA on this point. Applying the traditional standard to this case, however, Justice KELLY agreed that Yancy's testimony was false, that it was reasonably likely that his uncorrected false testimony affected the jury's judgment, and that defendant was therefore entitled to a new trial. Justice KELLY dissented from the majority's resolution of the speedy-trial issue.

The trial court did not correctly apply the balancing test from *Barker v Wingo*, 407 US 514 (1972), to assess defendant's speedy-trial claim after his trial had been delayed for 41 months while he was in prison. Some of the factors to be considered under the *Barker* test are (1) the length of the delay, (2) the justification for the delay, (3) the defendant's assertion of his or her right, and (4) the multifaceted prejudice to the defendant. The trial court did not apply the rule that prejudice is presumed after a delay of 18 months and that the burden then shifts to the prosecution to show there was no injury to the defendant's person or defense. Despite a total delay exceeding 18 months when defendant first moved for a speedy trial, the court found that defendant had not established prejudice because the total delay by the prosecution was less than 18 months. The Court of Appeals recognized that the trial court had misunderstood the *Barker* prejudice prong, but incorrectly concluded that no error had occurred. No prosecutorial evidence overcoming the presumption of prejudice appears on the record. By failing to fully engage in the balancing process established by *Barker* and therefore failing to impose the proper burden on the prosecution, the trial court did not afford defendant the complete protection of his right to a speedy trial. Justice KELLY would have reversed the judgment of the Court of Appeals, vacated defendant's convictions, and remanded this case to a new judge in the Genesee Circuit Court to consider whether the prosecution overcame the presumption of prejudice. If that presumption was overcome, a new trial would be warranted on the basis of the majority's reasoning. However, if the presumption was not overcome, a dismissal of all charges would be the only remedy for the speedy-trial violation.

Justice ZAHRA, dissenting, agreed that the prosecution may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, but stated that the majority had turned this constitutional principle into a new requirement that the prosecutor must elicit not just truthful testimony, but also complete testimony, fully disclosing all the facts and circumstances of how that witness came to testify. He further concluded that the majority had imposed an additional duty on the prosecutor to correct a defense attorney's mischaracterized questions made during the cross-examination of a prosecution witness. The result was an unacceptably high and extraordinarily ambiguous standard requiring prosecutors to correct every instance of mistaken, inaccurate, or incomplete testimony or risk every possible or perceived contradiction being rendered material. Yancy's relationship with the government and the details of his compensation were fully disclosed before trial. What the majority concluded was

false or substantially misleading would be better characterized as incomplete testimony. Accordingly, the prosecutor did not commit an error by failing to clarify that evidence in the manner required by the majority. Nor was the prosecutor's closing argument an improper exploitation of misleading testimony. Moreover, to the extent that the prosecutor's actions constituted error, that error was extinguished by defendant's waiver, forfeited for lack of preservation, or harmless. Justice ZAHRA would have affirmed defendant's convictions.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *David S. Leyton*, Prosecuting Attorney, and *Michael A. Tesner*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Valerie R. Newman* and *Katherine L. Marcuz*) for defendant.

MCCORMACK, J. In this case, we consider whether the prosecution breached a duty to correct the substantially misleading, if not false, testimony of a key witness about his formal and compensated cooperation in the government's investigation. Given the overall weakness of the evidence against the defendant and the significance of the witness's testimony, we conclude that there is a reasonable probability that the prosecution's exploitation of the substantially misleading testimony affected the verdict. See *Napue v Illinois*, 360 US 264, 271-272; 79 S Ct 1173; 3 L Ed 2d 1217 (1959). We therefore reverse the judgment of the Court of Appeals in part, vacate the defendant's convictions, and remand this case to the Genesee Circuit Court for a new trial.

I. FACTS AND PROCEDURAL HISTORY

The defendant was charged with, among other things, armed robbery, MCL 750.529, and first-degree felony murder, MCL 750.316(1)(b), after the police

found known drug dealer Larry Pass, Jr., dead in Pass's own home. At the defendant's trial, two prosecution witnesses claimed to have been present when the defendant allegedly shot Pass. The first witness was codefendant Tarence Lard, who testified for the prosecution as part of a plea agreement for his part in the crime. The second witness was Mark Yancy, who maintained his innocence with respect to the shooting but admitted collecting Pass's drugs, helping dispose of the murder weapon, and using cocaine with the defendant and Lard after the shooting. Yancy and Lard contradicted one another in important ways, although both testified that Yancy and the defendant had had a violent dispute over money in the weeks leading up to the murder. No other evidence connected the defendant to the crime or confirmed that he had ever been at the scene, and no murder weapon was ever recovered.

Yancy was a paid informant;[1] he had been compensated for his assistance in a Federal Bureau of Investigation (FBI) inquiry into Pass's murder and a suspected criminal enterprise involving the defendant. This fact was made clear in a pretrial hearing, during which the prosecutor[2] specifically called the investigation's FBI task force leader and informant coordinator, Special Agent Dan Harris, to address informant compensation in the case. Harris testified that Yancy was paid for his cooperation relating to "the Larry Pass

[1] More than three years before the trial in this case, around October 2008, the Federal Bureau of Investigation paid Yancy $4,000 for information he provided to a joint local and federal task force relating to the task force's investigation of the "Pierson Hood gang" and its wide-ranging criminal activity in the Flint area, including facts relevant to the murder at issue in this case. Accordingly, this Genesee County prosecution was the result of the work of that task force, including Yancy's compensated cooperation with it.

[2] The assistant prosecutor who appeared at this pretrial hearing was also the trial prosecutor.

homicide[,] which was information against Mr. Lard and Mr. Smith [the defendant]."[3]

At trial, however, the fact and extent of Yancy's participation in the investigation that lead to the prosecution of the defendant and the compensation Yancy received for it was never made known to the jury. On the contrary, Yancy testified that he was not paid for his cooperation in relation to "this case," i.e., the prosecution of the defendant for Pass's murder. The topic first arose during direct examination, during which Yancy admitted in response to the prosecutor's question that he had been "paid by a federal agency for [his] cooperation." Neither the prosecutor's question nor Yancy's answer tied his cooperation to his involvement in the investigation of the defendant as the prime suspect in Pass's murder. In order to avoid linking Yancy's compensated cooperation to the investigation and prosecution of the defendant, the prosecutor carefully limited her subsequent questions to whether he was specifically paid for the testimony he was giving, which Yancy denied.[4] By itself, such cautious presen-

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[3] Harris's full explanation was as follows:

> I did determine the amount on Mark Yancy was $4,000. The request was originally requested or submitted in October of 2008. I could not recall or could not find the date it was actually paid. The reason for [Yancy's] payment was for information against Pierson Hood members and their involvement, also for the Larry Pass homicide which was against Mr. Lard and Mr. Smith.

Harris made no further statements about the purposes of Yancy's compensation, nor did he describe how the payment was apportioned respective to information about Pierson Hood or the Pass homicide. We therefore disagree with the dissent's characterization of Harris's testimony as stating that the payment was "due in *significant* part for [Yancy's] cooperation relating to [Pierson Hood]." *Post* at 498 n 6 (emphasis added).

[4] The full exchange was as follows:

tation of testimony might not have been problematic because the prosecution was careful not to elicit outright false testimony. But then Yancy took this denial further during cross-examination:

> [*Defense Counsel*]: Do you deny -- first of all, it sounds like you agreed that you were paid $4,500 for *cooperating* with law enforcement, correct?
>
> [*Yancy*]: Correct.
>
> [*Defense Counsel*]: But you deny that it was with regards to this case, correct?
>
> [*Yancy*]: Correct. [Emphasis added.]

The prosecutor revisited the topic during redirect examination, again limiting her question to whether Yancy had been paid for his "testimony" in particular. Yancy again denied being compensated:

> [*Prosecutor*]: Okay, and just so we're clear, you were not paid to testify in this case, correct?
>
> [*Yancy*]: Correct.

> [*Prosecutor*]: Now, you've been paid by a federal agency for cooperation. Is that correct?
>
> [*Yancy*]: Yes.
>
> [*Prosecutor*]: And the money that you were paid was not related to testifying in this case, was it?
>
> [*Defense Counsel*]: Objection. Leading.
>
> [*Yancy*]: No.
>
> *The Court*: Okay. You can rephrase the question.
>
> [*Prosecutor*]: I'll rephrase.
>
> * * *
>
> Were you paid for your testimony in this case?
>
> [*Yancy*]: No.

Four times, then, Yancy denied having been paid in connection with the defendant's case—specifically, that he had not been compensated for his testimony at the defendant's trial and also that he had not been otherwise compensated for "cooperating" "with regards to this case." Clearly, the jury could have interpreted this statement to indicate that Yancy had *never* been paid for his involvement with the investigation of the Pass homicide, not merely that the Genesee County Prosecuting Attorney's office had not compensated him for "testimony" or cooperation with the defendant's formal prosecution. The latter point might have been true; the former point was plainly misleading and likely untrue, as the prosecutor well knew, having elicited Harris's testimony at the pretrial hearing. This former point, however, was never corrected or clarified at trial, nor was the true nature or extent of Yancy's participation or compensation as an informant put before the jury. Rather, the prosecutor exploited the potential confusion Yancy's testimony created by reminding the jury of Yancy's denials during closing argument, cementing the false notion that Yancy had only been paid for his cooperation in *other cases*, and attempting to advance his credibility as a result of that fact:

> Mark Yancy was here, ladies and gentlemen, and he talked to you about [sic] he wasn't charged in this homicide, and that he admitted he was in the house at the time of the homicide, and that he got the cocaine, and gave it to Lard and the defendant. *He told you he did not get consideration on this case for testifying, that he got consideration on other cases that the task force was involved with*. [Emphasis added.]

The jury found the defendant guilty of armed robbery and felony murder, but acquitted him of the other charges. On June 30, 2011, the defendant was sentenced as a fourth-offense habitual offender to life in

prison for the murder conviction and to 20 years, 10 months to 35 years for the armed-robbery conviction. The defendant appealed and, among other issues, argued that the prosecution's failure to correct Yancy's false testimony violated his right to due process and denied him a fair trial. The Court of Appeals affirmed his convictions because it was unpersuaded that the failure to correct Yancy's false testimony made a difference in the jury's estimation of his credibility. *People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued October 29, 2013 (Docket No. 304935), p 5. The defendant then sought this Court's review, and we granted leave to appeal.[5]

II. LEGAL BACKGROUND

A due process violation presents a constitutional question that this Court reviews de novo. *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010). It is inconsistent with due process when the prosecution allows false testimony from a state's witness to stand uncorrected. *Napue*, 360 US at 269; see also *People v Wiese*, 425 Mich 448, 453-454; 389 NW2d 866 (1986); *Giglio v United States*, 405 US 150, 153; 92 S Ct 763; 31 L Ed 2d 104 (1972). It is well established that "a State may not knowingly use false evidence, including

[5] We granted to leave to appeal, limited to two issues: "(1) whether the defendant was deprived of his constitutional right to a speedy trial; and (2) whether the defendant was deprived of his due process right to a fair trial through the presentation of perjured testimony." *People v Smith*, 496 Mich 855 (2014).

While we agree that the delay in this case was extraordinary, we are not persuaded that the defendant has shown sufficient prejudice to merit dismissal for a violation of his right to a speedy trial. See *Barker v Wingo*, 407 US 514, 530, 532; 92 S Ct 2182; 33 L Ed 2d 101 (1972). We therefore affirm on that issue for the reasons stated in the Court of Appeals' opinion.

false testimony, to obtain a tainted conviction . . . ." *Napue*, 360 US at 269. Indeed, the prosecution has an affirmative duty to correct false testimony, and this duty specifically applies when the testimony concerns remuneration for a witness's cooperation. See *Giglio*, 405 US at 154-155; *Wiese*, 425 Mich at 455-456. The responsibility "does not cease to apply merely because the false testimony goes only to the credibility of the witness." *Napue*, 360 US at 269. Nor is the blameworthiness of the prosecutor relevant. *Smith v Phillips*, 455 US 209, 220 n 10; 102 S Ct 940; 71 L Ed 2d 78 (1982). Rather, while "not every contradiction is material" and the prosecutor need not correct every instance of mistaken or inaccurate testimony, *United States v Martin*, 59 F3d 767, 770 (CA 8, 1995), it is the *effect* of a prosecutor's failure to correct false testimony that "is the crucial inquiry for due process purposes," *Smith*, 455 US at 220 n 10. A prosecutor's capitalizing on the false testimony, however, is of particular concern because it "reinforce[s] the deception of the use of false testimony and thereby contribute[s] to the deprivation of due process." *DeMarco v United States*, 928 F2d 1074, 1077 (CA 11, 1991); see *Jenkins v Artuz*, 294 F3d 284, 294-295 (CA 2, 2002) (stating that the prosecutor's promotion of the false testimony at summation "plainly sharpened the prejudice," " 'ha[d] no place in the administration of justice[,] and should neither be permitted nor rewarded' ") (citations and quotation marks omitted); *Mills v Scully*, 826 F2d 1192, 1195 (CA 2, 1987) ("[T]here may be a deprivation of due process if the prosecutor reinforces the deception by capitalizing on it in closing argument . . . ."). A new trial is required if the uncorrected false testimony "could . . . in any reasonable likelihood have affected the judgment of the jury." *Napue*, 360 US at 271-272; see also *Giglio*,

405 US at 154. Furthermore, as one federal circuit court of appeals has stated:

> Regardless of the lack of intent to lie on the part of the witness, *Giglio* and *Napue* require that the prosecutor apprise the court when he knows that his witness is giving testimony that is substantially misleading. This is not to say that the prosecutor must play the role of defense counsel, and ferret out ambiguities in his witness's responses on cross-examination. However, when it should be obvious to the Government that the witness' answer, although made in good faith, is untrue, the Government's obligation to correct that statement is as compelling as it is in a situation where the Government knows that the witness is intentionally committing perjury. [*United States v Harris*, 498 F2d 1164, 1169 (CA 3, 1974).][6]

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[6] See also *Jenkins*, 294 F3d at 296 ("[W]hile [the prosecutor's] questions elicited technically correct answers, . . . they left the jury with the mistaken impression that no plea agreement existed. We can think of no credible explanation for [the prosecutor's] conduct other than an attempt to reinforce [the witness's] false testimony."); *United States v Barham*, 595 F2d 231, 241 (CA 5, 1979) (asserting the prosecution's duty to correct testimony that "if not outright lies, certainly conveyed the false impression that none of [the] witnesses had received any promises of leniency or other considerations").

In *Harris*, a government witness falsely testified during cross-examination that in exchange for her testimony against the defendants, the prosecution had made no promises to help her achieve a reduced sentence on pending state charges against her. *Harris*, 498 F2d at 1166-1167. The prosecutor brought the witness's false testimony to the attention of the court and defense counsel a day after the testimony was given but still during the government's case-in-chief and offered to stipulate it. *Id*. at 1167. Unlike the prosecutor in this case, the *Harris* prosecutor did not seek to capitalize on the false testimony, but rather offered to correct it. *Id*. Indeed, it was the defendant's affirmative failure to take advantage of that offer and use other means to reveal the untruth that was fatal to the ability to complain about it on appeal. *Id*. at 1170. The dissent overlooks this important difference, and conflates the distinct prosecutorial duties to disclose exculpatory information, see *Brady v Maryland*, 373 US 83,

III. APPLICATION

A. FAILURE TO CORRECT TESTIMONY

As the Court of Appeals correctly observed, Yancy's trial testimony undoubtedly left the impression that he received no payment of any kind for his participation in this case, either for his testimony or for his prior cooperation that was the necessary condition to his testimony. The overall impression conveyed was false. Whether Yancy understood why or for what he had been compensated, the prosecutor knew that Agent Harris had given uncontroverted pretrial testimony that Yancy was compensated for information central to the formal prosecution of the defendant.

Instead of rectifying this false impression regarding Yancy's involvement, the prosecutor capitalized on and exploited it. Though well aware of Harris's testimony and the fact of Yancy's compensation, the prosecutor never took any steps to correct or explain Yancy's testimony. Rather, the prosecutor carefully limited her questioning of Yancy to the fact that he had been paid for cooperating with law enforcement, while never seeking to clarify that Yancy had been compensated for his cooperation in the investigation of the defendant. To the contrary, the prosecutor further distanced Yancy from the latter by emphasizing that any payment for his cooperation came from a "federal agency" and, impliedly, had nothing to do with the pending charges against the defendant. The prosecutor's follow-up questions built on this obfuscation; after leaving Yancy's testimony regarding his cooperation with law enforcement ambiguous and untethered to the defendant's case, the prosecutor pivoted directly to the more

87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), and to refrain from using false or misleading testimony to obtain a conviction, see *Napue*, 360 US at 269. See note 8 of this opinion.

limited claim that Yancy specifically had not been paid to *testify* at trial. And when Yancy specifically denied during cross-examination that he had been compensated in connection with the investigation of the defendant, the prosecutor again did nothing to correct it.[7]

[7] The obligation to avoid presenting false or misleading testimony of its own witness begins and ends with the prosecution and is prudent in the unique *Napue* context because *Napue* requires the prosecution's knowledge of the false or misleading testimony of its own witnesses. *Napue*, 360 US at 269. While we do not disagree that a defendant can waive a claim of error under *Napue*, we do not share the dissent's view that there was waiver in this case. First, we disagree with the dissent that the record reveals any strategy by defense counsel to keep the impeaching information from the jury. Given that we see no strategy here, the dissent's reference to cases finding waiver when counsel strategically elected not to address a government witness's false testimony is beside the point. We note, however, that we do not read all the cases the dissent cites in support of this general proposition as relevant. Two did not involve false testimony about a witness's cooperation agreement, see *Beltran v Cockrell*, 294 F3d 730, 735 (CA 5, 2002) (observing that the defendant prevented the prosecution from clarifying the allegedly false testimony that the defendant was the only person identified as the assailant); *United States v Decker*, 543 F2d 1102, 1105 (CA 5, 1976) (noting that any error from the witness's false statements about his attorney's presence at his cooperation meeting were harmless), and in another, the court held that it was not clear that there was any cooperation agreement with the witness at all, see *United States v Meinster*, 619 F2d 1041, 1045 (CA 4, 1980) ("Nothing was promised in exchange for [the witness's] testimony in this case."). Importantly, however, when a prosecutor has capitalized on the false or misleading evidence, the waiver rule is more nuanced. See *Jenkins*, 294 F3d at 296 (concluding that there was no waiver because "the prosecutor's actions cannot be overlooked on the ground that [defense] counsel did not continue to seek to gain an admission from [the witness] as to the plea agreement"); *Barham*, 595 F2d at 243 n 17 (concluding that there was no waiver because the prosecutor's "misleading questions . . . reinforced the deception"); *United States v Sanfilippo*, 564 F2d 176, 178-179 (CA 5, 1977) (concluding that there was no waiver when the prosecutor failed to correct and subsequently capitalized on the false testimony); *DeMarco*, 928 F2d at 1077 (concluding that there was no waiver when the prosecution's capitalizing on the testimony "contributed to the deprivation of due process"). Therefore, even if, as the dissent argues, counsel

She instead used Yancy's general claims of noncompensation to her advantage in closing, urging the jury to credit his story because "[h]e told you he did not get consideration on this case for testifying, that he got consideration on *other cases* that the task force was involved with." (Emphasis added.)

Capitalizing on Yancy's testimony that he had no paid involvement in the defendant's case is inconsistent with a prosecutor's duty to correct false testimony.[8] Indeed, the prosecutor sought to transform

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had a conscious strategy to keep the true nature of Yancy's compensation from the jury, it is far from clear whether that would have led to a waiver in this case, given that the prosecutor capitalized on the misleading evidence in her summation to the jury. In any event, what precise role counsel's effectiveness might play in determining the reviewability of a *Napue* complaint on appeal is not one we need reach today, since the prosecution has never argued in the course of this appeal that the defendant waived this *Napue* objection. See *People v McGraw*, 484 Mich 120, 131 n 36; 771 NW2d 655 (2009).

[8] The dissent insists that the prosecution's duty to correct false testimony under *Napue*, 360 US at 269, must be coupled with the separate, though often overlapping, duty to disclose exculpatory information under *Brady*, 373 US at 87. The dissent consequently asserts that "[i]t is the secreting of evidence that is offensive to due process." *Post* at 499. We agree that the secreting of evidence violates due process, but so too does a prosecutor's exploitation of false testimony by a state witness to gain a conviction, whether done together with a failure to disclose or not. In many cases, dereliction of both duties happens in tandem when a witness falsely testifies about an undisclosed cooperation agreement. But they need not happen together, and when they do not, the prosecution's *Napue* duty is not mitigated because it complied with its *Brady* duty. See *Jenkins*, 294 F3d at 296; *Sanfilippo*, 564 F2d at 178-179; *DeMarco*, 928 F2d at 1076-1077; *Belmontes v Brown*, 414 F3d 1094, 1115 (CA 9, 2005) ("Whether defense counsel is aware of the falsity of the statement is beside the point. . . . The prosecutor's duty to correct false testimony arises, not simply out of a duty of fairness to the defendant, but out of the free standing constitutional duty of the State and its representatives to protect the system against false testimony."), rev'd on other grounds sub nom *Ayers v Belmontes*, 549 US 7; 127 S Ct 469; 166 L Ed 2d 334 (2006) (citations and quotation marks omitted). The dissent's argument to the contrary is not supported by the authority

testimony that might have been merely confusing on its own into an outright falsity. Irrespective of the veracity of Yancy's claim that he had not been paid to

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it cites. *Routly v Singletary*, 33 F3d 1279 (CA 11, 1994), for example, does not address the idea that all *Napue* violations must accompany *Brady* violations. Rather, *Routly* involved unsuccessful and overlapping *Brady* and *Napue* claims, but each was denied because the prosecution had complied with each duty. *Id*. at 1284-1287.

Furthermore, the post-*Sanfilippo* cases in the United States Court of Appeals for the Fifth Circuit that the dissent cites certainly did not distinguish *Sanfilippo*'s relevance in cases in which, as here, the prosecutor capitalized on a freestanding *Napue* error. Compare *Sanfilippo*, 564 F2d at 178-179 (concluding that there was no waiver when the prosecutor failed to correct and subsequently capitalized on the false testimony), with *Beltran*, 294 F3d at 736-737 (concluding that *Sanfilippo* was inapposite because the prosecution had not "used the false testimony consciously allowed by the defense as part of a legal strategy"), and *United States v Antone*, 603 F2d 566, 570-571 (CA 5, 1979) (concluding that *Sanfilippo* was inapposite because it involved false testimony of "far more serious impact," i.e., relating to the conditions of the witness's plea deal for his testimony, while *Antone* simply involved an arrangement to have legal counsel appointed for the witness). And indeed, at least one post-*Sanfilippo* case from the Fifth Circuit has affirmed *Sanfilippo*'s rule that a prosecutor's capitalizing on false testimony might result in a due process deprivation even when the defense can be charged with knowledge of the evidence. See *Barham*, 595 F2d at 243 (stating that the prosecutor's "misleading questions . . . reinforced the deception" and "undermine[d] the Government's argument that defense counsel waived the false evidence issue" by virtue of his knowledge of the falsity).

There is no question that the prosecution complied with its *Brady* obligation regarding Yancy's compensation for his cooperation. Yet when Yancy's trial testimony did not reflect the true nature of his agreement, instead of clarifying, the prosecutor exploited the testimony to her advantage. This due process error stands apart from a failure to disclose. See *Jenkins*, 294 F3d at 296 (stating that "the prosecutor's actions cannot be overlooked" on the ground that defense counsel knew about and "did not continue to seek to gain an admission from [the witness] as to [his] plea agreement"); *Napue*, 360 US at 269 (stating that the duty to correct false evidence arises "when it appears"). The dissent's understanding that any *Napue* violation is only meaningful when coupled with a *Brady* violation simply misunderstands the separate duties.

"testify," the prosecutor should not have capitalized on Yancy's testimony after Yancy had confusingly denied being paid for cooperating in "this case."[9] *Napue*, 360 US at 269. The prosecutor's repeated emphasis on Yancy's lack of compensation for "testifying" and her comments at closing argument enhanced the misleading impression that Yancy was a totally independent witness. Her actions served to underscore the jury's false impression that because Yancy had not been paid to "testify," he had no questionable incentive for his participation in this case.[10] Simply put, the prosecutor sought to benefit from the problematic testimony and use it to her advantage. This prosecutorial conduct does not comport with due process.[11] See *DeMarco*, 928 F2d at 1077; *Jenkins*, 294 F3d at 294-295.

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[9] Indeed, it would be a much closer question if the prosecutor had not sought to create a false impression at closing argument. But the question of whether, in isolation, Yancy's uncorrected or unclarified cross-examination testimony would justify reversal is not before us in this case, and we decline to address it as though it had been presented in that fashion.

[10] We note that the prosecutor's duty to correct false or misleading testimony particularly arises in those instances in which law enforcement has directly participated in the subject matter of the testimony. Such participation would typically arise for purposes of this duty in the context of plea negotiations or other agreements for cooperation and testimony involving the prosecutor's office and others. Such participation may also arise when, as here, the prosecutor has direct knowledge of an agreement for cooperation between law enforcement and other persons concerning the particular case at hand.

[11] We disagree with the dissent that we "now hold[] prosecutors to the unacceptably high and extraordinarily ambiguous standard of having to correct every instance of mistaken, inaccurate, or incomplete testimony or risk the possibility that every possible or perceived contradiction will be rendered material." *Post* at 495. We respectfully submit that the dissent has mischaracterized and broadened the proper understanding of our opinion. As we emphasize above, a prosecutor need not correct every instance of mistaken or inaccurate testimony, *Martin*, 59 F3d at 770, nor must he or she "play the role of defense counsel, and ferret out ambiguities in [the] witness's responses on cross-examination," *Harris*,

B. ERROR AFFECTING THE JUDGMENT OF THE JURY

Whatever Yancy may have believed about the truth of his testimony, we conclude both that it conveyed a serious misimpression about the nature of his involvement in the case and that the prosecutor's exploitation of that testimony violated the defendant's right to due process. For this reason, we disagree with the Court of Appeals that this violation does not warrant relief. Rather, in light of the effect that Yancy's uncorrected testimony had on his credibility and the role that credibility played in securing the defendant's convictions, we conclude that there is a "reasonable likelihood" that the false impression resulting from the prosecutor's exploitation of the testimony affected the judgment of the jury. *Napue*, 360 US at 271. Accordingly, the defendant is entitled to a new trial.

As noted, there was no physical evidence tying the defendant to the crime. No murder weapon was ever recovered, the defendant's fingerprints were not found at the scene, and no other physical evidence confirmed that he had ever been at Pass's house. The defendant was convicted solely on the testimony of Lard and Yancy, two witnesses with significant credibility issues. As the jury was made aware, Lard was testifying pursuant to a favorable plea agreement for his role in the crime,[12] and

498 F2d at 1169. Indeed, it is on the basis of the prosecutor's exploitative tactics in this case that we conclude that she had and then breached her duty to correct the false impression she created. Accordingly, to be absolutely clear, we do not hold today that the prosecutor has a limitless obligation to correct every instance of false or misleading testimony, regardless of its subject matter.

[12] Lard agreed to testify after spending approximately two years in jail awaiting trial for his part in Pass's murder. Lard was charged with felony murder, armed robbery, and other gun-related offenses, and as he acknowledged during his testimony, he was facing a mandatory life sentence on those charges. See MCL 750.316(1) (mandatory life impris-

his testimony at trial proved inconsistent not only with Yancy's version of events, but with his own pretrial account.[13]

Yancy's account of the crime was also riddled with inconsistencies[14] and did not otherwise cast him in a particularly favorable light. First, while Yancy admitted at trial that he and the victim "had a kind of personal bond," he also admitted that he did not call an ambulance or the police while the victim was "gurgling off his blood" on the floor after being shot, instead leaving the house with the defendant and Lard to go share some of the victim's cocaine. Yancy acknowledged that he then promptly disappeared from town for approximately a year. Furthermore, Yancy admitted, and Lard confirmed, that Yancy and the defendant had "a little beef going on" at the time of the murder, arising from a violent dispute over money a few weeks earlier.

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onment without parole for first-degree murder). Pursuant to his plea agreement, these charges were dismissed, and Lard pleaded guilty to reduced charges of manslaughter, MCL 750.321, and unarmed robbery, MCL 750.530(1), each of which carried the possibility of probation.

[13] For example, Lard claimed in a pretrial statement to police that the defendant took a gun from Pass, but testified at trial that he did not see the defendant with a gun at any time. Lard also initially denied being at Pass's house on the night of the shooting. Moreover, Lard insisted that Yancy was a liar; Yancy testified that Lard had pulled a gun out of his sweatshirt, but Lard denied ever possessing one.

[14] Yancy initially told police officers that the defendant was the only one with a visible weapon. He then contradicted that statement both at the preliminary examination, when he testified that he never saw the defendant with a gun, and at trial, when he testified that it was Lard whom he saw with a gun. Yancy also testified at the preliminary examination that he had not consumed any drugs at Pass's house before the shooting, though he admitted at trial that he had. Similarly, he admitted at trial using some of Pass's drugs with the defendant and Lard after the shooting, though he had claimed at the preliminary examination that they never "gave" him any of those drugs (explaining at trial that he considered "giving" drugs to be different from "sharing" them).

There was, therefore, a basis for skepticism about both Lard and Yancy. What is most significant for our assessment, however, is that, as far as the jury knew, Yancy was uniquely credible in one respect: he was the sole lay witness who did not directly benefit from his participation in the case. Unlike Lard, he was not facing charges in connection with Pass's murder, and according to his testimony, he had not been compensated for testifying and had no paid connection with the defendant's case. Of course, Yancy did receive at least one known direct benefit for his participation in the case—financial compensation. But the prosecutor exploited the false impression to the contrary, urging the jury to believe Yancy—and convict the defendant—because of it. Given that the prosecution's case hinged entirely on the jury's credibility assessment of Lard and Yancy, this emphasis on the one (albeit false) indication of the difference in trustworthiness between them is unsurprising. For the same reason, however, we cannot overlook its prejudicial effect. See *Wiese*, 425 Mich at 456 (concluding, in a case that "depended almost entirely on [the falsely testifying witness's] testimony," that the use of the false testimony and the defendant's resulting inability to properly question the witness's credibility "reasonably could have affected the judgment of the jury").

In concluding that this prejudice was too insignificant to warrant relief, the Court of Appeals stressed that the impression that he had not been compensated could not have "bolstered" the "fairly dreadful state of Yancy's credibility . . . ." *Smith*, unpub op at 5. We agree that Yancy lacked credibility in a number of respects unrelated to his role as a paid informant. But we disagree with the Court of Appeals that the *impossibility* of raising Yancy's credibility from an already "dreadful state" is an appropriate way to frame the critical issue.

Instead, the question is what effect would likely have resulted if the jury had understood that Yancy was compensated for his information against the defendant. In our view, this unique additional impeachment evidence was not cumulative or immaterial. See *Napue*, 360 US at 270 ("[W]e do not believe that the fact that the jury was apprised of other grounds for believing that the witness . . . may have had an interest in testifying against [the defendant] turned what was otherwise a tainted trial into a fair one."); *Reynoso v Giurbino*, 462 F3d 1099, 1117 (CA 9, 2006) ("Unlike the other evidence used to impeach the eyewitnesses . . . such as inconsistent statements and general attacks on their credibility, evidence of their financial motives would have established a real incentive to lie, explaining *why* their testimony may have been fabricated."). Rather, there is good reason to believe that if the jury had been made aware that Yancy was compensated for his cooperation, the prosecution would have had a more difficult task persuading the jury that he should be believed.

Put simply, the "dreadful state" of Yancy's credibility would have been even more dreadful had the jury learned that he was paid for his information against the defendant. And contrary to the Court of Appeals' suggestion, the prejudice from the prosecutor's exploitation of Yancy's potentially misleading testimony cannot be discounted simply because the jury had other reasons to disbelieve Yancy. Indeed, this case demonstrates the opposite to be true. Presented with a witness who was revealed to be a regular drug user, to have been in a dispute with the defendant about money, to have taken the victim's drugs, to have left the victim "gurgling off his blood" on the floor, and to have then left town for a year, the jury was more likely to have viewed the false inference that Yancy was not compensated at all for his

involvement as the most significant basis for crediting his testimony against the defendant.[15]

Due process required that the jury be accurately apprised of the incentives underlying the testimony of this critical witness, and plainly that the prosecution not exploit any confusion relating to this critical topic. See *United States v Cervantes-Pacheco*, 826 F2d 310, 315 (CA 5, 1987) ("As in the case of the witness who has been promised a reduced sentence, *it is up to the jury* to evaluate the credibility of the compensated witness.") (emphasis added). Given the centrality of Yancy's credibility to the prosecution's case and the dearth of other evidence supporting the defendant's convictions, we hold that there was a reasonable likelihood that the prosecutor's exploitation of Yancy's misleading testimony affected the judgment of the jury.

IV. CONCLUSION

For the foregoing reasons, we conclude that the defendant is entitled to a new trial. Accordingly, we reverse the judgment of the Court of Appeals in part,

[15] The dissent argues that the defendant has forfeited his claim of error because he failed to object at trial and concludes therefore that the defendant's claim must be reviewed under the plain-error standard rather than *Napue*'s standard for reversal. While we are not convinced that plain-error analysis applies to *Napue* errors, we disagree with the dissent's conclusion that the defendant's claim does not meet that standard. As outlined above, (1) an error clearly occurred in this case, (2) that error was "clear and obvious" insofar as the jury was left with a false impression of Yancy's involvement, and (3) the error clearly affected substantial rights insofar as we find that it had a "reasonable probability" of affecting the jury's verdict. Furthermore, an error like this, in which the prosecutor deliberately exploited misleading evidence before the jury, clearly affects "the fairness, integrity or public reputation of judicial proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), quoting *United States v Olano*, 507 US 725, 736; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quotation marks omitted).

vacate the defendant's convictions, and remand this case for proceedings consistent with this opinion.

YOUNG, C.J., and MARKMAN and VIVIANO, JJ., and BERNSTEIN, J. (except for footnote 5), concurred with MCCORMACK, J.

BERNSTEIN, J. (*concurring in part and dissenting in part*). I concur with the majority opinion except for footnote 5. With respect to defendant's speedy-trial claim, I respectfully disagree with the majority's conclusion that defendant is not entitled to relief. Instead, I concur with Part II of Justice KELLY's partial concurrence and partial dissent. Accordingly, I would also reverse the judgment of the Court of Appeals with respect to the speedy-trial claim and remand this case to the trial court to consider whether the prosecution overcame the presumption of prejudice to defendant's person and defense.

KELLY, J. (*concurring in part and dissenting in part*). I concur in the result of the majority's opinion with respect to the issue of Yancy's false testimony. It is reasonably likely that Yancy's uncorrected false testimony affected the judgment of the jury; therefore, a new trial is warranted. I part ways with the majority to the extent that it would grant a new trial simply for "substantially misleading" testimony of a material witness that need not rise to the level of falsity and, further, dissent from the majority's resolution of defendant's speedy-trial issue.

I. FALSE TESTIMONY

I would grant a new trial on the basis of the false evidence in the form of Yancy's testimony, which was

"uncorrected when it appear[ed]" during defendant's trial.[1] The United States Supreme Court has long held that "a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction . . . ."[2] The majority expands the "false evidence" standard by allowing a new trial on the basis of "substantially misleading" evidence in the form of testimony.[3] This standard is unworkable for the reasons articulated by Justice ZAHRA: it allows a reviewing court to "pick[] and choose[] small snippets of testimony"[4] to determine the " 'overall impression' " that those small snippets create.[5] I would simply examine whether the prosecutor knowingly proffered false testimony. By attempting to decipher the "overall impression" particular snippets of testimony made on the jury, and by potentially requiring prosecutors to correct testimony that might not *actually* be false, the majority creates an ambiguous standard that will be difficult to apply in practice.

Nevertheless, applying the traditional standard to this case, I agree with the majority that defendant is entitled to a new trial. Yancy's testimony was, in fact, false. The Court of Appeals explained that "[o]n direct, cross, and redirect examination, Yancy repeatedly admitted that he was paid for cooperating with law

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[1] *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959).

[2] *Id*.

[3] Although the majority cites *United States v Harris* for its "substantially misleading" standard, the full quotation from *Harris* equates substantially misleading testimony with testimony that "is untrue." *United States v Harris*, 498 F2d 1164, 1169 (CA 3, 1974). Moreover, the testimony in *Harris* was, in fact, false, not just "substantially misleading." See *id*. at 1166-1168.

[4] *Post* at 506-507 (ZAHRA, J., dissenting).

[5] *Post* at 503, quoting *ante* at 478 (opinion of the Court).

enforcement but repeatedly denied that any of the payment pertained to the instant case."[6] Moreover, the prosecutor "did not exercise the opportunity to clarify" that Yancy "did receive payment for information pertaining to the case."[7] For the reasons stated by the majority, I agree that this false—not just substantially misleading—testimony was prejudicial and warrants a new trial.

II. RIGHT TO A SPEEDY TRIAL

Although defendant is entitled to a new trial on the basis of false testimony, I would not simply remand for a new trial but would also remand for additional factual findings related to defendant's speedy-trial claim, and I respectfully dissent from the majority's conclusion that defendant is not entitled to any relief on this claim. The Court of Appeals acknowledged that the circuit court did not correctly apply the *Barker v Wingo*[8] balancing test to assess defendant's speedy-trial claim after his trial was delayed for 41 months.[9] Specifically, the circuit court did not "follow[] the rule that after a delay of 18 months, prejudice is presumed,"[10] and the Court of Appeals likewise did not properly examine the extent to which the circuit court's analysis was influenced by its failure to require the

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[6] *People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued October 29, 2013 (Docket No. 304935), p 5.

[7] *Id*.

[8] *Barker v Wingo*, 407 US 514, 530-533; 92 S Ct 2182; 33 L Ed 2d 101 (1972).

[9] See *Smith*, unpub op at 3.

[10] *People v Grimmett*, 388 Mich 590, 606; 202 NW2d 278 (1972), citing *People v Den Uyl*, 320 Mich 477; 31 NW2d 699 (1948). *Grimmett* was overruled in part on other grounds by *People v White*, 390 Mich 245, 258; 212 NW2d 222 (1970), which was in turn overruled by *People v Nutt*, 469 Mich 565, 596; 677 NW2d 1 (2003).

prosecution to rebut the presumption of prejudice. I would therefore reverse the judgment of the Court of Appeals, vacate defendant's convictions, and remand this case to a new judge in the Genesee Circuit Court to consider whether the prosecution overcame the presumption of prejudice to defendant's person and defense.[11] If the presumption was overcome, a new trial is warranted on the basis of the reasoning provided in the majority opinion. However, if the presumption of prejudice to defendant's person and defense was *not* overcome, a dismissal of all charges is the only remedy for a speedy-trial violation.

The right to a speedy trial is enshrined in the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .[12]

The United States Supreme Court has held that the right to a speedy trial serves "to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself."[13]

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[11] *People v Collins*, 388 Mich 680, 694; 202 NW2d 769 (1972) ("There are two types of prejudice which a defendant may experience, that is, prejudice to his person and prejudice to his defense. Prejudice to his person would take the form of oppressive pretrial incarceration leading to anxiety and concern. Prejudice to his defense might include key witnesses being unavailable. Impairment of defense is the most serious, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.") (quotation marks and citation omitted).

[12] US Const, Am VI; see also Const 1963, art 1, § 20 ("In every criminal prosecution, the accused shall have the right to a speedy and public trial . . . ."). This assurance is further codified in MCL 768.1.

[13] *United States v Marion*, 404 US 307, 320; 92 S Ct 455; 30 L Ed 2d 468 (1971) (quotation marks and citation omitted).

There is no bright-line rule that indicates a "fixed number of days" that must pass before a defendant's right to a speedy trial is violated.[14] Instead, this Court applies the balancing test established by the United States Supreme Court in *Barker v Wingo*[15] in light of this Court's presumption of prejudice "after a delay of 18 months."[16] In *Barker*, the United States Supreme Court identified as some of the factors to be considered (1) the length of the delay, (2) the justification for the delay, (3) the defendant's assertion of his or her right, and (4) the multifaceted prejudice to the defendant.[17] The *Barker* test is case-specific, and none of the four factors is dispositive.[18] In assessing the prejudicial effect of a delay on a defendant, the United States Supreme Court has observed that "[t]he time spent in jail," as opposed to time released on bond, "has a detrimental impact on the individual."[19]

Defendant waited in prison for 41 months before being brought to trial. The circuit court's analysis of these delays inexplicably attributed extensive delays by the court to defendant.[20] As a result, despite a total delay exceeding 18 months at the time of defendant's

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[14] *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006).

[15] *Grimmett*, 388 Mich at 605-606 (adopting the *Barker* test).

[16] *Id*. at 606.

[17] *Barker*, 407 US at 530.

[18] *Id*. at 533.

[19] *Id*. at 532.

[20] For example, it was the court that failed to respond to defendant's motion to quash for more than seven months and delayed a response to defendant's first motion for a speedy trial for almost five months. Both delays were attributed to defendant, presumably because he was the source of the timely filed motions. Additionally, defendant is allegedly a member of a gang and was indicted along with numerous other codefendants, also alleged gang members, allegations that rendered defendant's case so complex, according to the circuit court and the prosecutor, as to account for a 3½-year delay.

first motion for a speedy trial, the court found that *defendant* had not established prejudice because the total delay *by the state* was less than 18 months. On appeal almost 25 months after defendant's first motion for a speedy trial, the Court of Appeals recognized that the circuit court had misunderstood the *Barker* prejudice prong, observing that "irrespective of whether defendant or the prosecution is more at 'fault' for the 41-month delay here, the simple fact is that the delay *was* 41 months, and consequently the burden is on the prosecution to show that there was no prejudice."[21] However, the Court of Appeals found no error in the circuit court's independent inquiry into prejudice because its independent inquiry was not tainted by its misapprehension of the law.[22]

Contrary to the Court of Appeals' conclusion, the circuit court's prejudice inquiry *was* tainted by its misapprehension of applicable law. In *People v Collins,* this Court established that "[a]fter 18 months, the burden shifts to the prosecution to show there was no injury [to the defendant's person or defense]."[23] No prosecutorial evidence overcoming the presumption of prejudice appears on the record.[24] By failing to fully

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[21] *Smith*, unpub op at 3; see also *Doggett v United States*, 505 US 647, 652 n 1; 112 S Ct 2686; 120 L Ed 2d 520 (1992) ("Depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year.").

[22] *Smith*, unpub op at 4 n 1.

[23] *Collins*, 388 Mich at 695.

[24] See *People v Davis*, 123 Mich App 553, 561; 332 NW2d 606 (1983) ("After 18 months, the *prosecution* has the burden of showing that the defendant was not prejudiced by the delay. The people have not even attempted to show that defendant was not prejudiced. Consequently, we conclude that the defendant was prejudiced by the 31-month delay between his arrest and conviction.") (emphasis added) (citations omitted).

engage in the "difficult and sensitive balancing process" established in *Barker*, and therefore failing to impose the proper burden on the prosecution, the circuit court did not afford defendant the complete protection of his constitutional right to a speedy trial.[25] In other words, the Court of Appeals' decision is "irreconcilable with . . . the original meaning of the Sixth Amendment . . . ."[26] Because the Court of Appeals did not afford defendant the presumption to which he is entitled, I would reverse the judgment of the Court of Appeals, vacate defendant's convictions, and remand this case to a new judge in the Genesee Circuit Court for the correct application of the relevant law. Final disposition of defendant's speedy-trial claim should await the prosecution's showing that defendant was not prejudiced by the delay and the circuit court's correct application of the remaining *Barker* factors.

BERNSTEIN, J., (with respect to Part II only), concurred with KELLY, J.

ZAHRA, J. (*dissenting*). The majority concludes that reversal of defendant's felony-murder and armed-robbery convictions is required because the prosecutor failed to meet her duty to correct "substantially misleading, if not false," testimony from Mark Yancy regarding the compensation paid to him by the Federal Bureau of Investigation (FBI) for information and cooperation. The objection to the prosecutor's conduct is premised in the notion that the "State may not

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[25] *Barker*, 407 US at 533.

[26] *Alleyne v United States*, 570 US ___, ___ n 5; 133 S Ct 2151, 2163 n 5; 186 L Ed 2d 314 (2013); see also *Barker*, 407 US at 533 ("[B]ecause we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.").

knowingly use false evidence, including false testimony, to obtain a tainted conviction . . . ." *Ante* at 475-476 (quotation marks and citation omitted). I agree with this fundamental proposition, and imagine that no one denies it. But today the majority has turned this rudimentary constitutional principle into a new requirement that the prosecutor not just elicit truthful testimony on direct examination, but also elicit complete testimony, fully disclosing all the facts and circumstances of how that witness came to testify. Further, the majority imposes an additional duty on the prosecutor to correct a defense attorney's mischaracterized questions made during cross-examination of a state's witness.

The record is clear that Yancy admitted being paid by the FBI for his cooperation. Nonetheless, despite the prosecutor's having elicited testimony from Yancy that he had been paid for his cooperation, the majority vacates defendant's convictions because the prosecutor did not make it absolutely clear to the jury that the FBI paid Yancy for his cooperation in the government's case against defendant. I respectfully dissent because I fear the majority now holds prosecutors to the unacceptably high and extraordinarily ambiguous standard of having to correct every instance of mistaken, inaccurate, or incomplete testimony or risk the possibility that every possible or perceived contradiction will be rendered material.[1]

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[1] I hope my fear is unfounded, as suggested by the majority in footnote 9 of its opinion. There, the majority suggests that it is the prosecutor's exploitation of a "false impression" during closing argument that justifies reversal. While I take issue with the majority's characterization of the prosecutor's conduct, if this is the majority's position, it should have said that and no more.

But even if the rule announced by the majority today is intended as a narrow one, as emphatically stated by the majority, the opinion

The majority's claim of error is predicated on the broad proposition "that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' "[2] Along these lines, a state may not knowingly use false evidence, including false testimony, or solicit false evidence or testimony and allow it to go uncorrected when it appears, to obtain a tainted conviction.[3] This Court has recognized that "[t]he prosecution's duty to correct the false testimony of a state witness arises 'when [the false testimony] appears.' "[4]

Each of these principles is sound when one understands how they have been developed and applied. In each case enunciating these principles, neither defense counsel nor the trial court was aware that the state

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remains rife with directives that a prosecutor must do more than refrain from knowingly arguing to the jury facts known to be untrue. Instead, the majority imposes on the prosecution the burden to do more than ensure that testimony elicited on direct examination is truthful; that testimony must now be truthful and complete. And it also imposes on the prosecution an obligation to correct misguided testimony that a reviewing court might later declare to be "substantially misleading," even when that testimony is the product of defense counsel's cross-examination and when, as here, defense counsel is fully aware that the testimony is misleading, has all the information needed to effectively cross-examine the witness on this point, and, as a matter of trial strategy, elects to let that testimony stand.

So if, as the majority states, my fear of the breadth of the majority opinion is overblown, it nevertheless seems to be fully justified and anchored in the various broad statements scattered throughout its opinion that are not congruent with the majority's claim that it announces a narrow rule.

[2] *Giglio v United States*, 405 US 150, 153; 92 S Ct 763; 31 L Ed 2d 104 (1972) (citation omitted).

[3] *Ante* at 475-476, citing *Napue v Illinois*, 360 US 264, 271-272; 79 S Ct 1173; 3 L Ed 2d 1217 (1959).

[4] *People v Wiese*, 425 Mich 448, 455; 389 NW2d 866 (1986), quoting *Napue*, 360 US at 269.

had agreed to compensate witnesses for their testimony because the prosecution did not disclose the agreements. This, however, is not a case in which the prosecutor kept secret the compensation the FBI paid to Yancy for his cooperation. Rather, the existence and extent of Yancy's relationship with the government and the details regarding the compensation paid to Yancy were fully disclosed and known not only to the prosecutor, but also to defense counsel and the trial court long before trial commenced. For this reason, I conclude that the evidence the majority finds to be false or "substantially misleading" is better characterized as incomplete testimony. Accordingly, I conclude that the prosecutor did not commit an error by failing to clarify the evidence in the manner espoused by the majority. Similarly, I do not conclude that the prosecutor's closing argument was an improper exploitation of misleading testimony. To the extent that the prosecutor's actions constituted error, that error was either extinguished by defendant's waiver, forfeited for lack of preservation, or harmless. I would affirm defendant's convictions.

I. THE SUPREME COURT CASES RELIED ON BY THE MAJORITY ARE DISTINGUISHABLE

The majority relies principally on *Napue v Illinois*, 360 US 264, 271-272; 79 S Ct 1173; 3 L Ed 2d 1217 (1959), *Giglio v United States*, 405 US 150, 154; 92 S Ct 763; 31 L Ed 2d 104 (1972), and *People v Wiese*, 425 Mich 448, 453-454; 389 NW2d 866 (1986), to support the proposition that reversal is required in this case. All these cases involved witnesses who denied under oath receiving of any remuneration from the government in exchange for their testimony. It is significant, in my view, that in each case the denial of remunera-

tion was clearly and patently false and, more importantly, that this falsity was known only by the prosecution.

Unlike the key prosecution witnesses in *Napue*, *Giglio*, and *Wiese*, Yancy admitted receiving compensation for his cooperation with the FBI. Moreover, as distinguished from *Napue*, *Giglio*, and *Wiese*, in the instant case it was not a secret that Yancy received compensation from the FBI in exchange for his cooperation. In stark contrast to *Napue*, *Giglio*, and *Wiese*, here there was a pretrial proceeding held for the benefit of defense counsel[5] during which the prosecution presented FBI Special Agent Dan Harris, who was charged with the responsibility of compensating informants. Defense counsel participated in this hearing, which was presided over by the trial court. During the hearing it was fully disclosed that Yancy had received $4,000 for information related to the Pierson Hood gang and for information that led to the charges against defendant.[6]

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[5] Specifically, defense counsel made a discovery request seeking

> [c]opies of any and all written and/or electronically recorded agreements for the payment of funds by the FBI and any other police agency to any cooperating witness in this cause, including, but not limited to, Mark Yancy and Tarence Lard [a codefendant in this case], and logs and other records pertaining to such payments. A summary of the content of any oral agreements is also requested.

As a result of this discovery request, the trial court conducted the evidentiary hearing at which FBI Special Agent Dan Harris testified.

[6] Defendant was on trial for the murder of Larry Pass. The majority minimizes the fact that the compensation paid to Yancy was not exclusively for information related to the Pass homicide. In fact, the main focus of the FBI investigation was the Pierson Hood gang and, as Harris testified, Yancy's compensation was due in significant part for his cooperation relating to the gang activity. Importantly, the record reveals

The fact that the trial court and defense counsel were made aware before trial of the consideration given Yancy for his cooperation with the FBI materially distinguishes this case from *Napue*, *Giglio*, and *Wiese*. This disclosure is fundamental. It is the secreting of evidence that is offensive to due process.[7] As

that defense counsel wanted to avoid at all costs any reference to the Pierson Hood gang to ensure that the jury never learned of defendant's ties to gang activity. See footnote 17 of this opinion. Therefore, it is entirely possible that the prosecutor did not develop the full extent of Yancy's compensation agreement with the FBI in order to accommodate defense counsel's strategy of distancing defendant from the highly publicized Pierson Hood gang.

[7] The majority accuses me of conflating the prosecution's obligation to disclose exculpatory information under *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), with the duty to correct false testimony under *Napue*, 360 US at 269. The United Stated Supreme Court has stated, however, that "[t]he rule of *Brady* . . . arguably applies in three quite different situations" and that "[e]ach involves the discovery, after trial of information which had been known to the prosecution but unknown to the defense." *United States v Agurs*, 427 US 97, 103; 96 S Ct 2392; 49 L Ed 2d 342 (1976). The Supreme Court observed that one of these situations arises when "undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." *Id*. The Court, citing *Napue* and *Giglio*, then stated that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair." *Id*. The majority here has created a new rule that wholly separates the duties under *Napue* from those under *Brady* even though the duties are inextricably linked. The United States Supreme Court has recognized this, stating that each *Brady* situation, including those having claims under *Napue* and *Giglio*, involves information known by the prosecution but unknown to defense counsel.

While there may be circumstances in which the prosecution has complied with *Brady* yet failed to meet an overriding duty to correct a witness's perjured testimony, we ought not let appellate hindsight decouple *Brady* from *Napue* in cases in which it is clear that defense counsel was aware that the testimony was arguably misleading and yet declined to clarify it for the jury.

The majority attempted to decouple *Brady* from *Napue* by citing three federal cases: *DeMarco v United States*, 928 F2d 1074, 1076-1077 (CA 11, 1991), *United States v Sanfilippo*, 564 F2d 176, 178-179 (CA 5, 1977), and

noted in *Giglio*, "When the 'reliability of a given witness may well be determinative of guilt or innocence,' *nondisclosure of evidence affecting credibility* falls within this general rule."[8] If disclosure of evidence affecting credibility is timely made, the witness's credibility should be left to the adversarial process. Indeed, "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case

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Jenkins v Artuz, 294 F3d 284, 296 (CA 2, 2002). The majority's reliance on these cases is seriously misplaced. To begin with, *DeMarco* involved actual perjured testimony, while the instant case involves, at best, "substantially misleading testimony." Further, a more recent case from the United States Court of Appeals for the Eleventh Circuit, *Routly v Singletary*, 33 F3d 1279, 1286 (CA 11, 1994), concluded that when "testimony concerning [a witness's] understanding was, at worst, equivocal, [it was] not so misleading as to require corrective action by the state." Further, while *Routly* expressly acknowledged *DeMarco*, it nonetheless held that "[t]here is no violation of due process resulting from prosecutorial non-disclosure of false testimony if defense counsel is aware of it and fails to object." *Id*.

Similarly *Sanfilippo*, was quickly distinguished within its own circuit. See *United States v Antone*, 603 F2d 566, 571 (CA 5, 1979). Interestingly, in *Beltran v Cockrell*, 294 F3d 730, 736-737 (CA 5, 2002), the United States Court of Appeals for the Fifth Circuit explained that "[t]he *Sanfilippo* court did not deal with the situation presented here, where the prosecution used the false testimony *consciously allowed by the defense as part of a legal strategy*." (Emphasis added.) Likewise, defense counsel in this case chose as part of his trial strategy to ignore Yancy's testimony and instead represent to the jury that Yancy and the prosecution had a tacit agreement that Yancy would not be charged for any crime in exchange for his testimony against defendant.

Finally, the majority's reliance on *Jenkins* is misplaced because that court expressly stated that defense counsel, unlike defense counsel in this case, had not relied on the witness's problematic testimony to advance a strategic or tactical omission at trial. In sum, the cases the majority cites are easily distinguishable. Moreover, the majority uses these cases for a proposition that has been rejected by more recent cases in those same circuits. In fact, a majority of federal courts have rejected the rule the majority now invokes. See footnote 18 of this opinion.

[8] *Giglio*, 405 US at 154, quoting *Napue*, 360 US at 269 (emphasis added).

will best promote the ultimate objective that the guilty be convicted and the innocent go free."[9] Our adversarial system of justice "is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question."[10] Under our adversarial system, however, each party bears the responsibility for ensuring that its positions are vigorously and properly advocated.[11] And "[a]lthough the judge plays a vital role in the trial of a criminal case, counsel for the parties are also essential components" because "[t]hey too share in the cause of justice."[12]

In cases in which the defendant claims that the prosecution has left unchecked questionable testimony from a witness, a reviewing court must assess whether the evidence was truly false and material to the proceedings or merely inaccurate, incomplete, or otherwise vague or ambiguous such that the discrepancy is immaterial.[13] As observed by the majority, "it is the *effect* of a prosecutor's failure to correct false testimony that 'is the crucial inquiry for due process purposes.' "[14] If the evidence in question was disclosed to the defense in a timely manner, this disclosure should weigh in

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[9] *Herring v New York*, 422 US 853, 862; 95 S Ct 2550; 45 L Ed 2d 593 (1975).

[10] *Penson v Ohio*, 488 US 75, 84; 109 S Ct 346; 102 L Ed 2d 300 (1988) (quotation marks and citations omitted).

[11] See *Napier v Jacobs*, 429 Mich 222, 228-229; 414 NW2d 862 (1987).

[12] *United States v Harris*, 498 F2d 1164, 1170 (CA 3, 1974).

[13] See *United States v Martin*, 59 F3d 767, 770 (CA 8, 1995) (noting that the prosecutor need not correct every instance of mistaken or inaccurate testimony); *Harris*, 498 F2d at 1169 (stating the prosecutor need not "play the role of defense counsel, and ferret out ambiguities in his witness' responses on cross-examination").

[14] *Ante* at 476, quoting *Smith v Phillips*, 455 US 209, 220 n 10; 102 S Ct 940; 71 L Ed 2d 78 (1982).

favor of a finding of immateriality. When all parties to the litigation are aware of the material facts, the adversarial process will separate the wheat from the chaff, leaving all material and pertinent information before the jury.[15]

II. THE ALLEGED "SUBSTANTIALLY MISLEADING" EVIDENCE PRESENTED BY THE PROSECUTOR WAS NOT ONLY DISCLOSED, IT WAS AT MOST INCOMPLETE AND THEREFORE IMMATERIAL

Examination of the testimony elicited by the prosecutor reveals no patent falsity. The majority takes issue with two questions[16] from the prosecutor during Yancy's direct examination:

> [*Prosecutor*]: Now, you've been paid by a federal agency for cooperation. Is that correct?
>
> [*Yancy*]: Yes.

* * *

[15] This is not to say that if disclosure of evidence affecting credibility occurred at some point in the pretrial process the prosecution is forever free from the obligation to correct patently false testimony offered by a prosecution witness. There will be some instances in which the false evidence will be so evident and irreconcilable with the truth that action by the prosecutor to effectuate an immediate and complete correction of the record will be required. But those instances will be rare, and that is not the case here.

[16] The parties understood that testimony relating to the Pierson Hood gang would not be admitted absent defense counsel's opening the door to such testimony. See footnote 17 of this opinion. This explains why the testimony is scant with regard to Yancy's compensation. It appears from the record that Yancy's cooperation in the investigation of the Pass homicide was limited to an interview in 2006 with Flint police officer Shawn Ellis. Thereafter, the FBI continued its investigation into the gang-related activity. We are not informed of the extent of Yancy's cooperation with regard to the Pierson Hood investigation, but we know that the FBI did not compensate witnesses until the FBI no longer needed the witness's cooperation. Yancy was compensated in the fall of 2008. This case did not go to trial until the spring of 2011.

[*Prosecutor*]: Were you paid for your testimony in this case?

[*Yancy*]: No.

The majority does not allege that either question and its respective response, taken individually, constituted the solicitation of false or misleading evidence. This is clearly because the responses to both questions are true. Yancy was paid for his cooperation, but he was not paid for his testimony. At most the majority takes issue with the prosecutor's use of the phrase "federal agency," framing that language as clear evidence the prosecutor purposefully attempted to distance the witness from the defendant and purposefully obfuscated the fact that Yancy had been compensated for information provided to the FBI. The majority uses innuendo and isolated phrases such as "federal agency" to somehow determine that "[t]he overall impression [with regard to Yancy's compensation] conveyed was false."

In reality, any misdirection with regard to the compensation paid by the FBI to Yancy was created not by the prosecutor but by defense counsel during Yancy's cross-examination:

[*Defense Counsel*]: Do you deny -- first of all, it sounds like you agreed that you were paid $4,500 for cooperating with law enforcement, correct?

[*Yancy*]: Correct.

[*Defense Counsel*]: But you deny that it was with regards to this case, correct?

[*Yancy*]: Correct.

On the basis of this response, the majority claims that Yancy denied that he was compensated for his "cooperation with the defendant's formal prosecution." But Yancy was not asked whether he was compensated

for his cooperation in the Pass murder investigation; he was asked whether he was compensated "with regards to this case." Yancy might well have believed that his compensation was not "with regards to this case," but was instead for his cooperation in the Pierson Hood gang case. Further, Yancy had just been asked if he had been paid for his testimony in this case. It would be reasonable for Yancy to assume that defense counsel was referring to his specific testimony.

Admittedly, neither the prosecutor nor defense counsel made this clarification. Instead, the prosecutor again asked Yancy to confirm that the compensation he received was not for his trial testimony. It is the prosecutor's failure to clarify the distinction between compensation for information and compensation for testimony—a confusion brought on by defense counsel's cross-examination—that the majority finds offensive. More specifically, the majority believes that the prosecutor was under a duty to expressly elicit testimony from Yancy that he was compensated for providing information that implicated defendant for the murder. This failure, says the majority, rendered the prosecutor's examination either false or substantially misleading.

If this were a case in which the prosecution alone was aware that Yancy was compensated for information that ultimately led to the charges against defendant, I might well have joined the majority opinion. This is not such a case. Defense counsel was fully aware of the specifics underlying the compensation the FBI paid Yancy. Accordingly, defense counsel had in his arsenal all the information necessary to cross-examine Yancy with regard to the incomplete, albeit truthful, testimony elicited by the prosecutor. Importantly, defense counsel conducted a vigorous and effective cross-examination:

[*Defense Counsel*]: But it was money, right? Real money, right?

[*Yancy*]: Correct.

[*Defense Counsel*]: For cooperating, correct?

[*Yancy*]: Correct.

[*Defense Counsel*]: With these folks, correct?

[*Yancy*]: Correct.

[*Defense Counsel*]: And you got some other benefits, too. Isn't that right?

[*Yancy*]: No.

[*Defense Counsel*]: Okay. Well, are you in prison or jail now?

[*Yancy*]: Because I didn't do nothing.

[*Defense Counsel*]: That's not my question.

[*Yancy*]: No I'm not.

[*Defense Counsel*]: You're not in prison or jail now. Okay. You weren't charged with murder or weapons possession, correct?

[*Yancy*]: I didn't have a weapon, no.

[*Defense Counsel*]: That's not my question.

[*Yancy*]: No.

[*Defense Counsel*]: Okay. You were not charged with drug charges, right?

[*Yancy*]: No.

[*Defense Counsel*]: I mean you delivered cocaine in the house, right? You handed it to these guys and then you shared it, so you delivered it or at the least used it, right? Didn't get charged with any of that stuff, right?

[*Yancy*]: No.[17]

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[17] Defense counsel did not highlight why the FBI paid Yancy. As later revealed during a discussion outside the presence of the jury, he had good reason to stay away from this topic:

The majority picks and chooses small snippets of testimony to determine that the prosecutor had evil

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> *The Court*: The jury is yet to be called for. Are we ready for our jurors?
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> [*Defense Counsel*]: No. There was just one issue that I wanted to get your opinion on one way or the other before I start my cross-examination and that is this. Listening to the detective, and it's no secret there was an interview of Yancy in '06, in the summer of '06 if I understood his testimony. My client wasn't arrested until December of '07. If I ask the officer to confirm, I won't be asking the officer why, but if I ask the officer to confirm when my client was arrested, am I opening the door to Pierson Hood? I don't think I am, but if you think I am, I'm not doing it. So, I need to know.
>
> [*Prosecutor*]: Your Honor, the reason that there was a delay was because of the Pierson Hood investigation. So, if he wants to go there, it seems to me that it's only fair that we don't make Sgt. Ellis look like he wasn't doing anything. I mean —
>
> *The Court*: Yeah, we would have to supply the context. I don't see it as being particularly beneficial. We've already indicated, I think there's been indication that Lard wasn't arrested until '07 for an '05 homicide. It would certainly suggest — if it is the delay in an arrest the defendant is seeking to elicit from the officer, then an explanation for the delay in arrest would be certainly forthcoming. Frankly, I think it's much, much more hazardous for any gain that's going to be made.
>
> [*Defense Counsel*]: All right. I'm not going to get into it.
>
> *The Court*: Yeah. All right.

Defense counsel's trial strategy was to avoid "opening the door to Pierson Hood" because, as the trial court noted, doing so would be hazardous to defendant's case. Rather, defense counsel sought to impeach Yancy's claim that he was not paid "with regards to this case" by suggesting that Yancy had received some tacit benefit from the prosecution for his testimony and cooperation.

Further, it appears that an integral part of defense counsel's trial strategy was to avoid mentioning Yancy's cooperation in the Pierson Hood gang investigation. This is a significant fact that the majority ignores. And it is significant precisely because the majority holds the prosecutor responsible for failing to "correct" evidence that was not patently false and that the defense introduced for its own purpose.

intent to obfuscate the evidence and confuse the jury. This could not be further from the truth. The prosecutor made a timely pretrial disclosure of the evidence affecting Yancy's credibility. The prosecutor elicited only true testimony from Yancy. Defense counsel had ample opportunity for a vigorous cross-examination with full knowledge that Yancy had indeed been paid money by the FBI for information that implicated defendant in the murder of Pass. Given this compelling information, I simply cannot conclude that any infirmity in the testimony elicited from Yancy constituted false or substantially misleading evidence sufficient to warrant the reversal of defendant's convictions. Instead, I would conclude that the testimony under review was at most incomplete and not material to the greater scheme of this criminal trial.

III. ANY ALLEGED ERROR IS BARRED BY WAIVER

While defense counsel conducted a vigorous cross-examination of Yancy, counsel chose not to clarify Yancy's testimony with regard to compensation from the FBI. I conclude that explicit disclosure of evidence affecting Yancy's credibility, coupled with defense counsel's subsequent failure to raise the specific issue at trial, constituted waiver of the claim at issue in this case.[18] Significantly, when Yancy denied on cross-

[18] While the majority does not share the view that a *Napue* error can be waived because counsel could have addressed the issue on cross-examination, I note that the majority of the federal courts of appeals have expressed views consistent with this approach: *United States v Iverson*, 208 US App DC 364, 366; 648 F2d 737 (1981) ("[W]e hold that, absent unusual circumstances, the right of the defendant to disclosure by the prosecutor is deemed waived if defense counsel with actual knowledge of the plea agreement or sentencing status information chooses not to present such information to the jury."); *Green v United States*, 256 F2d 483, 484 (CA 1, 1958) ("But [the defendant] cannot have

examination that he was compensated "with regards to

it both ways. He cannot withhold the evidence [that an assistant United States attorney persuaded a witness to commit perjury against the defendant by promising the witness a light sentence and that he would be spared deportation], gambling on an acquittal without it, and then later, after the gamble fails, present such withheld evidence in a subsequent proceeding . . . ."); *United States v Branch*, 261 F2d 530, 533 (CA 2, 1958) (concluding that when a defendant makes a deliberate choice not to call a witness to testify who claimed to have proof of alleged perjury by a key prosecution witness, "he cannot now by way of motion under [28 USC] 2255 assert a defense . . . which was available but not presented at the trial"); *United States ex rel Regina v LaVallee*, 504 F2d 580, 583 (CA 2, 1974) (concluding that when the defense is aware that the prosecution might have offered a promise of leniency in exchange for a witness's testimony but the witness denies it, the defense has an obligation to call available witnesses to prove the existence of the promise because "[a] defendant may not obtain a new trial on the basis of evidence which he could have discovered by reasonable diligence"); *Harris*, 498 F2d at 1169-1170 ("[I]f appellant's counsel was of the opinion that the errors were prejudicial it was his obligation to interpose a timely objection and seek corrective action by the Court. . . . He should have taken this course when he learned of the errors, but failed to do so. A defendant may not sit idly by in the face of obvious error and later take advantage of a situation which by his inaction he has helped to create.") (emphasis omitted) (quotation marks and citations omitted) (alteration in original); *United States v Meinster*, 619 F2d 1041, 1045 (CA 4, 1980) (concluding that because the defendants had knowledge of a "deal" between a witness and the prosecution but took no action on the matter during trial apart from asking the prosecutor if the deal existed, the defendants waived their objection to the witness's testimony that he had received no offer of leniency in exchange for his cooperation); *Beltran*, 294 F3d at 736 (concluding that the defendant waived his right to object to false testimony because "[d]efense counsel was aware that the testimony was misleading but consciously decided not to clarify for the jury" as "part of a deliberate defense strategy"); *Decker*, 543 F2d at 1105 ("[W]e hold that the Government fulfilled its duty of disclosure by supplying appellants with its recollection of the true circumstances of the negotiations with the witnesses at a time when recall and further exploration of these matters was still possible."); *Decker v United States*, 378 F2d 245, 251 (CA 6, 1967) ("We find no decision which fits the case at bar, but it has been held that deliberate toleration of the commission of perjury cannot be later employed to gain judicial relief for one who connived in the use of the perjury."); *Evans v United States*, 408 F2d 369, 370 (CA 7, 1969) ("When a criminal defendant, during his trial, has reason to believe that perjured

this case," defense counsel did not object, ask for a mistrial, seek a conference outside the presence of the jury, or otherwise ask the court to strike the allegedly false testimony.[19] Presumably defense counsel viewed Yancy's testimony as incomplete, vague, and perhaps even evasive, but deemed this testimony best addressed through vigorous cross-examination. And defense counsel in fact conducted a vigorous cross-examination of Yancy, but instead of clarifying Yancy's testimony with regard to compensation from the FBI, he sought to highlight that Yancy was not paid "with regards to this case" and impeached Yancy by suggesting that Yancy had received not only "[r]eal money" for cooperating with the FBI, but some additional tacit benefit from the prosecution for his testimony and cooperation. An issue is waived if the defendant intentionally abandons a known right.[20] "[W]aiver may be

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testimony was employed by the prosecution, he must impeach the testimony at the trial, and 'cannot have it both ways. He cannot withhold the evidence, gambling on an acquittal without it, and then later, after the gamble fails, present such withheld evidence in a subsequent proceeding . . . .' ") (citation omitted); *Ross v Heyne*, 638 F2d 979, 986 (CA 7, 1980); *Sanassarian v California*, 439 F2d 703, 703-704 (CA 9, 1971) (citation omitted); *Routly*, 33 F3d at 1286 ("There is no violation of due process resulting from prosecutorial non-disclosure of false testimony if defense counsel is aware of it and fails to object.").

[19] As mentioned, the trial court also presided over and actively participated in the October 6, 2010 hearing in which Yancy's agreement with the FBI was disclosed. Like defense counsel, the court was not surprised by and did not in any way express concern about or take exception to the testimony from Yancy that the majority today declares to be "substantially misleading, if not false." That neither defense counsel nor the experienced and knowledgeable trial judge (both officers of the court under an ethical obligation to correct false testimony) took exception to this testimony weighs strongly in support of my conclusion that the testimony and evidence in question are not material in the greater scheme of this criminal trial.

[20] *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

effected by action of counsel."[21] Because defense counsel had full knowledge of Yancy's cooperation and compensation and nonetheless chose to impeach Yancy at trial without mentioning the extent of Yancy's cooperation with the FBI, defendant has waived this issue on appeal.[22]

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[21] *Id*. at 218, citing *New York v Hill*, 528 US 110, 114; 120 S Ct 659; 145 L Ed 2d 560 (2000). *Hill* further explained that

> [a]s to many decisions pertaining to the conduct of the trial, the defendant is "deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' " Thus, decisions by counsel are generally given effect as to what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence. Absent a demonstration of ineffectiveness, counsel's word on such matters is the last. [*Hill*, 528 US at 115 (citations omitted).]

[22] See *Harris*, 498 F2d at 1169-1170. *Harris* involved a claim of false testimony arising from the failure to disclose a witness's deal with the prosecution. After the witness was excused but before the trial concluded, the prosecutor informed the defendant and the court of the witness's remuneration from the prosecution. Accordingly, it was evident that the witness presented false testimony. The defendant did nothing with this information and on appeal claimed that the prosecution had breached the duty to correct false testimony. The United States Court of Appeals for the Third Circuit concluded that the defendant had waived the issue by failing to take any action after being informed of the evidence affecting the witness's credibility. *Id*. at 1170. The majority here asserts that because the prosecutor in *Harris* disclosed to the defendant the full extent and nature of its remuneration with the witness, the prosecution ultimately complied with its *Napue* obligation. The *Harris* disclosure came in the midst of the trial and after the critical witness was excused. I respectfully submit that if disclosure of evidence affecting a witness's credibility is timely when provided in the midst of trial yet after the critical witness has been excused, there should be no question but that the prosecution satisfied its *Napue* obligation here when it disclosed to defense counsel and the trial court the full and complete extent of Yancy's compensation from the FBI at the 2010 hearing during which Special Agent Harris testified.

IV. THE UNPRESERVED ALLEGED ERROR IS FORFEITED

As discussed, defense counsel and the trial court were fully aware that the FBI had compensated Yancy for his cooperation and information implicating defendant in the murder of Pass. Because there was no objection when Yancy denied being compensated "with regards to this case,"[23] defendant's constitutional claim is unpreserved and subject to forfeiture.[24] "To avoid forfeiture under the plain error rule, three require-

[23] Again, in each United States Supreme Court case the majority relies on, defense counsel and the trial court were entirely unaware of any of the details relating to the state's agreements to compensate witnesses for their testimony. Thus, defense counsel in those cases obviously could not have objected. In this case, however, defense counsel was aware and readily could have objected to Yancy's testimony. Defense counsel's knowledge invokes an important principle of appellate review. That is, "[t]his Court disfavors consideration of unpreserved claims of error." *People v Carines*, 460 Mich 750, 761; 597 NW2d 130 (1999). "Michigan has long recognized the importance of preserving issues for appellate review." *Id*. at 762. Moreover, we recognize that "[t]rial is 'by far the best time to address a defendant's constitutional and nonconstitutional rights.' " *Id*., quoting *People v Grant*, 445 Mich 535, 551; 520 NW2d 123 (1994) (emphasis omitted). For these reasons I seriously question the propriety of the majority's chosen standard of review, which only requires a defendant to establish a " 'reasonable likelihood' that the [allegedly false or substantially misleading testimony] affected the judgment of the jury," quoting *Napue*, 360 US at 271. In my view, this standard only applies when the issue could not have been preserved at trial. See, e.g., *Robinson v Arvonio*, 27 F3d 877, 886 (CA 3, 1994) ("[W]hen it became clear that the prosecutor had not corrected the perjured testimony, the defense attorney could have alerted the judge and sought a remedy that would have eliminated any possibility of prejudice to his client . . . . Instead, the defense attorney sought to counter the misleading impression through cross-examination and closing argument. Although we agree with [the defendant] that his attorney did not waive the error by failing to call it to the attention of the court, *an error which the defense attorney could have corrected at trial is not likely 'to infect the integrity of the proceeding . . . .'* "), vacated 513 US 1186 (1995) (citation omitted) (emphasis added).

[24] *Carines*, 460 Mich at 763; see also *People v Vaughn*, 491 Mich 642, 663-664; 821 NW2d 288 (2012).

ments must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights."[25] "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings."[26] The defendant has the burden of establishing each of these three elements.[27] In this case, defendant has failed to show that any perceived error affected the outcome of the lower-court proceedings. In affirming defendant's convictions, the Court of Appeals relied heavily on the "fairly dreadful state of Yancy's credibility"[28] to conclude that any error was harmless. The majority believes that the panel's reliance on Yancy's dreadful credibility was misplaced because "the *impossibility* of raising Yancy's credibility from an already 'dreadful state' " was not the critical issue. Rather, the majority frames the issue as "what effect would likely have resulted if the jury had understood that Yancy was compensated for his information

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[25] *Carines*, 460 Mich at 763, citing *United States v Olano*, 507 US 725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

[26] *Carines*, 460 Mich at 763, citing *Olano*, 507 US at 734.

[27] *Carines*, 460 Mich at 763. Further, "[t]he reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*. at 774. The majority claims that when "the prosecutor deliberately exploit[s] misleading evidence before the jury, [it] clearly affects 'the fairness, integrity or public reputation of judicial proceedings.' " While I take issue with the majority's characterization of the prosecutor's conduct, I also note that the rule of law sanctioned by the majority in this case will give similarly situated defendants a free bite at the apple in future cases. Specifically, defense counsel aware of false testimony can ignore that testimony and roll the dice with a jury, knowing full well that if an acquittal is not obtained, the testimony will afford defendant a reversal on appeal. This rule of law seriously affects "the fairness, integrity, or public reputation of judicial proceedings."

[28] *People v Smith*, unpublished opinion per curiam opinion of the Court of Appeals, issued October 29, 2013 (Docket No. 304935), p 5.

against the defendant." In this regard, the majority concludes that reversal is required because "the 'dreadful state' of Yancy's credibility would have been even more dreadful had the jury learned that he was paid for his information against the defendant."

Of course the jury was certainly entitled to question Yancy's credibility. He admitted that he was a regular drug user, was in a dispute with defendant over money, took Pass's drugs (though he gave them to Lard), and left the victim "gurgling off his blood" on the floor (though he testified, "What could I do?" and "I thought I was next"), and left town for a year. Even the prosecutor wryly admitted, "[O]ur witnesses aren't from the Mormon Tabernacle choir . . . ." With that said, " '[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.' "[29] But here, defendant here has only shown a *possibility* that Yancy's credibility could be further diminished. In other words, it is entirely speculative that this possibility would have affected the outcome in this case. It is just as possible that the jury would have ignored additional impeachment given the then-existing "dreadful state of Yancy's credibility." Simply put, the burden is on defendant, and defendant failed to show that any perceived error actually, instead of possibly, affected the outcome of the lower-court proceedings. Accordingly, defendant has not satisfied his burden of establishing plain error that affected his substantial rights and therefore has forfeited this issue on appeal.

V. THE ALLEGED ERROR WAS HARMLESS

MCL 769.26 provides:

[29] *Carines*, 460 Mich at 763, quoting *Olano*, 507 US at 734.

> 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.

This statute essentially embodies Michigan's harmless-error rule.[30] " 'Simply stated, . . . reversal is only required if the error was prejudicial. That inquiry focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence.' "[31]

According to the majority, the alleged error prejudiced defendant because the prosecutor bolstered Yancy's credibility by arguing that he had only been paid for his cooperation in other cases:

> Mark Yancy was here, ladies and gentlemen, and he talked to you about [sic] he wasn't charged in this homicide, and that he admitted he was in the house at the time of the homicide, and that he got the cocaine, and gave it to Lard and the defendant. He told you he did not get consideration on this case for testifying, that he got consideration on other cases that the task force was involved with.

No objection was made to the prosecutor's closing argument. Further, this argument is consistent with the record evidence from Flint police officer Shawn Ellis, who testified without objection that Yancy was not paid for his testimony and had "cooperated on other investigations with task force officers." In any

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[30] *People v Lukity*, 460 Mich 484, 491; 596 NW2d 607 (1999).

[31] *Id*. at 492, quoting *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996).

event, reviewing courts should not flyspeck trial proceedings with the benefit of 20/20 appellate hindsight. "[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one."[32] Instead, our law generally demands that trial results not be overturned unless a miscarriage of justice has occurred.[33] This was a 7-day jury trial featuring more than 20 witnesses and numerous exhibits. It is often difficult for seasoned practitioners and judges to keep pace with trial proceedings. It is substantially more difficult for the jury to do so. This one fleeting, arguably inaccurate statement to which no objection was made does not detract from the actual evidence presented at trial and the prosecutor's truthful statement that Yancy "did not get consideration on this case for testifying." Moreover, the prosecutor's statement was responsive to defense counsel's line of questioning that suggested that Yancy had been compensated for his testimony against defendant. And not only did defense counsel suggest that Yancy had been compensated for his testimony against defendant, but he later stated in closing argument, without any factual basis, that Yancy "lied to you about his plea, whether he pled." Notwithstanding this assertion by defense counsel, there is absolutely no evidence that Yancy received any deal from the prosecution in exchange for his testimony in this case.

Further, the majority exaggerates the prejudicial effect of the alleged error. The extent to which Yancy's credibility was bolstered by argument that he had only been paid by the FBI for his cooperation in other cases is, at best, marginal. Additionally, the alleged error was clearly precipitated by the prosecutor's willing-

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

[33] See, e.g., MCL 769.26.

ness to accommodate defense counsel's trial strategy that avoided "opening the door to Pierson Hood" because, as the trial court noted, doing so would be hazardous.[34] Both the prosecutor and defense counsel fastidiously avoided mention of the Pierson Hood gang during trial. Rather than delve into specific prejudicial information that Yancy had provided to the FBI, defense counsel sought to challenge Yancy on his claim that he was not paid "with regards to this case" and impeached Yancy by suggesting not only that Yancy had received cash from the FBI for cooperation, but that he had also received some tacit benefit from the prosecution for his testimony and cooperation.

Finally, the majority does not address whether even if Yancy's testimony had been struck from the record, the prosecution nonetheless presented sufficient independent evidence at trial to establish beyond a reasonable doubt that defendant murdered Pass. Even if evidence is improperly admitted to bolster a witness's character for truthfulness, reversal is not required under MCL 769.26 if there exists other cumulative and independent evidence to support the conviction.[35] The majority apparently assumes that the jury simply did not believe the other key witness for the prosecution, but "[t]he jury is the sole judge of the facts; its role includes listening to testimony, weighing evidence, and

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[34] In 2007, the Flint Safe Streets Task Force, which included members of local and federal law enforcement, arrested more than 30 people related to the Pierson Hood gang, which was a criminal enterprise. Two of the people arrested were defendant and Lard. However, the circuit court quashed the charge against defendant of conducting a criminal enterprise, and eventually the case proceeded to trial only in respect to the murder of Pass.

[35] See *Lukity*, 460 Mich at 488-489, 496-497 (stating that the error was harmless when the prosecutor improperly bolstered the victim's credibility because an untainted witness testified about the defendant's inculpatory apology).

making credibility determinations."[36] Contrary to the assertions of the majority, Lard's testimony was largely consistent with Yancy's testimony with regard to the murder of Pass. It would be very difficult to conclude that the jury convicted defendant on the basis of Yancy's testimony while rejecting Lard's testimony.

Specifically, Yancy and Lard consistently testified that Lard brought defendant to Pass's home, that they used a mutual acquaintance's name to validate their intent to purchase cocaine, and that Pass let them inside. Inside the house, defendant and Pass discussed purchasing cocaine in the kitchen, and both Yancy and Lard saw Pass enter the bathroom, presumably to retrieve cocaine. After Pass returned to the kitchen, both Yancy and Lard heard multiple gunshots coming from the kitchen area, where only defendant and Pass were present. Lard testified that neither he nor Yancy shot Pass, but that defendant did so. Lard's testimony alone provided a rational basis to establish that defendant shot and killed Pass. In sum, having examined the entire cause, I cannot conclude that the error alleged by defendant affirmatively appears to have resulted in a miscarriage of justice. I would affirm.

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[36] *People v Mardlin*, 487 Mich 609, 626; 790 NW2d 607 (2010).

EPPS v 4 QUARTERS RESTORATION LLC

Docket No. 147727. Argued on application for leave to appeal March 10, 2015. Decided September 28, 2015.

Following a flood in 2006 that did extensive damage to their home, Danny and Joyce Epps brought an action in the Wayne Circuit Court against the individuals and businesses involved in the restoration of their home or with the flow of monies associated with the restoration project. Their insurance provider, defendant Auto-Owners Insurance Company, employed defendant AM Adjusting to refer plaintiffs to professionals capable of performing the restoration work. AM Adjusting referred plaintiffs to defendant Troy Willis and his companies, defendants 4 Quarters Restoration LLC and Emergency Insurance Services. Plaintiffs contracted with Willis to perform the restoration work. Willis failed to inform plaintiffs that his residential builder's license had been revoked. Willis began work on plaintiffs' home and making insurance claims through their homeowners' policy. When Willis received checks from Auto-Owners, he indorsed them himself, signing plaintiffs' names. Willis would then cash the checks at defendant Denaglen Corp.'s check-cashing business, MBM Check Cashing. Denaglen would then deposit the funds into its account at defendant Comerica Bank. Ultimately, Willis received and indorsed checks from Auto-Owners totaling $128,047. Willis discontinued work on plaintiffs' home at the end of 2006. The parties disputed whether the restoration was complete and whether the work that had been done was performed in a satisfactory manner. After plaintiffs filed suit, Comerica filed an interpleader action and deposited $128,047 from Denaglen's account into escrow. The claims against Comerica were subsequently dismissed. Auto-Owners assigned to plaintiffs any claims it had against the other defendants, and the claims against it were dismissed as were the claims against AM Adjusting. Plaintiffs alleged in their complaint that Willis and his businesses were not entitled to compensation for the work they performed because Willis was unlicensed and their contract was therefore void, that Willis had defrauded them, had conducted the restoration in an unworkmanlike manner, and had converted their insurance proceeds. Plaintiffs further alleged that Denaglen wrongfully cashed the insurance checks and converted the funds

paid by Auto Owners to plaintiffs. Denaglen failed to timely respond to plaintiffs' complaint and a default judgment was entered against it. The court, Michael F. Sapala, J., denied Denaglen's motion to set aside the default. The remaining parties moved for summary disposition. The court granted summary disposition in favor of plaintiffs. Willis and his businesses and Denaglen appealed. The Court of Appeals, GLEICHER, P.J., and SAWYER and FORT HOOD, JJ., affirmed in an unpublished opinion per curiam. Willis and his businesses and Denaglen then sought leave to appeal in the Michigan Supreme Court. The Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 496 Mich 853 (2014).

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

MCL 339.2412(1) does not prevent an unlicensed builder from defending against a lawsuit on its merits. Nor does the statute afford a homeowner an independent cause of action to seek damages for its violation. Contracts between an innocent homeowner and an unlicensed residential builder are voidable by the homeowner, and thereby effective in conveying rights and authorities to both parties and third parties. The Court of Appeals therefore erred when it declared the contract at issue void *ab initio*.

1. MCL 339.2412(1) prohibits an unlicensed residential builder from bringing or maintaining an action for the collection of compensation by filing or pursuing a complaint, cross-claim, counterclaim, or third-party claim against a homeowner. However, if it is the homeowner who seeks compensation or performance from the unlicensed builder, the homeowner has brought the action. And if the builder offers reasons why the homeowner should not recover in its action, the builder has asserted a defense and the assertion of a defense is not barred by MCL 339.2412(1).

2. MCL 339.2412(1) does not afford a homeowner a separate and independent right to demand that an unlicensed builder return funds paid for work conducted when the builder lacked the requisite license. The statute was written to protect a homeowner by imposing a burden on a builder who, in the Legislature's view, would endanger public safety by performing construction work without a license. However, a homeowner is protected from the harm that may result from the performance of unlicensed work—i.e., the provision of unsatisfactory or unsafe building services—through existing and traditional common-law causes of action in tort and contract. In addition, MCL 339.2412 expressly provides a mechanism for its enforcement, apart from civil liability,

by providing for civil prosecution by the Attorney General or a prosecuting attorney. By expressly conferring enforcement authority only on prosecutors and the Attorney General, the statute would seem by implication not to give similar authority to a private party. Given these facts, there is no basis for inferring a private cause of action to enforce MCL 339.2412(1).

3. The courts of this state have often pronounced contracts involving an unlicensed builder to be "void," but it appears that in many cases, courts have stated that these contracts are "void" without actually intending to use the term in its literal sense as evidenced by the fact that courts have shown a willingness to allow a homeowner to enforce such contracts against an unlicensed builder. In addition, while MCL 339.2412(1) imposes a limitation on the unlicensed builder, preventing the builder from bringing any kind of lawsuit in order to receive compensation for work performed without a license, the statute does not place any similar limitation on the acts that may be taken by a homeowner. The statute therefore suggests that contracts between a homeowner and an unlicensed builder are characterized by an asymmetrical enforceability. This statutory framework is largely in accordance with the nature of a voidable contract because in the case of a voidable contract, the party with the power of avoidance has the unilateral option to either rescind the contract and avoid the obligation of performance, or to ratify the contract and render it enforceable. Although there has been considerable confusion regarding the proper legal status of these contracts, treating them as voidable is the only outcome that satisfactorily applies MCL 339.2412(1) while giving due consideration to our judicial precedents.

4. The trial court did not abuse its discretion by refusing to set aside Denaglen's default. Even after receiving notice of its default, Denaglen inexplicably waited seven weeks before moving to have the default set aside. In arguing Denaglen's motion to set aside the default, and in their applications for leave to appeal, the parties presented irreconcilable accounts of the circumstances surrounding the default. It was for the trial court to evaluate the credibility and reasonableness of the parties' arguments, and it determined that Denaglen had not made the necessary showing to merit relief from the default. However, because this opinion calls into question the legal justifications for the lower courts' decisions in favor of plaintiffs' conversion claims against defendants, the potential for an inconsistent result exists. If Willis is not liable for converting the insurance checks, then logically Denaglen could not have converted the checks, either. In

the face of such an outcome, Denaglen's default, as to the conversion claim only, would need to be set aside.

5. The contract between Willis (the unlicensed builder), and plaintiff homeowners was voidable. Because the contract was not a nullity from the outset, it could in theory have conveyed to Willis the authority to receive, indorse, and cash the insurance checks. The trial court, however, granted plaintiffs summary disposition without deciding whether the contract, if valid, would have conferred that authority on Willis. We therefore remand to that court for a determination of whether the agreement granted Willis and his companies the specific authority to perform those actions on plaintiffs' behalf and whether they acted within the scope of that authority. If on remand the trial court determines that Willis and his companies might be liable for any of plaintiffs' claims arising under the contract, those defendants must be permitted to defend against those claims. Neither Willis's breach of the contract nor MCL 339.2412(1) prevent Willis from demanding that plaintiffs prove their actual damages. If plaintiffs seek judicial redress, including damages, they are required to prove the extent to which they have been harmed by defendants and defendants are entitled to rebut those proofs. With regard to any outstanding equitable claims, such as restitution, plaintiffs must also be prepared to establish that they have acted equitably.

Affirmed in part, reversed in part, and remanded.

1. LICENSES — BUILDING CONTRACTS — PROHIBITION AGAINST ACTIONS BY UNLICENSED BUILDERS — ACTIONS BY THE HOMEOWNER — ASSERTION OF A DEFENSE BY THE BUILDER.

MCL 339.2412(1) prohibits an unlicensed residential builder from bringing or maintaining an action for the collection of compensation by filing or pursuing a complaint, cross-claim, counterclaim, or third-party claim against a homeowner; the assertion of a defense by a builder in an action brought by the homeowner is not barred by MCL 339.2412(1).

2. LICENSES — BUILDING CONTRACTS — PROHIBITION AGAINST ACTIONS BY UNLICENSED BUILDERS — PRIVATE CAUSES OF ACTION BY THE HOMEOWNER.

MCL 339.2412(1) does not afford a homeowner a separate and independent right to demand that an unlicensed builder return funds paid for work conducted when the builder lacked the requisite license.

3. LICENSES — BUILDING CONTRACTS — PROHIBITION AGAINST ACTIONS BY UNLICENSED BUILDERS — VOIDABLE CONTRACTS.

Contracts involving an innocent homeowner and an unlicensed residential builder are voidable, not void *ab initio* (MCL 339.2412(1)).

Posner, Posner and Posner (by *Gerald F. Posner*) for Danny and Joyce Epps.

Roger L. Premo for 4 Quarters Restoration LLC, Denaglen Corp., Emergency Insurance Services, and Troy Willis.

MARKMAN, J. Defendants, an unlicensed residential builder; his businesses; and Denaglen Corp., a check-cashing service, seek leave to appeal the decision of the Court of Appeals denying them relief from summary disposition. The trial court entered judgment in favor of plaintiffs, a married couple and parties to a home restoration contract with the unlicensed builder defendant and his businesses, and the Court of Appeals affirmed. We directed that oral arguments be held to address whether to grant the application for leave to appeal or take other action pursuant to MCR 7.302(H)(1). *Epps v 4 Quarters Restoration, LLC*, 496 Mich 853 (2014). After hearing arguments on March 10, 2015, defendants' application is now considered. This case raises four issues: (1) whether MCL 339.2412(1), which prohibits an unlicensed builder from "bring[ing] or maintain[ing] an action . . . for the collection of compensation" prevents an unlicensed builder from defending on the merits against claims asserted against him by a homeowner; (2) whether MCL 339.2412(1) provides a homeowner with an independent cause of action for damages arising from the statute's violation; (3) whether a contract for the services of an unlicensed builder is void *ab initio* or whether it may have some

form of continuing legal existence; and (4) whether the trial court abused its discretion in refusing to set aside the default of Denaglen Corp., the check-cashing service. In lieu of granting leave to appeal, we affirm in part and reverse in part the judgment of the Court of Appeals and remand to the trial court for further proceedings consistent with this opinion.

I. FACTS AND HISTORY

Plaintiffs Danny and Joyce Epps own a home in Detroit. On July 26, 2006, that home was damaged in a flood. Plaintiffs' home insurance provider, Auto-Owners Insurance Company, employed AM Adjusting for the purpose of referring plaintiffs to professionals capable of performing the necessary restoration work. AM Adjusting referred plaintiffs to defendant Troy Willis and his companies, 4 Quarters Restoration and Emergency Insurance Services. Willis met with plaintiffs and showed them a book depicting some of his work. The book also displayed a copy of Willis's residential builder's license, although Willis neglected to inform plaintiffs that the license had been revoked on January 31, 2006.

Plaintiffs subsequently decided to hire Willis to perform restoration services on their home and on personal property damaged in the flood, and the parties signed a misnamed "Fire Repair Agreement" to that effect on July 26, 2006.[1] That agreement states that plaintiffs:

> assign[] the proceeds of the adjusted [insurance] claim to the Emergency Insurance Services [Willis's company], as full payment for the fire repairs.

* * *

[1] Capitalization and emphasis altered.

> The owner, the undersigned, is not liable for anything in excess of the insurance check. The owner is to approve specifications before work is started, endorsement of the [insurance checks] to Emergency Insurance Services, will be payment in full for the . . . repairs.[2]

An addendum, titled "Work Authorization,"[3] states in relevant part:

> To the Insurance Companies, their agents, or to Whom it may Concern:
>
> I/We, Danny & Joyce Epps, the undersigned, hereby irrevocably engage 4 Quarters Restoration LLC., to make all necessary restoration and or clean damage [to the] property caused by your loss occurring on the 26th day of July 2006. To the property owned by the undersigned located at . . . City Detroit, State Michigan.
>
> The undersigned to insure payment, assigns the proceeds of the adjusted claim to 4 Quarters Restoration LLC., as full payment for cleaning and or restoration.[4]

Another addendum, titled "Insurance Power of Attorney,"[5] was signed by plaintiffs and contained the following language:

> To: The Insurance Companies
>
> Their Agents
>
> All Concerned Parties
>
> I Danny Epps & Joyce Epps, hereby give my (Contractor), Troy Willis Power of Attorney, to sign my name to all documents pertaining to settling the insurance claim and restoring the damage to my property . . . .[6]

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[2] Capitalization and emphasis altered.

[3] Emphasis altered.

[4] Emphasis altered.

[5] Emphasis altered.

[6] Emphasis altered.

Willis began work on plaintiffs' home, and also began making insurance claims through plaintiffs' homeowners' policy. Plaintiffs were aware that Willis was filing claims on their behalf, although they assert they were unaware of the amounts of these claims. Upon approving the claims, Auto-Owners sent checks directly to Willis. Sometimes these checks listed both Willis and the plaintiffs as payees, and at other times only the plaintiffs were listed as payees. When Willis received the checks, he indorsed them himself, signing plaintiffs' names. In total, Willis received and indorsed checks from Auto-Owners equaling $128,047. Upon receiving and endorsing the checks, he then cashed these at Denaglen's check-cashing business, MBM Check Cashing.[7] Denaglen charged Willis a 3% fee for providing its services. After Willis had indorsed the checks to Denaglen, the latter deposited the funds into its account at Comerica Bank. By the end of 2006, Willis had apparently discontinued work on plaintiffs' home. The parties dispute both whether the restoration had been completed and whether the work had been performed in a satisfactory manner.

On July 24, 2009, plaintiffs filed the present action in the Wayne Circuit Court against all the individuals and businesses involved in either the restoration of their home or with the flow of monies associated with the project, including Willis and his businesses, Denaglen Corp., Comerica, Auto-Owners, and AM Adjusting. Comerica Bank filed an interpleader action and deposited $128,047 from Denaglen's account into escrow and the claims against Comerica were dismissed. Auto-Owners Insurance assigned to plaintiffs

[7] Although Willis cashed the checks at MBM Check Cashing, that entity is an alter ego of Denaglen Corp. Because the parties refer to this defendant as "Denaglen," this opinion will do the same.

any claims it had against the other named defendants and the claims against it were also dismissed, as were the claims against AM Adjusting.

As to Willis and his businesses, plaintiffs alleged that these parties performed restoration services on plaintiffs' home absent the requisite license and therefore were not entitled to receive compensation for their services. Plaintiffs sought to have the agreement between them and Willis had declared "illegal, void and unenforceable" and thereby rescinded. Plaintiffs further alleged that Willis defrauded them, carried out their restoration in an unworkmanlike manner, and converted the proceeds of their insurance checks. Regarding the latter claim, plaintiffs sought treble damages measured by the face value of the insurance checks.

With regard to Denaglen, plaintiffs alleged that it wrongfully cashed the insurance checks, acted in bad faith and without employing reasonable commercial standards, and converted the funds paid by Auto-Owners to plaintiffs. As a result, plaintiffs sought the $128,047 placed into escrow by Comerica. Denaglen failed to file a timely answer to plaintiffs' complaint and a default judgment against it was entered. Denaglen subsequently moved to have the default set aside, but the trial court denied the motion.

The parties filed competing motions for summary disposition. The trial court granted plaintiffs' motion and denied defendants' motion, ordering that the escrow funds be awarded to plaintiffs. The court explained its ruling by stating, "MCL 339.2412(1) is applicable in this case and Plaintiffs are entitled to summary disposition as a matter of law." The trial court finally held that defendants were liable as a matter of law for converting the insurance checks issued by Auto-Owners.

Defendants appealed, and the Court of Appeals affirmed albeit on different grounds. The Court of Appeals disagreed with the trial court that MCL 339.2412(1) mandated judgment in plaintiffs' favor, noting that MCL 339.2412(1) states only that an unlicensed builder may not " 'bring or maintain an action . . . for the collection of compensation . . . .' " *Epps v 4 Quarters Restoration, LLC*, unpublished opinion per curiam of the Court of Appeals, issued June 6, 2013 (Docket No. 305731), p 4. Because defendants did not "bring or maintain an action," but sought only to defend against plaintiffs' action, MCL 339.2412(1) did not impose liability on defendants. *Id*. The Court also held that the statute did not afford plaintiffs a private cause of action to seek damages for its violation, but rather that a homeowner aggrieved by a builder's unlicensed work was obligated to seek damages under traditional common-law contract and tort theories. *Id*. at 5-6.

The Court of Appeals nonetheless affirmed summary disposition in favor of plaintiffs because it believed that defendants had converted the proceeds of the insurance checks. The Court noted that Willis had misrepresented himself to plaintiffs as a licensed builder and held that "Willis's fraud rendered the power of attorney entered by the [plaintiffs] void *ab initio*." *Id*. at 6. Accordingly, it concluded that "Willis therefore had no authority to endorse and negotiate checks issued by the insurance company on the [plaintiffs'] behalves." *Id*. The Court agreed with the trial court that the proper measure of damages for the conversion was the face value of the converted instruments and affirmed the lower court's order distributing the funds held in escrow to plaintiffs.

Defendants sought leave to appeal in this Court, contending that the Court of Appeals erred by finding defendants liable for conversion as a matter of law and

also that the trial court abused its discretion when it failed to set aside Denaglen's default. Plaintiffs filed a cross-appeal, conditioned upon this Court granting defendants' application for leave to appeal, contending that the Court of Appeals erred when it held both that MCL 339.2412(1) did not provide plaintiffs with a private cause of action to recover the funds paid to Willis and that Willis was entitled under the statute to defend himself against plaintiffs' claims.

II. STANDARD OF REVIEW

This case involves matters of statutory and contract interpretation, which are reviewed de novo. *Sands Appliance Servs v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000). A trial court's ruling on a motion for summary disposition is also reviewed de novo. *Costa v Community Emergency Med Servs, Inc*, 475 Mich 403, 416; 716 NW2d 236 (2006). A trial court's decision regarding a motion to set aside a default judgment is reviewed for an abuse of discretion. *Lawrence M Clarke, Inc v Richco Constr, Inc*, 489 Mich 265, 272; 803 NW2d 151 (2011). An abuse of discretion occurs when the court's decision results in an outcome that falls outside the range of principled outcomes. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

III. ANALYSIS

A. ABILITY TO DEFEND

The trial court granted summary disposition in favor of plaintiffs because it believed that MCL 339.2412(1) mandated that result. The Court of Appeals disagreed, holding that the statute does not apply because it only operates to prevent an unlicensed builder from "*bring*[*ing*] *or maintain*[*ing*]" claims

against a homeowner. The statute does not, however, prevent an unlicensed builder from *defending* itself against a claim on its merits. Because it was the homeowners bringing claims against the builder in the instant case, MCL 339.2412(1) is inapplicable. We agree with that analysis.

MCL 339.2412(1) states:

> A person or qualifying officer for a corporation or member of a residential builder or residential maintenance and alteration contractor shall not bring or maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract.

"The primary goal of statutory interpretation is 'to ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute.' " *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 427; 751 NW2d 8 (2008), quoting *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 420; 662 NW2d 710 (2003). When the language of a statute is clear, it is presumed that the Legislature intended the meaning expressed therein. *Allison*, 481 Mich at 427. If a statute does not define a word, it is appropriate to consult dictionary definitions to determine the plain and ordinary meaning of the word. *Id*., citing *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Legal terms, however, are to be construed according to their "peculiar and appropriate meaning in the law." MCL 8.3a.

MCL 339.2412(1) prohibits an unlicensed builder from "bring[ing] or maintain[ing] an action . . . for the collection of compensation . . . ." The Court of Appeals was correct in holding the statute inapplicable here; it

does not bar the compensation itself, but only an "action" to collect it. An "action" is defined as "a lawsuit brought in court; a formal complaint within the jurisdiction of a court of law." *Black's Law Dictionary* (6th ed). "Cause of action" is similarly defined as, "[t]he fact or facts which give a person a right to judicial redress or relief against another. . . . A situation or state of facts which would entitle a party to sustain action and give him right to seek a judicial remedy in his behalf." *Id*. A party may assert a cause of action by filing a "complaint, cross-claim, counterclaim, or third-party claim . . . ." MCR 2.111(F)(2).

By contrast, a "defense" is "[t]hat which is offered and alleged by the party proceeded against in an action or suit, as a reason in law or fact why the plaintiff should not recover or establish what he seeks; [t]hat which is put forward to diminish plaintiff's cause of action or to defeat recovery." *Black's Law Dictionary* (6th ed). It is not an action, such as a complaint, cross-claim, counterclaim, or third-party claim, but rather an assertion made in *response* to an action. Therefore, a party may bring an "action" seeking compensation by filing a complaint and the adverse party may then assert a "defense" as a reason why the complainant should not recover what he or she seeks or otherwise prevail in the action. An "action" and a "defense" are separate assertions and are essentially a call and a response, the assertion of the former preceding and triggering the latter. A party bringing an "action" seeks to recover from the opposing party, while a party asserting a "defense" seeks to "diminish" or "defeat" that action.

In the context of litigation involving an unlicensed builder, MCL 339.2412(1) bars an unlicensed builder from seeking compensation by pursuing a complaint,

cross-claim, counterclaim, or third-party claim against a homeowner. In these circumstances, the unlicensed builder would be asking the court to order the homeowner to pay some amount allegedly due. However, if it is the homeowner who seeks compensation or performance from the unlicensed builder, the homeowner has brought the "action." And if the builder offers reasons why the homeowner should not recover in its action, the builder has asserted a "defense" and the assertion of a defense is not barred by MCL 339.2412(1).

Further supporting the conclusion that MCL 339.2412(1) does not impair an unlicensed builder's ability to *defend* himself or herself from litigation, the statute forbids actions for the "collection of compensation[.]" *The American Heritage Dictionary of the English Language* (New College ed, 1981) defines "collect" as "to call for and obtain payment of." When an unlicensed builder defends against an action by a homeowner to recover sums paid, the builder does not seek to "collect" compensation; rather, the builder presumably seeks to *retain* compensation already possessed. Any other interpretation would mean that a defendant in a lawsuit who asserts a successful defense has somehow "collected" from the plaintiff. While it is true that in many cases, as here, the unlicensed builder may have previously collected some amount of payment from the homeowner, MCL 339.2412(1) only prohibits actions "in a court of this state" for the collection of compensation. Any collection of payment that occurred before the litigation was not accomplished by an "action in a court" and therefore does not come within the scope of MCL 339.2412(1).

We also concur with the Court of Appeals in *Parker v McQuade Plumbing & Heating, Inc*, 124 Mich App 469, 471; 335 NW2d 7 (1983), in which the following

was said of MCL 339.2412(1): "The statute removes an unlicensed contractor's power to sue, not the power to defend, [and] was intended to protect the public as a shield, not a sword." This, we believe, constitutes the most reasonable interpretation of the statute, and when a statute is plain and unambiguous, it must be applied as written and without judicial gloss. *Wayne Co v Hathcock*, 471 Mich 445, 456; 684 NW2d 765 (2004). MCL 339.2412(1) operates as a bar to actions, not a bar to defenses. It prevents an unlicensed builder from attempting to "collect" payment from a homeowner through the filing of "actions" in a court of law. It does not, however, prevent an unlicensed builder from seeking to "diminish" or "defeat" actions filed against the builder by arguing that the claimant has not been damaged by the builder to the extent alleged.[8]

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[8] Plaintiffs support their argument that an unlicensed builder may not defend itself under MCL 339.2412(1) by citing *Roberson Builders v Larson*, unpublished opinion per curiam of the Court of Appeals, issued September 19, 2006 (Docket No. 260039), lv den 482 Mich 1138 (2008), as well as Justice MARILYN KELLY's concurring statement to this Court's order denying leave to appeal, *Roberson Builders v Larson*, 482 Mich 1138 (2008). The Court of Appeals refused to allow an unlicensed builder to argue for a reduction in the amount of a homeowner's damages claim arising from allegedly poor workmanship. The builder had provided services for which it had not been paid. When litigation arose, the builder sought to use the value of unpaid services not contemplated by the contract to reduce the homeowner's recovery. The Court essentially treated the builder's argument as a separate claim for compensation for the additional work performed: "At issue is whether the trial court erred when it allowed [the builder] to present evidence that it was entitled to recover the unpaid balance of the contract, as well as payment for extra work performed that was not included in the original contract." *Roberson*, unpub op at 2. We believe the Court's distinction to have been artificial; the builder did not seek to defend the portion of the contract that it did not perform or to collect for the portion of the contract that it did perform; rather, it sought only to challenge the homeowner's alleged damages arising from its deficient performance. By pointing out that it was not paid for other services that it provided, the builder sought only to show that the homeowner had not been damaged to the extent alleged. It was not maintaining an "action"

B. PRIVATE CAUSE OF ACTION

The Court of Appeals concluded that MCL 339.2412(1) does not give rise to a private cause of action that a homeowner may bring against an unlicensed builder. Plaintiffs argue that the statute should be interpreted to allow a homeowner to bring a private cause of action seeking the disgorgement of monies paid to an unlicensed builder. We agree, however, with the analysis of the Court of Appeals that MCL 339.2412(1) does not afford a homeowner a separate and independent right to demand that an unlicensed builder return funds paid for work conducted when the builder lacked the requisite license.

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for compensation; rather, it was seeking only to reduce the amount of damages that the homeowner could collect, and its argument was asserted in a purely defensive context.

Justice KELLY similarly believed that MCL 339.2412(1) prevented the contractor in *Roberson* from arguing for a reduction in the amount owed to the homeowner. She cited *Black's Law Dictionary* (8th ed), defining "action" to include any " 'civil or criminal judicial proceeding,' " and cited MCL 440.1201, defining "action" to include " 'recoupment[s], counterclaim[s], setoff[s], suit[s] in equity, and any other proceedings in which rights are determined.' " *Roberson*, 482 Mich at 1139 (emphasis omitted). She concluded that the builder's argument for a reduction in its liability was actually a "setoff," and that if the builder was allowed to so argue, it would be collecting "compensation" for work it performed while unlicensed. *Id*. at 1139-1140. But as with the Court of Appeals, she treated the builder's argument regarding the value it provided the homeowner as separate and distinct from the circumstances that formed the basis for the homeowner's lawsuit. However, there was a *single* transaction in *Roberson*—the builder's performance of building services. We respectfully believe that Justice KELLY's definition of an "action" also comes into tension with the term "defense," which *Black's Law Dictionary* (6th ed) has defined as "[t]hat which is put forward to diminish plaintiff's cause of action or to defeat recovery[.]" Put simply, in *Roberson* the homeowner alleged that the builder's actions had impaired the value of his property by a certain amount. The builder should have been allowed to argue that the homeowner's actual damages were less than that amount, thus merely "diminish[ing]" the homeowner's recovery.

MCL 339.2412(1) clearly does not create an *express* private cause of action, given that by its terms it only purports to *preclude* certain actions by an unlicensed builder. Nonetheless, it is sometimes possible that a court can *infer* a private cause of action from a statute when necessary to remediate its breach. Such an inference is appropriate when the statute provides no express remedy for its violation, yet it is deemed, exclusively or in part,

> (a) to protect a class of persons which includes the one whose interest is invaded; (b) to protect the particular interest which is invaded; (c) to protect that interest against the kind of harm which has resulted; and (d) to protect that interest against the particular hazard from which the harm results. [*Lash v Traverse City*, 479 Mich 180, 192-193; 735 NW2d 628 (2007), quoting cases quoting 2 Restatement Torts, 2d, § 286, p 25 (quotation marks omitted).]

We find no basis here for inferring a private cause of action to enforce MCL 339.2412(1). Clearly, the statute was written to protect homeowners, such as plaintiffs in this case, by imposing a burden on a builder who in the Legislature's view would endanger the public safety by performing construction work without a license. However, a homeowner is protected from the harm that may result from the performance of unlicensed work—i.e., the provision of unsatisfactory or unsafe building services—through existing and traditional common-law causes of action in tort and contract. Therefore, even if MCL 339.2412(1) did not exist, an unlicensed builder could be held liable for the consequences of poorly performed construction work.

Furthermore, MCL 339.2412 expressly provides a mechanism for its enforcement, apart from civil liability:

> A prosecuting attorney and the attorney general may bring an action for a civil violation in a court of competent jurisdiction against a person not licensed under this article that has violated [MCL 339.601 or MCL 339.602]. The court shall assess a civil fine, to be paid to the prosecuting attorney or the attorney general bringing the action, of not less than $5,000.00 and not more than $25,000.00, aside from any civil damages or restitution. [MCL 339.2412(4).]

By expressly conferring enforcement authority only on prosecutors and the Attorney General, the statute would seem by implication not to confer similar authority on a private party.[9] MCL 339.2412(1) was written, as its terms make reasonably clear, to impose a *burden* on an unlicensed builder, not—except indirectly by its restriction of lawsuits by the builder against the homeowner—to afford a *benefit* to a homeowner.

In summary, (a) MCL 339.2412(1) prevents an unlicensed builder from bringing "actions," i.e., claims, counterclaims, cross-claims, and third-party claims, to collect compensation for services performed in violation of our state's licensing requirements; (b) MCL 339.2412(1) does not, however, prevent an unlicensed builder from defending on the merits against an action brought by a homeowner seeking to recover sums already paid to the builder;[10] and (c) MCL 339.2412(1)

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[9] See *Claire-Ann Co v Christenson & Christenson, Inc*, 223 Mich App 25, 30-31; 566 NW2d 4 (1997):

> Michigan jurisprudence holds that where a statute creates a new right or imposes a new duty unknown to the common law and provides a comprehensive administrative or other enforcement mechanism or otherwise entrusts the responsibility for upholding the law to a public officer, a private right of action will not be inferred.

[10] We are not oblivious to the fact that this understanding of the statute creates a potential anomaly: an unlicensed builder may receive

does not create a private cause of action allowing a homeowner to bring claims against an unlicensed builder. The statute has but one purpose—to prevent an unlicensed builder from "bring[ing] or maintain-[ing] . . . action[s] . . . for the collection of compensation . . . ."

C. STATUS OF CONTRACT

We must next assess the legal character of the purported contract between plaintiffs and Willis.[11] Plaintiffs argue that the restoration contract was illegal and therefore void *ab initio* because it contemplated the performance of an illegal act—the provision of construction services by an unlicensed builder in violation of MCL 339.601.[12] Plaintiffs thereby argue that the contract, in effect, never came into existence and was a nullity from the outset and thus could not confer rights or obligations on either of the parties.[13]

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compensation for illegally provided services, be sued by the homeowner, and by an effective defense be able to retain some portion of that compensation, even though it would not have been able affirmatively to seek that compensation by filing a lawsuit if the homeowner had simply refused to pay. However, this is the result that the statute mandates.

[11] We note that there is no indication in the record that plaintiffs knew about defendants' unlicensed status. Accordingly, our analysis in this case is limited to determining the legal status of a contract between an "innocent" homeowner and an unlicensed builder. Cf. *Stokes v Millen Roofing Co*, 466 Mich 660; 649 NW2d 371 (2002); *Leland v Ford*, 245 Mich 599, 609-610; 223 NW 218 (1929).

[12] "A person shall not engage in or attempt to engage in the practice of an occupation regulated under this act [including residential building services] or use a title designated in this act unless the person possesses a license or registration issued by the department for the occupation." MCL 339.601(1).

[13] See *Alexander Bros v Weishuhn*, 166 Mich 532, 536; 131 NW 1107 (1911) (" 'If the contract is held to be void, title never passed. . . . [And] neither party could enforce their rights. Neither party would have rights under it.' "), quoting the trial court ruling; *Mich Mut Auto Ins Co v*

Defendants disagree and argue that the contract was merely voidable at the option of plaintiffs. If that were the case, the contract would be valid and enforceable unless and until plaintiffs themselves exercised their option to rescind it.[14]

The legal status of the instant contract—implicating the distinction between a "void" contract, a "voidable" contract, and a valid and enforceable contract—is crucial in resolving the underlying dispute because it determines whether the Court of Appeals correctly held that, as a matter of law, defendants here *converted* the insurance checks drawn by Auto-Owners. "Void" is defined as: "[n]ull; ineffectual; nugatory; having no legal force or binding effect . . . ." *Black's Law Dictionary* (6th ed). "Void contract" is similarly defined as: "[a] contract that does not exist at law; a contract having no legal force or binding effect. . . . [S]uch contract creates no legal rights and either party thereto may ignore it at his pleasure, insofar as it is executory." *Id*. In

Reddig, 129 Mich App 631, 635; 341 NW2d 847 (1983) ("Since the sale, unaccompanied by the delivery of the certificate of title, was in violation of the statute, . . . it was void and . . . the seller remained the owner of the vehicle.").

[14] See *Poli v Nat'l Bank of Detroit*, 355 Mich 17, 19-20; 93 NW2d 925 (1959) (stating that when a contract is voidable, it is valid until the party with the option to avoid the contract exercises that option). See also *Whitcraft v Wolfe*, 148 Mich App 40, 52-53; 384 NW2d 400 (1985) (stating that when a contract is induced by fraud, it is merely voidable, and the aggrieved party may choose to either rescind the contract and seek return of the property, or sue for damages caused by the fraud); *Semmens v Floyd Rice Ford*, 1 Mich App 395, 401; 136 NW2d 704 (1965) (concluding that a minor who had executed a voidable contract to purchase an automobile had legal responsibility for its use, and the seller did not regain responsibility for the vehicle until after the contract was voided); *Jack Mann Chevrolet Co v Assoc Inv Co*, 125 F2d 778, 784 (CA 6, 1942) ("When a party has entered into a voidable contract and wishes to be restored to the rights he possessed before the contract was executed, he must promptly disaffirm the contract . . . .").

contrast, "voidable" is defined as: "[t]hat which may be avoided, or declared void; not absolutely void, or void in itself[,]" while a "voidable contract" is defined as: "[a] contract that is valid, but which may be legally voided at the option of one of the parties. . . . One which can be avoided (cancelled) by one party because a right of rescission exists as a result of some defect or illegality (*e.g.*, fraud or incompetence)." *Id*. Finally, a valid and enforceable contract is, of course, simply a contract lacking any inherent flaws that would impair a party's ability to enforce it.

Plaintiffs argue, and the Court of Appeals held,[15] that the instant contract was void *ab initio*. Because

[15] The Court of Appeals' analysis conflated distinct contractual concepts: voidness for illegality and fraud in the inducement. Courts have long stated that illegal contracts are void. See, e.g., *McNamara v Gargett*, 68 Mich 454, 462; 36 NW 218 (1888) ("If any part of a consideration is illegal, the whole consideration is void, because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or promise . . . ."). The parties agree that a critical question before this Court is whether Willis's status as an unlicensed builder renders the restoration contract void. The Court of Appeals, however, suggests that the contract was void because it was induced by Willis's fraudulent assertion that he was a licensed residential builder when in fact he was not. "Willis's *fraud* rendered the power of attorney entered by the Epps[es] void *ab initio*." *Epps*, unpub op at 6 (emphasis added). When a party fraudulently induces another to enter into a contract, that contract is voidable at the option of the defrauded party and is not void. *Dunn v Goebel Brewing Co*, 357 Mich 693, 697; 99 NW2d 380 (1959). Insofar as the Court of Appeals suggested that Willis's fraud rendered the contract void, it was mistaken. However, the Court of Appeals also cited for support *Wedgewood v Jorgens*, 190 Mich 620, 622; 157 NW 360 (1916), which held that contracts made in violation of licensing statutes are illegal and "void." In so doing, it appears the Court failed to distinguish between contracts rendered voidable by fraud in the inducement, and contracts that contemplate services in violation of a licensing statute. The latter flaw in the contractual relationship—the violation of the licensing statute—is dispositive in this case. If Willis had, in fact, been licensed, but had otherwise fraudulently induced plaintiffs into entering the contract, it is clear that under the rule in *Dunn* the contract would have been voidable at plaintiffs' option.

the contract was a nullity from the outset, it could not as a matter of law grant any authority to Willis. Consequently, the Court of Appeals held that summary disposition in favor of plaintiffs on their conversion claim was appropriate. Because of this, it was unnecessary for the Court of Appeals to assess plaintiffs' fraud and breach of contract claims against Willis.

If plaintiffs and the Court of Appeals are correct that the instant contract is void *ab initio*, then it could not as a matter of law have given Willis the right to receive, indorse, and cash the insurance checks because defendants contend that Willis possessed that authority pursuant to the contract's assignment and "power of attorney" addendums. According to defendants, because Willis's alleged fraud rendered the contract at most voidable, and because it is undisputed that plaintiffs never sought to rescind the contract before Willis performed his services, *at the time* he indorsed and cashed the checks, he possessed the authority to do so. If the contract is not *void ab initio*, then at least some question is raised as to whether the actual terms of the contract conferred on Willis the authority to receive, indorse, and cash the insurance checks on his own and without plaintiffs' knowledge.

In determining that the instant contract was void *ab initio*, the Court of Appeals not unreasonably cited past decisions of this Court stating as much. Unfortunately, the proper disposition of this issue—whether a restoration contract such as in this case was void, voidable, or lawful and valid under Michigan law—remains unclear. Courts in Michigan, as well as throughout the country, have treated contracts involving an unlicensed builder in a disparate and inconsistent fash-

ion.[16] Furthermore, although the courts of this state have often pronounced contracts involving an unlicensed builder to be "void," it appears that in many instances, courts have stated that particular types of contracts are "void" without employing that term in its actual sense.[17] So while a court may pronounce a contract "void," it may nonetheless have treated the contract as possessing some form of legal existence and import.

It is not altogether surprising that a lack of clarity has arisen surrounding the legal status of these particular kinds of contracts. In a typical dispute involving an unlicensed builder, the builder is attempting to enforce the contract against the homeowner and to recover compensation.[18] However, because the unli-

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[16] See 5 Bruner & O'Connor, Construction Law, §§ 16:19 to 16:22 and cases cited therein.

[17] See, e.g., *Way v Root*, 174 Mich 418; 140 NW 577 (1913). In that case, the defendant husband executed a contract for the sale of real property without the consent of his wife, which was required by law. The purchaser sued for breach of contract, and the husband defended by arguing that the contract was void, citing *Naylor v Minock*, 96 Mich 182; 55 NW 664 (1893). The Court in *Way* conceded that the defendant correctly cited *Naylor* for the proposition that such contracts are void, but explained that " '[the] term "void" is perhaps seldom, unless in a very clear case, to be regarded as implying a complete nullity; it is, in a legal sense, subject to large qualifications, in view of all the circumstances calling for its application and the rights and interests to be affected in a given case.' " *Way*, 174 Mich at 425, quoting *Brown v Brown*, 50 NH 538 (1871). The Court then proceeded to hold that, although the contract was invalid as to its ability to convey title to real property, it remained valid as to its ability to support a claim for damages arising from its breach. *Way*, 174 Mich at 426.

[18] See, e.g., *Charles Featherly Constr Co v Prop Dev Group, Inc*, 400 Mich 198; 253 NW2d 643 (1977); *Bilt-More Homes, Inc v French*, 373 Mich 693; 130 NW2d 907 (1964); *Annex Constr, Inc v Fenech*, 191 Mich App 219; 477 NW2d 103 (1991); *Bernard F Hoste, Inc v Kortz*, 117 Mich App 448; 324 NW2d 46 (1982); *Chilson v Clevenger*, 12 Mich App 56; 162 NW2d 303 (1968).

censed builder is forbidden by MCL 339.2412(1) from asserting such an action, the court will determine that such a builder cannot enforce the contract. *Alexander v Neal*, 364 Mich 485, 489-490; 110 NW2d 797 (1961). In so ruling, the court will sometimes refer to the contract as "void." See, e.g., *Bilt-More Homes, Inc v French*, 373 Mich 693, 699; 130 NW2d 907 (1964). But in those cases, it is far from clear that the court actually intended to " 'imply [that the contract is] a complete nullity,' " devoid of any legal existence at any point in time. *Way v Root*, 174 Mich 418, 425; 140 NW 577 (1913) (citation omitted). Rather, the court merely might have determined that the contract could not be *enforced* by the unlicensed builder; it did not matter whether the contract was unenforceable because it was void *ab initio* or because some other legal impediment precluded enforcement. In cases proclaiming contracts with an unlicensed builder to be "void," the distinction between a genuinely void contract and a contract that is unenforceable but not altogether void did not often make a difference in the outcome. In the present case, however, that distinction matters.

An analysis of the law regarding the present contract must recognize and closely examine the lengthy line of precedent stating that contracts for the provision of construction services by an unlicensed builder are illegal and therefore void. As recently as 2002, this Court offered the following in *Stokes v Millen Roofing Co*, 466 Mich 660, 672; 649 NW2d 371 (2002): " 'Contracts by a residential builder not duly licensed are not only voidable but void—and it is not for a trial court to begin the process of attrition whereby, in appealing cases, the statutory bite is made more gentle . . . .' " That assertion was drawn from a quotation in *Bilt-More Homes, Inc v French*, 373 Mich 693, 699; 130 NW2d 907 (1964), which in turn cited *Alex-*

ander, 364 Mich at 487, for the proposition. *Alexander* was apparently the first case in which this Court interpreted a predecessor statute of MCL 339.2412(1); that statute forbade an unlicensed builder from "bring-[ing] or maintain[ing] an action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required . . . ." 1956 CL 338.986.[19] In *Alexander*, we held that a residential builder was barred from bringing an action to collect compensation for a roof he had installed absent the requisite license. We further opined that the licensing statute was enacted "to protect the public from incompetent, inexperienced, and fly-by-night contractors," and that "contract[s] made in violation of a police statute enacted for public protection [are] void and there can be no recovery thereon." *Id*. at 487 (citation omitted).

In holding the contract void, *Alexander* cited *Turner v Schmidt Brewing Co*, 278 Mich 464; 270 NW 750 (1936), which held that a builder could not recover for services provided in building a beer garden for an unlicensed alcohol vendor. *Turner* refused to enforce the contract, stating that " 'where statutes enacted to protect the public against fraud or imposition, or to safeguard the public health or morals, contain a prohibition and impose a penalty, all contracts in violation thereof are void.' " *Id*. at 469, quoting *Cashin v Pliter*, 168 Mich 386; 134 NW 482 (1912). " 'It is also well settled that, if a contract be void as against public policy, the court will neither enforce it while executory,

[19] However, the Michigan Legislature enacted laws requiring a residential builder to obtain a license before this statute was passed. See, e.g., *Sullivan v Graham*, 336 Mich 65, 66; 57 NW2d 447 (1953) (analyzing 1939 PA 311, as amended by 1945 PA 315, prohibiting a residential builder from providing services in counties with populations of more than 250,000 without having a license to do so).

nor relieve a party from loss by having performed it in part.' " *Turner*, 278 Mich at 470, quoting *Richardson v Buhl*, 77 Mich 632, 661; 43 NW 1102 (1889). On the basis of this Court's decision in *Turner*, a contract for the provision of services by an unlicensed builder has generally been characterized in our courts as a contract that is "illegal" or "against public policy." It is also clear that our cases have sometimes characterized such contracts as "void."[20] And Michigan is not alone in this regard; the courts of many states have similarly described contracts made in contravention of licensing statutes.[21]

The difficulty as pointed out by the Restatement of Restitution and Unjust Enrichment, is that courts

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[20] See, e.g., *Krause v Boraks*, 341 Mich 149, 155; 67 NW2d 202 (1954), quoting *Jaenicke v Davidson*, 290 Mich 298, 298; 287 NW 472 (1939) (syllabus) (" 'All contracts which are founded on an act prohibited by a statute under a penalty are void although not expressly declared to be so and neither law nor equity will enforce a contract made in violation of such a statute or one that is in violation of public policy.' "); *McNamara v Gargett*, 68 Mich 454, 460; 36 NW 218 (1888) (" 'This rule, however, may be safely laid down, that wherever any contract conflicts with the morals of the time, and contravenes an established interest of society, it is void, as being against public policy.' "), quoting 1 Story, Contracts, § 675.

[21] See, e.g., *Dabbs v Four Tees, Inc*, 36 So 3d 542, 551 (Ala, 2008) (" 'If any person performs work within [the statutory definition of 'general contractor'] and fails to obtain a general contractor's license, the contract must be declared null, void, and unenforceable.' "), quoting *Herbert v Birmingham-Jefferson Civic Ctr Auth*, 694 F2d 240, 241 (CA 11, 1982); *Rasmus Constr Corp v Nagel*, 168 Misc 2d 520, 522; 646 NYS2d 926 (1996) ("Based upon the 'public safety' concerns underlying the Code licensing requirements, home improvement contracts entered into by such unlicensed entities are considered 'void.' "); *Elephant Lumber Co v Johnson*, 120 Ohio App 266, 268; 202 NE2d 189 (1964) ("The general rule is that a contract entered into by a person engaged in a business without taking out a license as required by law is void and unenforceable . . . ."); *Seaview Hosp, Inc v Medicenters of America, Inc*, 570 SW2d 35, 39 (Tex App, 1978) ("A contract for engineering services to be performed by a person who is prohibited from practicing engineering in Texas . . . is void, and being void, is unenforceable.").

have been known to be imprecise with their use of the term "void," and have on occasion mistakenly employed that term to describe a contract when what is actually meant is that a contract is voidable or otherwise unenforceable, and not that it is void *ab initio*. Thus, "the fact that a particular contract is described by statute or regulation as 'illegal,' 'unenforceable,' or 'void' is not necessarily the end of the inquiry . . . ." 1 Restatement Restitution & Unjust Enrichment, 3d, Illegality, § 32, comment *a*, p 507. As one commentator has observed of the law in this realm, "The law is littered with confusion when it comes to the concept of voidness." Schaefer, *Beyond a Definition: Understanding the Nature of Void and Voidable Contracts*, 33 Campbell L Rev 193, 194 (2010).

That confusion has permeated judicial opinions regarding contracts with an unlicensed residential builder. While courts often proclaim these contracts to be "void," see *Stokes*, 466 Mich at 672, they have also shown a willingness to allow a homeowner to enforce the contracts against an unlicensed builder. See, e.g., *H A Smith Lumber & Hardware Co v Decina*, 258 Mich App 419, 437; 670 NW2d 729 (2003), rev'd on other grounds, 471 Mich 925 (2004). Essentially, the courts of this state have on distinct occasions viewed such contracts both as a complete nullity and as enforceable against an unlicensed builder. Those propositions cannot both be true.

So it would seem that at the present a significant amount of uncertainty and inconsistency exists in our state's law regarding the legal status of contracts between a homeowner and an unlicensed residential builder. However, when faced with a legal question, our analysis must begin with any relevant statutes. *Detroit Auto Inter-Ins Exch v Gavin*, 416 Mich 407, 425; 331

NW2d 418 (1982). In this case, a statute is in place that governs the relationship between a homeowner and an unlicensed builder: MCL 339.2412(1). That statute, once again, provides that an unlicensed residential builder "shall not bring or maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required . . . ." It furthermore imposes a limitation on the unlicensed builder, preventing him from bringing any kind of lawsuit in order to receive compensation for work performed without a license. The statute does not place similar limitations on the actions that may be taken by the homeowner.

However, the statute does not directly address the question at hand—whether the contract between the unlicensed builder and the homeowner is void *ab initio* or voidable. Therefore, because the statute, on its face, cannot supply a complete answer, we must "determine and effectuate the intent of the Legislature through reasonable construction in consideration of the purpose of the statute and the object sought to be accomplished." *Gross v Gen Motors Corp*, 448 Mich 147, 158-159; 528 NW2d 707 (1995). Despite its lack of clarity on the instant matter, MCL 339.2412(1) allows us nonetheless to deduce several relevant inferences in our effort to discern the Legislature's intent.

First, it is relevant to look at the overall effect of MCL 339.2412(1). As explained, the statute imposes a limitation on an unlicensed residential builder. This Court has previously opined that the evident purpose of this limitation is to "protect the public from incompetent, inexperienced, and fly-by-night contractors." *Alexander*, 364 Mich at 487. It thus seems clear that the Legislature, in drafting MCL 339.2412(1), intended the statute to be protective of the homeowner's inter-

ests. So with that overarching purpose in mind, we inquire whether this purpose would be better served by treating contracts between an innocent homeowner and an unlicensed builder as void or voidable. We believe that this inquiry militates in favor of treating such contracts as voidable.

If the contract is void, a homeowner defrauded by an unlicensed builder has but a single remedial option: he or she can seek to undo the transaction and restore the *status quo ante*.[22] However, rescission might not be an entirely satisfactory remedy because it might well preclude the homeowner from receiving the full benefit of his or her bargain. That is, instead of undoing the transaction, the homeowner may find it more beneficial to seek damages for a builder's breach of contract. That remedy is only available, however, if the homeowner is entitled to enforce the *actual contract* against the builder. If the contract were to be treated as void, it would be a complete nullity and there would be nothing for the homeowner to enforce. Therefore, the statute's purpose in protecting the homeowner would seem to be significantly advanced by treating contracts between an innocent homeowner and an unlicensed builder as voidable rather than void.

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[22] See *Groves v Jones*, 252 Mich 446, 450-451; 233 NW 375 (1930) ("Having determined that the parties are not *in pari delicto* [the parties are not equally culpable] in making a contract prohibited by the statute, it follows that the plaintiff is entitled to recover . . . the money he paid . . . ."); *Kuchenmeister v Dusza*, 218 Mich 497, 498; 188 NW 337 (1922) ("Where a void contract still remains executory, money paid under it may be recovered under the count for money had and received."), citing *De Croupet v Frank*, 212 Mich 465, 467; 180 NW 363 (1920); *Edward v Ioor*, 205 Mich 617, 625; 172 NW 620 (1919) ("When plaintiff's stock in the Arizona Piano Company, received on this void contract, was tendered back he was entitled to the stocks he had assigned in payment therefor. The transaction had been rescinded . . . .").

Second, it is relevant to look at the manner in which MCL 339.2412(1) refers to the business relationship between the homeowner and the unlicensed builder. The statute precludes an unlicensed contractor from bringing an action "for the collection of compensation for the performance of an act or *contract* for which a license is required . . . without alleging and proving that the person was licensed under this article during the performance of the act or *contract*." (Emphasis added.) The statute's very use of the term "contract" strongly implies that the Legislature did not intend for all contracts between a homeowner and an unlicensed builder to be rendered altogether void. Void contracts do not in effect exist; indeed, the very term "void contract" is an oxymoron because a contract that is void is not a contract at all. See *Black's Law Dictionary* (6th ed) (defining "void contract" as: "[a] contract that *does not exist* at law") (emphasis added). If the Legislature viewed all contracts between a homeowner and an unlicensed builder as void, it would have no reason to craft a statute preventing an unlicensed builder from enforcing "contracts;" there would be no contracts at all to enforce. We believe that the Legislature's use of the term "contract" further suggests that the contract at issue is voidable and not void.

Third, it is relevant to examine the manner by which MCL 339.2412(1) seeks to achieve its intended purpose. Which parties are affected by operation of the statute, and in what manner? As observed, MCL 339.2412(1) imposes a limitation on the unlicensed builder—he *alone* is denied the ability to bring lawsuits seeking compensation for unlicensed work. The statute therefore establishes that contracts between a homeowner and an unlicensed builder are characterized by an asymmetrical enforceability. The unlicensed builder is without authority to enforce the contract

against the homeowner, but the homeowner suffers no similar statutory disability. Thus, the statute leaves any power of enforceability there may be over the contract exclusively within the hands of the homeowner. This framework is largely in accordance with the nature of a voidable contract. As to such a contract, the party with the power of avoidance has the unilateral option to either rescind the contract and avoid the obligation of performance, or to ratify the contract and render it enforceable. *Whitcraft v Wolfe*, 148 Mich App 40, 52-53; 384 NW2d 400 (1986). A voidable contract, therefore, exhibits a distinctive one-sided enforceability. By contrast, a void contract exhibits a symmetrical unenforceability; both parties are equally denied the authority to enforce. We conclude that the asymmetrical effect of MCL 339.2412(1) further suggests that the contract at issue is voidable and not void.

Fourth, it is relevant to examine not only the words and phrases *present* in MCL 339.2412(1), but also the words and phrases that are conspicuously *absent*. It is clear that the statute was designed to limit the enforceability of contracts between the homeowner and the unlicensed builder. However, there is no indication that the Legislature intended to go so far as to mandate that all contracts with an unlicensed residential builder be deemed void *ab initio*. If the Legislature had intended that result, it could, without much difficulty, have said as much, as it has done in related contexts.[23]

Fifth, it is relevant that MCL 339.2412(1) says nothing regarding the rights or obligations of third parties. In many situations that can be contemplated, particularly with regard to agreements to build, a contract may

[23] See, for example, MCL 451.414(1). There, the Legislature specifically provided that a contract to provide debt management services "made by a person without a license is *null and void*." (Emphasis added.)

serve to transfer rights to one of the parties upon which a third party might reasonably rely. In this case, for example, the contract purportedly gave Willis the right to receive, indorse, and cash insurance checks made out to plaintiffs. Denaglen argues that it relied on the contract's transfer of indorsement rights when it allowed Willis to cash the checks at its place of business. A contract may also directly give rights to third parties as intended beneficiaries. MCL 600.1405; *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 427-428; 670 NW2d 651 (2003). These and other third parties could potentially be harmed if contracts with an unlicensed builder were treated as void; they would be unable to rely on or enforce any transfers of rights or obligations under a void contract. It is therefore clear that by affecting the status of contracts between the homeowner and the unlicensed builder, MCL 339.2412(1) has the potential to inflict a considerable hardship on third parties. However, the statute is again conspicuously silent in this regard; if the Legislature had intended to impose such a hardship or risk on third parties to all contracts involving an unlicensed builder, it is reasonable to think that the Legislature would have offered some express indication to that effect. We believe the statute's silence in this respect further suggests that the contract at issue is voidable and not void.

In summary, we conclude that MCL 339.2412(1) more strongly supports the proposition that contracts between an innocent homeowner and an unlicensed builder are voidable, than that they are void *ab initio*. This conclusion receives further support from the caselaw of this state.[24] As previously explained, many Michigan cases have summarily and imprecisely re-

[24] When the proper application of a statute is less than clear, it is appropriate to supplement our understanding of the statute by referring

ferred to contracts with an unlicensed residential builder as "void."[25] However, those cases generally only prevented the builder from engaging the legal system to receive compensation for services performed without a license, while reinforcing the principle that an unlicensed builder may not enforce a building contract or recover the reasonable value of the builder's services through equity.[26] In those cases, it did not matter whether the contract was unenforceable because it was genuinely "void," or because it was unenforceable for some other reason but not a nullity from the outset. In addition, once the Legislature enacted the predecessor of MCL 339.2412(1), most cases ceased referring to contracts with an unlicensed builder as "void," and no longer analyzed their validity under the common law. Instead, courts simply interpreted and straightfor-

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to prior judicial decisions in Michigan. *Nummer v Treasury Dep't*, 448 Mich 534, 544; 533 NW2d 250 (1995); *Pierson v Manning*, 2 Mich 445, 454 (1852).

[25] See, e.g., *Stokes*, 466 Mich at 672 (extinguishing a construction lien placed on a home by an unlicensed residential builder); *Bilt-More Homes*, 373 Mich at 699 (barring an unlicensed residential builder from seeking compensation); *Alexander*, 364 Mich at 487 (same); *Barbour v Handlos Real Estate & Bldg Corp*, 152 Mich App 174, 181-182; 393 NW2d 581 (1986) (refusing to discharge a mortgage given to an unlicensed residential builder in exchange for his services in building a house); *Robert H Pastor Bldg & Real Estate Dev Co v Cole*, 127 Mich App 168, 175; 339 NW2d 11 (1983) (builder not required to be licensed, but joint venture in which it was to participate required license); *Brummel v Whelpley*, 46 Mich App 93, 96; 207 NW2d 399 (1973) (unlicensed residential builder's claim for compensation dismissed).

[26] See, e.g., *Stokes*, 466 Mich at 671-672 (unlicensed residential builder not entitled to quantum meruit relief because "[c]ourts must be careful not to usurp the Legislative role under the guise of equity"); *Grosslight v Butts*, 3 Mich App 51, 55; 141 NW2d 657 (1966), quoting *Turner v Schmidt Brewing Co*, 278 Mich 464, 469; 270 NW 750 (1936) (unlicensed residential builder "cannot maintain an action to recover for such services or materials").

wardly applied MCL 339.2412(1).[27] Given the lack of clarity in the common law, some courts apparently wanted to avoid the issue altogether. So despite numerous indications in dicta that courts believed these contracts to be void *ab initio*,[28] there appears to be no Michigan case that has actually held that a transfer of property or rights *did not occur at all* because the transfer was predicated on a void contract for the provision of construction services by an unlicensed residential builder.

However, there *are* cases that have allowed a party to enforce a contract that contemplated the provision of services by an unlicensed residential builder,[29] suggesting that such contracts are not genuinely void *ab initio* because, if they were, obviously no party could seek recovery for breach of contract. The contract would never have come into existence in the first place and there would have been no basis for a contractual remedy. *Raub v Smith*, 61 Mich 543, 547; 28 NW 676 (1886) ("[I]t has been held that a contract which is void under the statute of frauds cannot be used for any

[27] See, e.g., *Edgewood Dev, Inc v Landskroener*, 262 Mich App 162; 684 NW2d 387 (2004); *Annex Constr, Inc v Fenech*, 191 Mich App 219; 477 NW2d 103 (1991); *Parker v McQuade Plumbing & Heating, Inc*, 124 Mich App 469; 335 NW2d 7 (1983); *Bernard F Hoste, Inc v Kortz*, 117 Mich App 448; 324 NW2d 46 (1982).

[28] See, e.g., *Brummel*, 46 Mich App at 96 ("The contract in the present case is *void* and unenforceable. The parties are in their same respective positions as before they entered into the void contract.").

[29] See, e.g., *H A Smith*, 258 Mich App at 437; 670 NW2d 729 (2003) (unlicensed residential builder defendant could not use equity to defend against the homeowner's claim because the homeowner sought damages for breach of contract, and not equitable relief); *Parker*, 124 Mich App at 471 (unlicensed residential builder may defend a breach of contract lawsuit on its merits); *Lindhout v Ingersoll*, 58 Mich App 446, 450-451; 228 NW2d 415 (1975) (affirming award of damages for breach of contract to homeowner).

purpose. Such a contract is regarded as a nullity.") (citations omitted). It appears that when the *homeowner* has been the party seeking to enforce the contract, as opposed to the *unlicensed builder*, courts have been willing, at least to some extent, to recognize the validity of the contract.

Michigan's application of the "substantial compliance" doctrine in regard to contracts involving an unlicensed builder further suggests that these contracts are not altogether void. Under this doctrine, if an unlicensed builder enters into a contract to provide building services but *subsequently* obtains the requisite license before he provides services for which the license is required, the contract has been deemed valid and enforceable by the builder.[30] Courts applying the doctrine reason that because the builder has been licensed at the time that he begins performance, he has "substantially complied" with the licensing requirement, even though he improperly entered into a contract while unlicensed. Most pertinently, the doctrine could not be invoked if the contract at issue was genuinely void; if it was truly a nullity at the time it was signed, the builder's subsequent licensure could not logically revive or resuscitate a legal obligation that did not exist in the first place. Thus, courts

[30] See, e.g., *Mich Roofing & Sheet Metal v Dufty Rd Props*, 90 Mich App 732, 735-738; 282 NW2d 809 (1979), vacated on other grounds, 409 Mich 887; 295 NW2d 230 (1980); accord *Edgewood Dev*, 262 Mich App at 166-167 (unlicensed builder could recover under contract because the builder became licensed before construction began); *Bernard F Hoste, Inc*, 117 Mich App at 452-453 (unlicensed builder could not recover under contract because it performed services before it obtained license). We need not, and therefore will not, address the merits of applying the "substantial compliance" doctrine to contracts involving an unlicensed builder. Instead, we simply note that courts applying this doctrine to contracts involving an unlicensed builder have not treated these contracts as void.

applying this doctrine have not treated contracts with an unlicensed builder as truly void.

In conclusion, we hold that contracts involving an innocent homeowner and an unlicensed residential builder are voidable.[31] This conclusion is based on relevant inferences derived from MCL 339.2412(1), which suggest that such contracts are better characterized as voidable rather than void. The caselaw of this state further supports this conclusion. Our courts have for decades indicated that a homeowner may be able to enforce contracts with an unlicensed builder, and that such contracts are not necessarily a nullity from the outset. There has been no instance in which an innocent homeowner was denied the right to enforce a contract against an unlicensed builder because the court deemed the contract *void ab initio*. So although there has been considerable confusion regarding the proper legal status of these contracts, we believe that treating these contracts as voidable is the only outcome that faithfully applies MCL 339.2412(1) while giving due consideration to our judicial precedents.[32]

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[31] Our holding is limited to the type of contract at issue in this case: a contract with an unlicensed residential builder for home construction or repair. The extent to which this holding should be extended to "illegal contracts" of allegedly similar types must be decided in future cases. Compare, e.g., MCL 339.1019, which prohibits an unlicensed personnel agency from maintaining an action for the collection of compensation.

[32] We recognize that contracts between an innocent homeowner and an unlicensed residential builder are not "voidable" in the fullest and most traditional sense of that term. A voidable contract may typically be ratified by the party with the power of avoidance, rendering the contract fully enforceable by either party. *Harry & Max Dunitz, Inc v Meineke*, 260 Mich 586, 588-589; 245 NW 524 (1932); *Roszczewski v Jozwiak*, 225 Mich 670, 672-673; 196 NW 359 (1923). However, in the instant circumstance, an innocent homeowner exercising the power of ratification cannot give an unlicensed contractor the ability to do what the law expressly prohibits—"bring[ing] or maintain[ing] an action in a court of

D. DEFAULT

Finally, we must determine whether the trial court erred by refusing to set aside Denaglen's default. A default is a punitive measure used to encourage participation and cooperation in litigation. *Rogers v J B Hunt Transp, Inc*, 466 Mich 645, 653; 649 NW2d 23 (2002). Entry of a default judgment is equivalent to an admission of every well-pleaded matter in the complaint. *Lesisko v Stafford*, 293 Mich 479, 481; 292 NW 376 (1940). "Once the default of a party has been entered, that party may not proceed with the action until the default has been set aside by the court . . . ." MCR 2.603(A)(3). A default or a default judgment may be set aside pursuant to MCR 2.603(D), which states:

> A motion to set aside a default or a default judgment, except when grounded on a lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.

However, "the policy of this state is generally against setting aside defaults and default judgments that have been properly entered." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999). "The carelessness or neglect of either the litigant or his attorney is not normally grounds for granting a belated application to set aside a default regularly entered." *White v Sadler*, 350 Mich 511, 522; 87 NW2d 192 (1957). At the same time, a default is merely an admission of liability and not an admission regarding the proper amount of damages. *Haller v Walczak*, 347 Mich 292, 300; 79 NW2d 622 (1956) ("In ordinary actions founded on contract or tort the rule seems well

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this state for the collection of compensation" for the performance of residential building services. MCL 339.2412(1).

established that a default in appearing or pleading admits the right to recover, but not the amount of the damages."). If the amount of damages is in dispute, a defaulting defendant is nonetheless entitled to a hearing, at which it may challenge the plaintiff's alleged damages amount, if the trial court determines that a hearing is necessary. *Zaiter v Riverfront Complex, Ltd*, 463 Mich 544, 554; 620 NW2d 646 (2001); MCR 2.603(B)(3)(b).

We hold that the trial court did not abuse its discretion by refusing to set aside Denaglen's default. Even after receiving notice of its default, Denaglen inexplicably waited seven weeks before moving to have the default set aside. In arguing Denaglen's motion to set aside the default, and in their applications for leave to appeal, the parties presented irreconcilable accounts of the circumstances surrounding the default. It was for the trial court to evaluate the credibility and reasonableness of the parties' arguments, and it determined that Denaglen had not made the necessary showing to merit relief from the default. The Court of Appeals did not disturb that ruling by finding any abuse of discretion on the part of the trial court and neither do we. *Lawrence M Clarke*, 489 Mich at 272. However, because this opinion calls into question the legal justifications for the lower courts' decisions in favor of plaintiffs' conversion claims against defendants, the potential for an inconsistent or anomalous result exists. If Willis is not liable for converting the insurance checks, then logically Denaglen could not have converted the checks, either. In the face of such an outcome, Denaglen's default, as to the conversion claim only, would need to be set aside. See *Ackron Contracting Co v Oakland Co*, 108 Mich App 767, 774; 310 NW2d 874 (1981) (" '[W]here a bill makes a joint charge against several defendants, and one of

them makes default, . . . if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike—the defaulter as well as the others.' "), quoting *Frow v De La Vega*, 82 US (15 Wall) 552, 554; 21 L Ed 60 (1872).

IV. APPLICATION

The contract between Willis (the unlicensed builder) and plaintiff homeowners was voidable. Because the contract was not a nullity from the outset, it could in theory have conveyed to Willis the authority to receive, indorse, and cash the insurance checks. The trial court, however, granted plaintiffs summary disposition without deciding whether the contract, if valid, would have conferred that authority on Willis. We therefore remand to that court for a determination of whether the agreement granted Willis and his companies the specific authority to perform those actions on plaintiffs' behalf and whether they acted within the scope of that authority.[33]

If on remand the trial court determines that Willis and his companies might be liable for any of plaintiffs' claims arising under the contract, those defendants must be permitted to defend against those claims.

[33] We decline to address at this time the extent of damages to which plaintiffs may be entitled should they establish defendants' liability for conversion. We stress, however, that while "the measure of liability [for conversion of a negotiable instrument] is presumed to be the amount payable on the instrument, . . . recovery may not exceed the amount of the plaintiff's interest in the instrument." MCL 440.3420(2). Furthermore, under Michigan's general conversion statute, MCL 600.2919a, a person whose property has been converted "to the other person's own use" "may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees[.]" On remand, we leave it to the parties to assert, and the court to resolve as necessary, whether and to what extent plaintiffs' "interest" in those proceeds, and their "actual damages" for any conversion thereof, should be limited in some amount.

Neither Willis's breach of the contract nor MCL 339.2412(1) prevent Willis from demanding that plaintiffs prove their actual damages. If plaintiffs seek judicial redress, including damages, they are required to prove the extent to which they have been harmed by defendants and defendants are entitled to rebut those proofs.[34] Additionally with regard to any outstanding equitable claims, such as restitution, plaintiffs must also be prepared to establish that they have acted equitably. *Goodenow v Curtis*, 33 Mich 505, 509 (1876). Finally, as discussed earlier in this opinion, the trial court did not abuse its discretion by refusing to set aside Denaglen's default. However, if on remand the trial court determines that Willis and his companies are not liable for converting the insurance checks, that court must set aside Denaglen's default in regard to plaintiffs' conversion claim. This is because Denaglen logically may only be held liable for conversion if Willis actually converted the checks from plaintiffs. It is clear that Denaglen did not convert the checks directly from plaintiffs; therefore, any conversion for which Denaglen may be held liable would have been committed indirectly through Willis. Denaglen thus may not be held liable for conversion if Willis is not. Furthermore, the amount of plaintiffs' damages remains in dispute as already noted. Denaglen is therefore entitled to participate in any hearing that the trial court deems necessary to establish the amount of conversion damages owed to plaintiffs.

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[34] We note that the extent of the possible harm might include any harm that Auto-Owners suffered by paying any fraudulent or excessive claims. Because Auto-Owners assigned all of its claims to plaintiffs, plaintiffs are entitled to damages compensating any injury sustained by Auto-Owners, as well as any injuries that they might have personally sustained.

V. CONCLUSION

The trial court and Court of Appeals erred by granting summary disposition in favor of plaintiffs. The Court of Appeals correctly held that MCL 339.2412(1) does not prevent an unlicensed builder from defending against a lawsuit on its merits and does not afford a homeowner an independent cause of action to seek damages for its violation. However, contracts between an innocent homeowner and an unlicensed residential builder are voidable by the homeowner and thereby effective in conveying rights and authorities to both parties and third parties. The Court of Appeals therefore erred when it declared the contract at issue void *ab initio*, although that court's error was wholly understandable given the confusing state of applicable law. Finally, the trial court did not abuse its discretion by refusing to grant Denaglen relief from its default. However, because the proper amount of damages remains in dispute, Denaglen may attempt to challenge the extent of its liability. We therefore affirm in part and reverse in part the judgment of the Court of Appeals and remand to the trial court for further proceedings consistent with this opinion.

YOUNG, C.J., and KELLY, ZAHRA, MCCORMACK, VIVIANO, and BERNSTEIN, JJ., concurred with MARKMAN, J.

LEGO v LISS

Docket Nos. 149246 and 149247. Argued October 14, 2015 (Calendar No. 3). Decided January 4, 2016.

Michael Lego and his spouse, Pamela Lego, brought an action against Jake Liss in the Wayne Circuit Court, alleging that Liss, a police officer, acted with gross negligence when he shot Michael Lego, a fellow officer, while attempting to apprehend an armed-robbery suspect. Defendant moved for summary disposition, arguing that the suit was barred by MCL 600.2966, which provides immunity from tort liability for injuries arising from the normal, inherent, and foreseeable risks of the firefighter's or police officer's profession. The court, John H. Gillis, Jr., J., denied the motion, and defendant appealed. The Court of Appeals, OWENS and SHAPIRO, JJ., (JANSEN, P.J., concurring in part and dissenting in part), affirmed in an unpublished opinion per curiam, issued March 27, 2014 (Docket Nos. 312392 and 312406), holding in part that the applicability of MCL 600.2966 could not be decided as a matter of law because plaintiffs' allegations, if true, would demonstrate that defendant had acted in disregard of his police training and violated numerous safety procedures. The Supreme Court granted defendant's application for leave to appeal. 497 Mich 926 (2014).

In a unanimous opinion per curiam, the Supreme Court *held*:

The Court of Appeals erred by holding that defendant would not be entitled to immunity if he acted with gross negligence. MCL 600.2966 immunizes governmental entities and employees from all tort liability for an injury to a firefighter or police officer that arises from the normal, inherent, and foreseeable risks of the police officer's profession. These risks may include being shot by a fellow officer while engaging an active shooter, regardless of the degree of recklessness with which the injuring party acted. Accordingly, defendant was entitled to immunity as a matter of law.

Court of Appeals judgment reversed in part; case remanded to the Wayne Circuit Court for entry of an order granting summary disposition to defendant.

GOVERNMENTAL IMMUNITY — FIREFIGHTER'S RULE — GROSS NEGLIGENCE.

MCL 600.2966 immunizes governmental entities and employees from all tort liability for an injury to a firefighter or police officer that arises from the normal, inherent, and foreseeable risks of the police officer's profession; this immunity applies regardless of whether the injuring party acted with gross negligence.

Stefani & Stefani, Professional Corporation (by *Michael L. Stefani*, *Matthew S. Slazinski*, and *Frank J. Rivers*), for plaintiffs.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Joseph T. Froehlich*, Assistant Attorney General, for defendant.

PER CURIAM. We granted leave to appeal in this case to consider the scope of the immunity provision of the firefighter's rule for governmental entities and employees, MCL 600.2966. During an attempted apprehension of an armed-robbery suspect, the defendant, Jake Liss, a police officer, shot the plaintiff Michael Lego, also a police officer. Lego and his spouse, Pamela Lego, filed suit against the defendant, asserting gross negligence. The trial court denied the defendant's motion for summary disposition based on MCL 600.2966 and the Court of Appeals affirmed in a divided opinion.[1] We granted leave to appeal. 497 Mich 926 (2014). We reverse in part the judgment of the Court of Appeals and remand this case to the Wayne Circuit Court for entry of an order granting summary disposition to the defendant.

Specifically, we disagree with the Court of Appeals majority that the applicability of MCL 600.2966 could

[1] *Lego v Liss*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2014 (Docket Nos. 312392 and 312406). The Court of Appeals also affirmed the trial court's denial of summary disposition to defendant based on the worker's compensation exclusive remedy provision, MCL 418.131(1), and defendant has not appealed that ruling.

not be decided at this time as a matter of law under the facts presented in this case. MCL 600.2966 provides in part as follows:

> The state, a political subdivision of this state, or a governmental agency, governmental officer or employee, volunteer acting on behalf of a government, and member of a governmentally created board, council, commission, or task force are *immune from tort liability* for an injury to a firefighter or police officer that arises from the *normal, inherent, and foreseeable* risks of the firefighter's or police officer's profession. [Emphasis added.]

The majority erred by affirming the denial of summary disposition to the defendant on the basis that the plaintiffs' allegations, if true, would demonstrate that the defendant acted in disregard of his police training and violated numerous safety procedures. The majority essentially determined that the defendant might not be entitled to immunity if his actions were especially egregious; in other words, if the defendant were grossly negligent, he would not be entitled to immunity because the injury resulting from his actions would not "arise[] from the normal, inherent, and foreseeable risks of [Michael Lego's] profession" as required under MCL 600.2966. This interpretation of the language "normal, inherent, and foreseeable risks," however, contravenes MCL 600.2966, especially when it is read in conjunction with the general firefighter's rule, MCL 600.2967.[2] That rule provides that a firefighter or police officer may sue for damages for injuries arising

[2] MCL 600.2967(1) provides in pertinent part:

> Except as provided in [MCL 600.2966], a firefighter or police officer who seeks to recover damages for injury or death arising from the normal, inherent, and foreseeable risks of his or her profession while acting in his or her official capacity must prove that 1 or more of the following circumstances are present:

out of a normal, inherent, and foreseeable risk of his or her profession if the injuring party acted with (among other mental states) gross negligence. MCL 600.2967(1)(a)(*i*). But MCL 600.2966 exempts governmental entities and employees from that general rule by immunizing them from *all* tort liability "for an injury to a firefighter or police officer that arises from the normal, inherent, and foreseeable risks of the firefighter's or police officer's profession." To hinge the applicability of this immunity provision on the degree of recklessness with which the defendant acted would undermine the statutory language by potentially denying immunity to a governmental defendant on the very basis for which the statute is intended to provide such immunity. Rather, when determining the applicability of the immunity provision of MCL 600.2966, the inquiry must be whether the injury arose from the normal, inherent, and foreseeable risks of the police officer's or firefighter's profession.

The undisputed facts here are that Michael Lego was shot by the defendant as both were attempting to apprehend an armed robbery suspect. As the Court of Appeals partial dissent correctly concluded, "being shot

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(a) An injury or resulting death that is a basis for the cause of action was caused by a person's conduct and that conduct is 1 or more of the following:

(*i*) Grossly negligent.

(*ii*) Wanton.

(*iii*) Willful.

(*iv*) Intentional.

(*v*) Conduct that results in a conviction, guilty plea, or plea of no contest to a crime under state or federal law, or a local criminal ordinance that substantially corresponds to a crime under state law.

by a fellow police officer while engaging an active shooter is one of 'the normal, inherent, and foreseeable risks of . . . [a] police officer's profession' within the meaning of MCL 600.2966." This is true irrespective of whether the defendant was acting consistently with his training and departmental safety procedures or whether the defendant was grossly negligent while attempting to apprehend the suspect in this case.[3] Thus, no question of material fact remains unresolved.[4]

Accordingly, the defendant is entitled to immunity as a matter of law. We reverse in part the judgment of the Court of Appeals and remand this case to the Wayne Circuit Court for entry of an order granting summary disposition to the defendant.

YOUNG, C.J., and MARKMAN, ZAHRA, MCCORMACK, VIVIANO, BERNSTEIN, and LARSEN, JJ., concurred.

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[3] This conclusion does not mean, as the Court of Appeals majority suggested, that being shot by another officer is "always, as a matter of law, a normal, inherent, and foreseeable risk of being a police officer." *Lego*, unpub op at 2. It simply means that the fact that there is a question whether the defendant acted with gross negligence cannot alone transform a normal, inherent, and foreseeable risk of a police officer's profession into one that is not normal, inherent, and foreseeable.

[4] To the extent that the Court of Appeals majority opinion relied on the federal district court decision in *Rought v Porter*, 965 F Supp 989, 994 (WD Mich, 1996), we agree with Court of Appeals Judge JANSEN in her partial dissent that it is not binding. *Lego*, unpub op at 2 (JANSEN, P.J., concurring in part and dissenting in part). See also *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004) (stating that lower federal court decisions are not binding on state courts). Further, while the phrase "normal, inherent, and foreseeable risks" can be traced to our interpretations of the common-law firefighter's rule, see e.g., *Kreski v Modern Wholesale Electric Supply Co*, 429 Mich 347, 351, 372; 415 NW2d 178 (1987), we are not bound by those interpretations because the common-law rule has been abolished, MCL 600.2965, and the phrase has not clearly acquired a "peculiar and appropriate meaning in the law," MCL 8.3a.

ORDERS IN CASES

ORDERS ENTERED IN CASES BEFORE THE SUPREME COURT

Summary Disposition June 30, 2015:

AFT MICHIGAN v STATE OF MICHIGAN, Nos. 145924, 145925, and 145926; reported below: 297 Mich App 597.

By order of May 21, 2014, the application for leave to appeal the August 16, 2012 judgment of the Court of Appeals and the application for leave to appeal as cross-appellants were held in abeyance pending the decision in *AFT Michigan, et al v State of Michigan* (Docket No. 148748). On order of the Court, the case having been decided on April 8, 2015, 497 Mich 197 (2015), the applications are again considered. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand these cases to the Court of Appeals for reconsideration in light of the enactment of 2012 PA 300 and this Court's decision in *AFT Michigan, et al v State of Michigan*. On remand, the Court of Appeals shall consider what issues presented in these cases have been superseded by the enactment of 2012 PA 300 and this Court's decision upholding that Act, and it shall only address any outstanding issues the parties may raise regarding 2010 PA 75 that were not superseded or otherwise rendered moot by that enactment and decision. We do not retain jurisdiction.

Leave to Appeal Denied June 30, 2015:

WEINBERG v KERWIN, No. 149553; Court of Appeals No. 319045.

PEOPLE v BERRY ROBINSON, No. 150032; Court of Appeals No. 322104.

PEOPLE v GREENE, No. 150171; Court of Appeals No. 322381.

MODZELEWSKI-SHEKOSKI v BINDIG, No. 150215; Court of Appeals No. 314830.

PEOPLE v BROCKMAN, No. 150243; Court of Appeals No. 322657.

PEOPLE v CALVIN WARE, No. 150281; Court of Appeals No. 315863.

PEOPLE v MOBLEY, No. 150301; Court of Appeals No. 322260.

PEOPLE v PRIKOPA, No. 150317; Court of Appeals No. 313539.

PEOPLE v ANDREW CLARK, No. 150338; Court of Appeals No. 322762.

PEOPLE v COCHRAN, No. 150344; Court of Appeals No. 322277.

PEOPLE v PERRY, No. 150352; Court of Appeals No. 322838.

PEOPLE v RIOS, No. 150353; Court of Appeals No. 321670.

BEAUCHAMP v SCHRAMM, No. 150359; Court of Appeals No. 313377.

PEOPLE v CALLOWAY, No. 150381; Court of Appeals No. 321182.

PEOPLE v HOUSTON, No. 150403; Court of Appeals No. 322264.

PEOPLE v DANFORTH, No. 150413; Court of Appeals No. 322477.

PEOPLE v BARTELL, No. 150418; Court of Appeals No. 323338.

PEOPLE v PAUL SIMMONS, No. 150419; Court of Appeals No. 322804.

PEOPLE v STEVEN WILLIAMS, No. 150423; Court of Appeals No. 322404.

PEOPLE v MOSLEY, No. 150425; Court of Appeals No. 321537.

PEOPLE v KINARD, No. 150430; Court of Appeals No. 323214.

PEOPLE v HARRIGER, No. 150435; Court of Appeals No. 323444.

PEOPLE v BYRD, No. 150439; Court of Appeals No. 321821.

PEOPLE v STEVENSON, No. 150441; Court of Appeals No. 323286.

PEOPLE v DRAKE, No. 150442; Court of Appeals No. 323067.

PEOPLE v FRITZ, No. 150445; Court of Appeals No. 321391.

PEOPLE v VALIANT WHITE, No. 150449; Court of Appeals No. 323520.

PEOPLE v GRANT, No. 150461; Court of Appeals No. 316487.

PEOPLE v NICHOLS, No. 150467; Court of Appeals No. 316432.

PEOPLE v OSBORN, No. 150472; Court of Appeals No. 316228.

BORMUTH v WEST BAY EXPLORATION COMPANY, No. 150512; Court of Appeals No. 316298.

PEOPLE v LABADIE, No. 150561; Court of Appeals No. 318024.

DEPARTMENT OF TRANSPORTATION v DETROIT INTERNATIONAL BRIDGE COMPANY, No. 150571; Court of Appeals No. 315453.

GRIEVANCE ADMINISTRATOR v TINDALL, No. 150572.

DEPARTMENT OF TRANSPORTATION v DETROIT INTERNATIONAL BRIDGE COMPANY, No. 150592; Court of Appeals No. 315912.

PEOPLE v DEONTE HOWARD, No. 150604; Court of Appeals No. 311169.

PEOPLE v MATLOCK, No. 150611; Court of Appeals No. 317248.

PEOPLE v EDDIE DEJUAN-TOLBERT SMITH, No. 150622; Court of Appeals No. 315842.

PEOPLE v BIFFLE, No. 150640; Court of Appeals No. 316789.

PEOPLE v MOOD, No. 150649; Court of Appeals No. 316278.

ZUMBACH v DETROIT EDISON COMPANY, Nos. 150697 and 150698; Court of Appeals Nos. 316863 and 317928.

GOWDY v CITY OF FLINT, No. 150727; Court of Appeals No. 318165.

PEOPLE v JAQAVIOUS WILLIAMS, No. 150736; Court of Appeals No. 324309.

PEOPLE v WAYNE SEALS, No. 150765; Court of Appeals No. 316474.

PEOPLE v WEBSTER, No. 150766; Court of Appeals No. 319731.

PEOPLE v POWE, No. 150785; Court of Appeals No. 322741.

RODRIGUEZ-ARANGO v SAGINAW CORRECTIONAL FACILITY WARDEN, No. 150786; Court of Appeals No. 322899.

PEOPLE v GARDIN, No. 150800; Court of Appeals No. 323475.

PEOPLE v HOBBS, No. 150801; Court of Appeals No. 318014.

PEOPLE v TIMOTHY WILLIAMS, No. 150805; Court of Appeals No. 317458.

PEOPLE v ANDREW WRIGHT, No. 150807; Court of Appeals No. 317086.

BEAR v PRATHER, No. 150836; Court of Appeals No. 313378.

BROCK v BROCK, No. 150842; Court of Appeals No. 314628.

BEGININ v THOMAS HOSPITALITY GROUP, INC, No. 150845; Court of Appeals No. 317515.

PEOPLE v PARRISH, No. 150847; Court of Appeals No. 316903.

PEOPLE v WILLIAM EVANS, No. 150849; Court of Appeals No. 317353.

PEOPLE v HILL, No. 150851; Court of Appeals No. 317294.

WOOD v WILLIAMS & WILLIAMS II, LLC, No. 150871; Court of Appeals No. 317716.

SANTO v ADULT WELL BEING SERVICES, No. 150877; Court of Appeals No. 322624.

GELDYS v CITY OF DEARBORN HEIGHTS, No. 150890; Court of Appeals No. 322271.

AARON v CBS OUTDOORS, INC, No. 150900; Court of Appeals No. 317552.

PEOPLE v KOWALSKI, No. 150918; Court of Appeals No. 315495.

PEOPLE v YEARBY, No. 150927; Court of Appeals No. 324070.

RENTAL PROPERTIES OWNERS ASSOCIATION OF KENT COUNTY v KENT COUNTY TREASURER, Nos. 150942 and 150943; reported below: 308 Mich App 498.

FRANZEL v NATIONSTAR MORTGAGE, LLC, No. 150955; Court of Appeals No. 315600.

PEOPLE v ARNOLD HOWARD, No. 150965; Court of Appeals No. 317627.

MORGAN v THUMB CORRECTIONAL FACILITY WARDEN, No. 150977; Court of Appeals No. 319221.

PEOPLE v ANSCHUTZ, No. 150986; Court of Appeals No. 317905.

PEOPLE v RODNEY JOHNSON, No. 150988; Court of Appeals No. 321903.

PEOPLE v NICHOLSON, No. 150991; Court of Appeals No. 317213.

PEOPLE v WESSON, No. 150992; Court of Appeals No. 318746.

PEOPLE v LOPEZ-BRIONES, No. 150995; Court of Appeals No. 318522.

PEOPLE v VOELKNER, No. 151007; Court of Appeals No. 317827.

PEOPLE v MORAN, No. 151008; Court of Appeals No. 318102.

PEOPLE v ANDRE PARKER, No. 151009; Court of Appeals No. 316981.

PEOPLE v CURTIS BRAGG, No. 151012; Court of Appeals No. 318368.

PEOPLE v VIDANA, No. 151013; Court of Appeals No. 317387.

MILOSTAN v TROY INTERNAL MEDICINE, No. 151023; Court of Appeals No. 317704.

PEOPLE v JERNAGIN, No. 151025; Court of Appeals No. 316615.

PEOPLE v DOBREFF, No. 151030; Court of Appeals No. 317846.

PEOPLE v JASON O'NEIL JOHNSON, No. 151031; Court of Appeals No. 324771.

PEOPLE v BOSTICK, No. 151046; Court of Appeals No. 316375.

PEOPLE v HUMPHREY, No. 151047; Court of Appeals No. 324645.

PEOPLE v BRINDISI, No. 151049; Court of Appeals No. 324586.

PEOPLE v HUBBARD, No. 151050; Court of Appeals No. 324475.

PEOPLE v WARSAW, No. 151056; Court of Appeals No. 324599.

PEOPLE v KAMINSKI, No. 151077; Court of Appeals No. 324605.

PEOPLE v WINCE, No. 151079; Court of Appeals No. 317079.

PEOPLE v GEORGE CLARK, No. 151080; Court of Appeals No. 325584.

PEOPLE v WOODLAND, No. 151086; Court of Appeals No. 317384.

PEOPLE v XAVIER WHITE, No. 151087; Court of Appeals No. 318590.

PEOPLE v SOMMER, No. 151090; Court of Appeals No. 324473.

PEOPLE v RENEE BULLOCK, No. 151095; Court of Appeals No. 317855.

SMITH v IONIA CIRCUIT COURT JUDGE, No. 151102; Court of Appeals No. 325021.

PEOPLE v GREER, No. 151110; Court of Appeals No. 318286.

PEOPLE v LIVINGSTON, No. 151111; Court of Appeals No. 324743.

PEOPLE v TOWNS, No. 151128; Court of Appeals No. 325081.

PEOPLE v REILLY, No. 151129; Court of Appeals No. 324974.

PEOPLE v MARSHALL, No. 151131; Court of Appeals No. 324770.

PEOPLE v MERCHANT, No. 151133; Court of Appeals No. 318873.

PEOPLE v JIMMY WALKER, No. 151135; Court of Appeals No. 318192.

PEOPLE v APRIL FOSTER, No. 151155; Court of Appeals No. 317444.

In re STOKES, No. 151156; Court of Appeals No. 322479.

PEOPLE v ALVIN FRAZIER, No. 151161; Court of Appeals No. 325286.

PEOPLE v KENNETH BULLOCK, No. 151162; Court of Appeals No. 317639.

PEOPLE v LEACHMAN, No. 151171; Court of Appeals No. 317508.

PEOPLE v ANTOINE WILSON, No. 151172; Court of Appeals No. 318508.

PEOPLE v WARD, No. 151175; Court of Appeals No. 323857.

PEOPLE v RAND, No. 151193; Court of Appeals No. 318082.

PEOPLE v HAIRSTON, No. 151237; Court of Appeals No. 317218.

PEOPLE v TYRONZA BUSH, No. 151253; Court of Appeals No. 324278.

DURBIN v MONDAY, No. 151462; Court of Appeals No. 322027.

PEOPLE v RISCA, No. 151505; Court of Appeals No. 324753.

PEOPLE v BUSH, No. 151625; Court of Appeals No. 311543.

PEOPLE v WIREMAN, No. 151640; Court of Appeals No. 325264.

Reconsideration Denied June 30, 2015:

WHITE v DETROIT EAST COMMUNITY MENTAL HEALTH, No. 150309; Court of Appeals No. 314990. Leave to appeal denied at 497 Mich 983.

PEOPLE v EDDIE LEE SMITH, No. 150322; Court of Appeals No. 323098. Leave to appeal denied at 497 Mich 1012.

HOWARD v CHIPPEWA CORRECTIONAL FACILITY WARDEN, No. 150340; Court of Appeals No. 322288. Leave to appeal denied at 497 Mich 973.

In re SULLIVAN, No. 150347; Court of Appeals No. 321808. Leave to appeal denied at 497 Mich 1012.

PEOPLE v VANHORN, No. 150456; Court of Appeals No. 322470. Leave to appeal denied at 497 Mich 984.

Superintending Control Denied June 30, 2015:

ANDERSON v ATTORNEY GRIEVANCE COMMISSION, No. 150872.

Order of Removal From Office Entered July 1, 2015:

In re SANDERS, No. 150039.

On order of the Court, the Judicial Tenure Commission having issued a Decision and Recommendation, and the Respondent 36th District Court Judge Brenda K. Sanders having withdrawn her petition to reject or modify the Commission's Decision and Recommendation, we accept in part the recommendation of the Judicial Tenure Commission. With respect to Count I of the Formal Complaint, we accept the determination that the Respondent suffers from a mental disability that prevents the performance of her judicial duties. As a result, we order that the Respondent be removed from office.

In December 2013, Respondent sent a letter to U.S. Attorney Barbara McQuade, requesting an investigation into certain events that occurred at the 36th District Court. She alleged that two judges had died under mysterious circumstances and that a newspaper tried to name her as a suspect in the deaths, that the Republican Party and this Court were involved in having her evicted from her residence, that this Court and the Judicial Tenure Commission had been engaged in a constant attempt to slander and defame her name, that she had been "medically harmed" because her doctors had been influenced by her employer, and that her "e-mail accounts, bank accounts, cell phones, etc. have been hacked and are currently being tracked." Respondent also noted that she feared for her safety, that she possessed a concealed weapon permit, and that she legally carried a weapon. Additionally, Respondent failed to cooperate in the scheduling of an independent psychiatric examination, including disobeying an order of this Court that she undergo such an examination. A board certified psychiatrist concluded that, due to her delusions, Respondent could not interpret reality correctly and could not make rational decisions. The psychiatrist opined that Respondent's "insight and judgment are too impaired because of her delusions, to render opinions not only in court but elsewhere, but particularly in court as a judge."

On that count, we adopt the conclusions of the Judicial Tenure Commission:

> The Commission concludes that the Examiner has established by a preponderance of the evidence that Respondent suffers from a mental disability that prevents the performance of her judicial duties, as set forth in Count I of the Amended Formal Complaint. Mich Const 1963, art VI, § 30; MCR 9.205(B). This conclusion is supported by Dr. Norman Miller's opinion that Respondent suf-

fers from a psychotic disorder that affects her ability to interpret reality and make rational judgments.

* * *

Respondent's conduct breached the standards of judicial conduct, and she is responsible for the following:

> a. Mental disability that prevents the performance of judicial duties, Michigan Constitution of 1963, as amended, Article 6, Section 30 and MCR 9.205(B).

We also accept the determination that the Respondent committed misconduct as described in Counts III and IV of the Formal Complaint. As we conduct our de novo review of this matter, in particular the recommended sanction pertaining to the findings of misconduct, we are mindful of the standards set forth in *In re Brown*, 461 Mich 1291, 1292-1293 (2000). We adopt the findings and conclusions of the Judicial Tenure Commission. Respondent at all relevant times was a judge of the 36th District Court. In September 2013 Respondent falsely told her employer that she required a long-term medical leave of absence due to imminent knee surgeries. Although the medical leave was granted, the surgeries were never performed. Respondent made numerous intentional misrepresentations to the Judicial Tenure Commission regarding her medical condition and efforts to treat it, including efforts to schedule an independent medical examination. She also made false statements to the Commission regarding the scheduling of an independent psychiatric examination. Respondent also made false statements in pleadings filed in federal court and in the 36th District Court.

The standards set forth in *Brown* are also being applied to the following conclusions of the Judicial Tenure Commission, which we adopt as our own:

> [T]he Commission concludes that the Examiner has established by a preponderance of the evidence a factual basis for the allegations set forth in Counts III and IV of the Amended Formal Complaint. A preponderance of the evidence at the formal hearing showed that Respondent failed to cooperate with the Commission in its investigation, and that Respondent made intentional misrepresentations to the Commission, to her employer, and to courts in which she was involved in litigation.
>
> Respondent's conduct breached the standards of judicial conduct, and she is responsible for the following:
>
> * * *
>
> b. Misconduct in office, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30 and MCR 9.205;

c. Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30 and MCR 9.205;

d. Failure to establish, maintain, enforce, and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to MCJC, Canon 1;

e. Irresponsible or improper conduct that erodes public confidence in the judiciary, in violation of MCJC, Canon 2A;

f. Conduct involving impropriety and appearance of impropriety, contrary to MCJC, Canon 2A;

g. Failure to respect and observe the law and to conduct oneself at all times in a manner which would enhance the public's confidence in the integrity and impartiality of the judiciary contrary to the Code of Judicial Conduct, Canon 2B;

h. Conduct that is contrary to justice, ethics, honesty or good morals, contrary to MCR 9.104(3);

i. Conduct that violates the standards or rules of professional conduct adopted by the Supreme Court, contrary to MCR 9.104(4);

j. Conduct that is prejudicial to the proper administration of justice, in violation of MCR 9.104(1);

k. Conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, contrary to MCR 9.104(2);

l. Failure to submit to a mental examination requested by the Commission and ordered by the Michigan Supreme Court, in violation of MCR 9.207(E).

After reviewing the recommendation of the Judicial Tenure Commission, the standards set forth in *Brown*, and the above findings and conclusions, we order that for the misconduct described in Counts III and IV of the Formal Complaint, the Honorable Brenda K. Sanders be removed from office.

We also find that under the unique circumstances of this case an award of costs under MCR 9.205(B) would not be appropriate.

Summary Disposition July 1, 2015:

PEOPLE v KYLE CLARK, No. 150202; Court of Appeals No. 313121. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, we vacate the sentence of the Washtenaw Circuit Court, and we remand this case to the trial court for resentencing. Had Offense Variable (OV) 3, MCL 777.33, not been

scored, the correct guidelines range was 84 to 140 months, rather than the range of 87 to 145 months on which the defendant's sentence was based. Therefore, the defendant is entitled to relief under the rationale of *People v Francisco*, 474 Mich 82 (2006). 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.

PEOPLE v MICHAEL BUTLER, No. 151499; Court of Appeals No. 325650. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Berrien Circuit Court and we remand this case to the trial court for resentencing. According to the Presentence Investigation Report and the sentencing transcript, the defendant was assessed 25 points on Offense Variable (OV) 13, MCL 777.43, based on out-of-state charges or accusations, but the record provides no facts in support of the score. Before any such alleged crimes may be used to score OV 13, the prosecution must prove by a preponderance of the evidence that the crimes actually took place, that the defendant committed them, that they are properly classified as felony "crimes against a person," MCL 777.43(1)(c), and that they occurred "within a 5-year period" of the sentencing offense, MCL 777.43(2)(a). See *People v Hardy*, 494 Mich 430 (2013).

Leave to Appeal Granted July 1, 2015:

INNOVATION VENTURES, LLC v LIQUID MANUFACTURING, LLC, No. 150591; Court of Appeals No. 315519. The parties shall include among the issues to be briefed whether the Nondisclosure Agreement and Equipment Manufacturing Agreement are void due to failure of consideration, and whether the non-compete provisions in the Termination Agreement and the Nondisclosure Agreement are enforceable.

PEOPLE v RADANDT, No. 150906; Court of Appeals No. 314337. The parties shall include among the issues to be briefed: (1) whether the police officers unlawfully expanded a "knock and talk" procedure by entering the defendant's back yard and walking onto a wooden deck, which was attached to the home, see *Florida v Jardines*, 569 US 1; 133 S Ct 1409; 185 L Ed 2d 495 (2013); and (2) if a constitutional violation occurred, whether the good-faith exception to the exclusionary rule applies under the facts of this case. See *United States v Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984).

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 July 1, 2015:

NOWACKI v DEPARTMENT OF CORRECTIONS, No. 150167; Court of Appeals No. 315969.

RUSHA v DEPARTMENT OF CORRECTIONS, No. 150522; reported below: 307 Mich App 300.

HAYNES v VILLAGE OF BEULAH, No. 150547; reported below: 308 Mich App 465.

BUTTON v PROGRESSIVE MICHIGAN INSURANCE COMPANY, Nos. 150625 and 150626; Court of Appeals Nos. 314836 and 319312.

HOPE NETWORK—REHABILITATION SERVICES v CITY OF KENTWOOD, No. 150810; Court of Appeals No. 317367.

In re COH, No. 151199; Court of Appeals No. 312691.

Summary Disposition July 2, 2015:

WINDRUSH, INC v VANPOPERING, No. 150118; Court of Appeals No. 315958. Pursuant to MCR 7.302(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 *BC Tile & Marble Co, Inc v Multi Building Co, Inc*, 288 Mich App 576 (2010). We do not retain jurisdiction.

BANK OF NEW YORK MELLON v JAAFAR, No. 150957; Court of Appeals No. 316521. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals.

An offer "is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." See *Eerdmans v Maki*, 226 Mich App 360, 364 (1997). Here, and contrary to the judgment of the Court of Appeals, the January 20, 2012 e-mail from plaintiff's counsel to defendants' counsel did not constitute an offer to settle this case. Instead, this e-mail inquired whether defendants would present an offer at some point in the future, which they did, through a subsequent e-mail by their counsel. Defendants' counsel confirmed that this subsequent e-mail was an offer by later inquiring whether plaintiff had accepted *their* offer. For these reasons, and for the reasons stated by the Court of Appeals' dissenting opinion, no enforceable settlement agreement existed to bind the parties in this case. We remand this case to the Wayne Circuit Court for further proceedings not inconsistent with this order. We do not retain jurisdiction.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered July 2, 2015:

PIRGU v UNITED SERVICES AUTOMOBILE ASSOCIATION, No. 150834; Court of Appeals No. 314523. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether: (1) the determination of reasonable attorney fees under MCL 500.3148(1) is governed by *Smith v Khouri*, 481 Mich 519 (2008), and/or *Wood v DAIIE*, 413 Mich 573 (1982), and (2) the Oakland Circuit Court abused its discretion in

calculating the attorney fees due the plaintiff. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied July 2, 2015:

DOTSON v GARFIELD COURT ASSOCIATES, LLC, No. 150446; Court of Appeals No. 315411.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal and would instead grant leave to address a growing lack of consistency in our law concerning the application of the "open and obvious" doctrine to winter snow and ice accumulations, as well as the applicability of *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 429 (2008) (stating that the lessor has a duty to the lessee under MCL 554.139(1)(a) to keep a parking lot "fit for the use intended by the parties"), as it pertains to winter snow and ice accumulations.

On an early January morning, plaintiff was injured when she stepped in a snow-covered pothole in her apartment's parking lot while walking to a trash dumpster to deposit a bag of trash. Because it had snowed that night, defendants had plowed and salted the parking lot several hours earlier. Plaintiff, who for several months had lived in the apartment and regularly used the lot to park her vehicle and access the dumpster, was aware that the parking lot contained several potholes and had been newly covered by snow. The trial court granted summary disposition in favor of defendants because the danger presented by the pothole was "open and obvious." The Court of Appeals, however, reversed, holding that there were questions of fact concerning whether the danger was not "open and obvious" and whether the parking lot—a common area—was "fit for the use intended by the parties." *Dotson v Garfield Court Assoc, LLC*, unpublished opinion per curiam of the Court of Appeals, issued August 7, 2014 (Docket No. 315411), pp 3-5.

In Michigan, we are familiar with the accumulation of snow and ice during winter months, as well as the constant efforts to minimize the disruption to our daily lives caused by these accumulations. We are also familiar with the reality that these accumulations sometimes cause injuries, in particular of a "slip and fall" character. The instant case presents one typical injury of that nature. In my judgment, this case affords this Court the opportunity to provide clearer guidance to the bench and bar, and the people of this state, concerning winter accumulations and a lessor's related duties under MCL 554.139(1)(a). As the following sampling of cases suggest, further guidance from this Court would seemingly be helpful.

In *Patterson v Knollwood Village Assoc Ltd Partnership*, unpublished opinion per curiam of the Court of Appeals, issued July 1, 2014 (Docket No. 314806), p 3, the Court of Appeals affirmed the trial court's grant of summary disposition in favor of the defendant apartment lessor in a case in which the plaintiff " 'stepped on the slant of the [snow-covered] curb' " and suffered injury. The Court of Appeals held that the danger was "open and obvious" because the "plaintiff knew of the existence of the curb and, more importantly, testified that she believed there was ice

on it also[.]" *Id*. On the other hand, in *Robbins v Village Crest Condo Ass'n* (*On Remand*), unpublished opinion per curiam of the Court of Appeals, issued July 30, 2013 (Docket No. 300842), p 1, the Court of Appeals reversed the trial court's grant of summary disposition in favor of the defendant condominium association in a case in which the plaintiff "slipped and fell on black ice" on the parking lot. The Court of Appeals held that although "the temperature was below freezing" and "it had snowed two days before," there nevertheless existed a "question of fact regarding whether there were indicia of a potentially hazardous condition . . . ." *Id*. at pp 3-5. That is, the Court of Appeals held that the black ice was not "open and obvious" despite winter conditions suggesting otherwise. How can these two decisions be reconciled? In *Patterson*, the plaintiff was *not* able to recover for injuries suffered as a result of a snow-covered obstacle because she was on notice of its presence, yet in *Robbins*, the plaintiff *was* able to recover for injuries suffered as a result of black ice notwithstanding that she should have had at least constructive notice of its presence.

Such inconsistencies are not limited to premises liability decisions; the Court of Appeals has inconsistently applied the lessor's duty under MCL 554.139(1)(a) as well. In *Young v Michigan Tree Apartments LLC*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2015 (Docket No. 320439), the Court of Appeals affirmed the trial court's grant of summary disposition in favor of the defendant apartment in a case in which the plaintiff slipped and fell on ice on an unlit parking lot. The Court of Appeals held that the "plaintiff could not show that apartment tenants were unable to 'enter and exit the parking lot, to park their vehicles therein, and to access those vehicles.' " *Id*. at 5, quoting *Allison*, 481 Mich at 430. But in *Dougherty v Nykel-Somerset Mgt, LLC*, unpublished opinion of the Court of Appeals, issued September 4, 2012 (Docket No. 303910), the Court of Appeals reversed the trial court's grant of summary disposition in favor of the defendant apartment complex and the defendant management company in a case in which the plaintiff slipped and fell on black ice on the sidewalk. The Court of Appeals held that the plaintiff had established a genuine issue of material fact concerning his MCL 554.139(1)(a) claim because "the lighting was so inadequate that it made it difficult for an ordinary user to discover dangerous conditions on the sidewalk when it is dark." *Id*. at 7 (opinion by M. J. KELLY, J.). The Court of Appeals did not explain how the presence of better lighting might have facilitated the plaintiff's identification of the black ice, which by its very nature is transparent. Nor did it explain how ice obscured by inadequate lighting is different from ice obscured by snow or how the presence of ice somehow made the sidewalk here "unfit for use." Again, how can these decisions be reconciled? In both decisions, the respective plaintiffs were unable to visually identify the ice, yet only one plaintiff was able to recover for an alleged breach of the lessor's duty under MCL 554.139(1)(a).

Turning to the instant case, I discern little difference between the snow-covered pothole and the snow-covered curb in *Patterson*, and it is incongruous that only the defendants here may be subject to liability notwithstanding the 'open and obvious' doctrine. Furthermore, as

defendants had plowed and salted the parking lot the very night before, as well as the morning of the accident, to allow tenants to traverse the lot, I fail to understand why defendants here may have breached their MCL 554.139(1)(a) duty to keep the parking lot "fit for the use intended by the parties," while the *Young* defendant did not breach its MCL 554.139(1)(a) duty notwithstanding that it could have provided better lighting. In the absence of additional guidance from this Court concerning winter snow and ice accumulations, I can only expect further such inconsistent results, of which the cases mentioned herein constitute only the tip of the iceberg (and snowberg).

It is essential that landowners in a cold-weather state such as Michigan—one in which snow and ice tend to appear on a predictable basis during certain times of the year—be clearly apprised of their legal obligations in responding to the obstacles, risks, and inconveniences posed by winter's conditions. What are the landowner's obligations to facilitate safe passage, and what are the non-landowner's obligations to facilitate safe passage by the exercise of personal responsibility? What are the realistic legal expectations of the landowner, and what are the realistic legal expectations of non-landowners? While there are decisions of this Court that have set forth rules of law for understanding the legal obligations of winter, see, e.g., *Hoffner v Lanctoe*, 492 Mich 450, 481 (2012) ("[T]he law compels individuals to accept personal responsibility for their well-being by avoiding apparent hazards, including those precipitated by Michigan winters."); *Allison*, 481 Mich at 430 ("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 purpose."), continued and close attention must be given to this widely litigated area of the law. Already, I believe, we are seeing the reappearance of a legal environment in this state in which, as a function of the lesser review given by this Court to unpublished Court of Appeals decisions, there are a growing number of contradictory cases from which lawyers for injured persons can focus on decisions from Column A and lawyers for landowners can focus on decisions from Column B. Such an environment is incompatible with the rule of law, and this Court should respond by the creation of clear governing rules. The Court of Appeals' decision in this case now becomes just one more of a mounting number of incompatible decisions by our state courts concerning winter accumulations.

In re BALIS, No. 151667; Court of Appeals No. 323472.

In re NORFLEET, Nos. 151732 and 151734; Court of Appeals Nos. 323110 and 323116.

In re VANGORDER, No. 151741; Court of Appeals No. 324716.

Leave to Appeal Denied July 10, 2015:

JOHNSON v PONTIAC SCHOOL DISTRICT, No. 150181; Court of Appeals No. 320708.

BERNSTEIN, J., would grant leave to appeal.

BAUMGARTNER v PERRY PUBLIC SCHOOLS and AUBERT v REED CITY AREA SCHOOLS and WRIGHT v FLINT COMMUNITY SCHOOLS, Nos. 151479, 151480, and 151481; Court of Appeals Nos. 313945, 314158, and 314696.

BERNSTEIN, J., would grant leave to appeal.

In re JOHNSON, Nos. 151775 and 151776; Court of Appeals Nos. 324032 and 324033.

Rehearing Denied July 21, 2015:

STONE v MICHIGAN STATE POLICE, No. 149940; opinion at 497 Mich 290.

Summary Disposition July 28, 2015:

LORILLARD TOBACCO COMPANY v DEPARTMENT OF TREASURY, No. 150664; Court of Appeals No. 313256. Pursuant to MCR 7.302(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 2014 PA 282.

PEOPLE v EUGENE BROWN, No. 151036; Court of Appeals No. 324575. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

HOME-OWNERS INSURANCE COMPANY v SMITH, No. 151058; Court of Appeals No. 322694. Pursuant to MCR 7.302(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 July 28, 2015:

PEOPLE v DAVIS, No. 149708; Court of Appeals No. 308922.

KEYWORTH v STATE OF MICHIGAN, No. 150214; Court of Appeals No. 314861.

PEOPLE v LEWIS HARBIN, No. 150253; Court of Appeals No. 321596.

PEOPLE v REGGIE BURKS, No. 150363; Court of Appeals No. 322023.

PEOPLE v JAMAR PINKNEY, No. 150366; Court of Appeals No. 323932.

PEOPLE v HARRIS, No. 150380; Court of Appeals No. 322825.

PEOPLE v HOLCOMB, No. 150402; Court of Appeals No. 322907.

PEOPLE v GARDNER, No. 150464; Court of Appeals No. 322848.

PEOPLE v VEGA, No. 150480; Court of Appeals No. 323619.

PEOPLE v HUTTER, No. 150487; Court of Appeals No. 322528.

PEOPLE v NASOULUCK, No. 150495; Court of Appeals No. 323114.

PEOPLE v BELL, No. 150496; Court of Appeals No. 323381.

PEOPLE v HAROLD JOHNSON, No. 150509; Court of Appeals No. 323479.

FORD v WOODWARD TAP, INC, Nos. 150556 and 150557; Court of Appeals Nos. 316694 and 318008.

PEOPLE v MEANS, No. 150560; Court of Appeals No. 322213.

MICHIGAN INSURANCE COMPANY v CHANNEL ROAD CONSTRUCTION, INC, Nos. 150565 and 150566; Court of Appeals Nos. 315837 and 315859.

PEOPLE v MICHAEL BASSETT, No. 150580; Court of Appeals No. 323437.

PEOPLE v CURTIS BAILEY, No. 150600; Court of Appeals No. 315992.

PEOPLE v HARTFIELD, No. 150601; Court of Appeals No. 316828.

PEOPLE v TINSLEY, No. 150606; Court of Appeals No. 323659.

PEOPLE v RAMSEY, No. 150608; Court of Appeals No. 323301.

CITY OF BRIGHTON v BONNER and BONNER v CITY OF BRIGHTON, Nos. 150617 and 150618; Court of Appeals Nos. 314597 and 314854.

PEOPLE v MAURICE LEWIS, No. 150621; Court of Appeals No. 323536.

PEOPLE v FLAGEL, No. 150638; Court of Appeals No. 323870.

PEOPLE v SIMS, No. 150644; Court of Appeals No. 323984.

PEOPLE v ANTHONY SPRINGER, No. 150645; Court of Appeals No. 323616.

PEOPLE v SHANNON, No. 150651; Court of Appeals No. 323351.

PEOPLE v PAULA BENNETT, No. 150659; Court of Appeals No. 321999.

VERMILYA v DELTA COLLEGE BOARD OF TRUSTEES, No. 150666; Court of Appeals No. 315403.

PEOPLE v SHANTEE BROWN, No. 150693; Court of Appeals No. 317066.

PEOPLE v LOON, No. 150704; Court of Appeals No. 317578.

BARCLAY v GENERAL MOTORS, LLC, No. 150724; Court of Appeals No. 322722.

DUNCAN v DEPARTMENT OF CORRECTIONS, No. 150726; Court of Appeals No. 322435.

PEOPLE v MOORE, No. 150734; Court of Appeals No. 314311.

PEOPLE v CONERLY, No. 150816; Court of Appeals No. 318164.

In re ESTATE OF BLOHM, Nos. 150821 and 150823; Court of Appeals No. 315400.

HEFFELFINGER V BAD AXE PUBLIC SCHOOLS, No. 150825; Court of Appeals No. 318347.

PEOPLE V BROADNAX, No. 150837; Court of Appeals No. 317572.

PEOPLE V DAVID BASSETT, No. 150840; Court of Appeals No. 316664.

In re PATULSKI ESTATE, Nos. 150885 and 150886; Court of Appeals Nos. 317275 and 317449.

In re APPLICATION OF MICHIGAN CONSOLIDATED GAS COMPANY TO INCREASE RATES, No. 150889; Court of Appeals No. 316141.

PEOPLE V RISELAY, No. 150907; Court of Appeals No. 317352.

JAHNKE V ALLEN, No. 150920; reported below: 308 Mich App 472. BERNSTEIN, J., did not participate.

PACKAGING CORPORATION OF AMERICA V DEPARTMENT OF TREASURY, No. 150925; Court of Appeals No. 317708.

SILVERMAN V SPITZER, No. 150928; Court of Appeals No. 317682.

PEOPLE V NANCY JOHNSON, No. 150933; Court of Appeals No. 319816.

PEOPLE V BATES, No. 150953; Court of Appeals No. 323262.

PEOPLE V MALESH, No. 150954; Court of Appeals No. 322994.

PEOPLE V TARNEZ JOHNSON, No. 150962; Court of Appeals No. 324279.

PEOPLE V BONNER, No. 151014; Court of Appeals No. 324078.

REESE PUBLIC SCHOOL DISTRICT V REESE PROFESSIONAL SUPPORT PERSONNEL ASSOCIATION MEA/NEA, NO. 151017; Court of Appeals No. 316528.

VAN ELSLANDER V SEBOLD & ASSOCIATES, INC, No. 151021; Court of Appeals No. 318500.

PEOPLE V FAULKNER, No. 151022; Court of Appeals No. 316064.

HOFFENBLUM V HOFFENBLUM, No. 151024; reported below: 308 Mich App 102.

OLIVARES V PERFORMANCE CONTRACTING GROUP, No. 151042; Court of Appeals No. 323823.

PEOPLE V BORNS, No. 151055; Court of Appeals No. 318376.

PEOPLE V BINGHAM, No. 151060; Court of Appeals No. 318370.

PEOPLE V GUFFEY, No. 151061; Court of Appeals No. 317902.

PEOPLE V MCLILLY, No. 151073; Court of Appeals No. 318627.

In re OLIVARES, No. 151084; Court of Appeals No. 325406.

PEOPLE v CHARLES FRAZIER, No. 151100; Court of Appeals No. 317087.

WARE v BRONSON METHODIST HOSPITAL, No. 151103; Court of Appeals No. 307886.

FRITZ v SANDY PINES WILDERNESS TRAILS, No. 151105; Court of Appeals No. 317144.

PEOPLE v BRILL, No. 151127; Court of Appeals No. 325111.

PEOPLE v CONRAD, No. 151137; Court of Appeals No. 324858.

PEOPLE v PYNE, No. 151138; Court of Appeals No. 314684.

BROWN v FERROUS PROCESSING AND TRADING COMPANY, No. 151153; Court of Appeals No. 316666.

PEOPLE v FINN, No. 151174; Court of Appeals No. 324021.

PEOPLE v HAMILTON, No. 151176; Court of Appeals No. 317645.

PEOPLE v GIBBS, No. 151181; Court of Appeals No. 318529.

PEOPLE v ANTHONY KELLY, No. 151182; Court of Appeals No. 325143.

PEOPLE v STONE, No. 151191; Court of Appeals No. 318261.

PEOPLE v GILDE, No. 151201; Court of Appeals No. 324807.

PEOPLE v SWEET, No. 151204; Court of Appeals No. 317362.

PEOPLE v CALDWELL, No. 151216; Court of Appeals No. 325009.

PEOPLE v DEPAUL BROWN, No. 151223; Court of Appeals No. 325160.

PEOPLE v DWAYNE CLARK, Nos. 151226 and 151228; Court of Appeals Nos. 316546 and 316547.

PEOPLE v MELLINGER, No. 151230; Court of Appeals No. 324666.

PEOPLE v COBREA, No. 151234; Court of Appeals No. 317646.

PEOPLE v JUSTIN SMITH, No. 151235; Court of Appeals No. 318311.

PEOPLE v TIMOTHY MILLER, No. 151236; Court of Appeals No. 317187.

PEOPLE v TRAVIS, No. 151239; Court of Appeals No. 324946.

PEOPLE v DAVIS, No. 151243; Court of Appeals No. 325436.

PEOPLE v TODD KELLY, No. 151263; Court of Appeals No. 323595.

PEOPLE v DALE, No. 151267; Court of Appeals No. 324390.

PEOPLE v RENDER, No. 151270; Court of Appeals No. 324656.

OEGEMA v BELL, No. 151272; Court of Appeals No. 316499.

THE BANK OF NEW YORK MELLON v DICKINSON, No. 151278; Court of Appeals No. 323377.

SUSKI v USEWICK, No. 151285; Court of Appeals No. 322895.

KANG v REGENTS OF THE UNIVERSITY OF MICHIGAN, No. 151287; Court of Appeals No. 318221.

BERNSTEIN, J., did not participate due to a familial relationship.

PEOPLE v BAKER, No. 151289; Court of Appeals No. 319304.

PEOPLE v BEAMON, No. 151291; Court of Appeals No. 324682.

PEOPLE v HATTON, No. 151301; Court of Appeals No. 325329.

PEOPLE v BREWINGTON, No. 151307; Court of Appeals No. 325474.

PEOPLE v MCGAUGHY, No. 151321; Court of Appeals No. 325274.

PEOPLE v GRABON, No. 151326; Court of Appeals No. 324845.

TKMS LTD v MICHIGAN COMPENSATION APPELLATE COMMISSION, No. 151333; Court of Appeals No. 324003.

PEOPLE v CARGLE, No. 151345; Court of Appeals No. 320389.

PEOPLE v BLACKMER, No. 151370; Court of Appeals No. 318858.

PEOPLE v JONES, No. 151380; Court of Appeals No. 325497.

GRIEVANCE ADMINISTRATOR v DUNCHOCK, No. 151395.

OLIVARES v PERFORMANCE ABATEMENT SERVICES, No. 151396; Court of Appeals No. 325738.

TCF NATIONAL BANK v SHEENA, No. 151488; Court of Appeals No. 324780.

PEOPLE v ORLEWICZ, No. 151576; Court of Appeals No. 324161.

PEOPLE v YEITER, No. 151666; Court of Appeals No. 325990.

PEOPLE v BERRIMAN, No. 151703; Court of Appeals No. 324797.

In re JMD, No. 151718; Court of Appeals No. 324899.

In re JSF, No. 151733; Court of Appeals No. 322859.

ADKINS v ADKINS, No. 151804; Court of Appeals No. 326742.

Reconsideration denied July 28, 2015:

INTERNATIONAL OUTDOOR, INC v CITY OF ROSEVILLE, No. 149462; Court of Appeals No. 313153. Leave to appeal denied at 497 Mich 952.

KELLY v STREETER, No. 149531; Court of Appeals No. 318629. Leave to appeal denied at 497 Mich 952.

BIUNDO v MAHAL, No. 149597; Court of Appeals No. 313569. Leave to appeal denied at 497 Mich 952.

PEOPLE v KIM MOSS, No. 149728; Court of Appeals No. 320350. Leave to appeal denied at 497 Mich 987.

In re REINSTATEMENT OF MURASKI, No. 149896. Leave to appeal denied at 497 Mich 1010.

MUELLER v BOUIS, No. 149990; Court of Appeals No. 321758. Leave to appeal denied at 497 Mich 997.

BOUIS v MUELLER, No. 150014; Court of Appeals No. 321157. Leave to appeal denied at 497 Mich 997.

PEOPLE v TAYLOR, No. 150491; Court of Appeals No. 318633. Leave to appeal denied at 497 Mich 1003.

MORRIS v ESTATE OF RUBY MORRIS, No. 150525; Court of Appeals No. 315892. Leave to appeal denied at 497 Mich 1013.

PEOPLE v KEITH WATKINS, No. 150731; Court of Appeals No. 318060. Leave to appeal denied at 497 Mich 973.

PEOPLE v TURNPAUGH, No. 150848; Court of Appeals No. 324529. Leave to appeal denied at 497 Mich 1015.

DUBUC v COPELAND PAVING, INC, No. 151041; Court of Appeals No. 325228. Leave to appeal denied at 497 Mich 984.

Superintending Control Denied July 28, 2015:

BURKE v ATTORNEY GRIEVANCE COMMISSION, No. 151157.

BURKE v ATTORNEY GRIEVANCE COMMISSION, No. 151180.

Leave to Appeal Denied July 31, 2015:

In re PAYNE/PUMPHREY/FORTSON, No. 151900; reported below: 311 Mich App 49.

FEDERAL HOME LOAN MORTGAGE CORPORATION v ESTATE OF SEDLAK, No. 151913; Court of Appeals No. 325620.

Summary Disposition August 19, 2015:

REIS v KOSS, No. 152113; Court of Appeals No. 326850. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the stay of proceedings entered by the Court of Appeals.

Leave to Appeal Denied August 21, 2015:

PEOPLE v KAVANAUGH, No. 151875; Court of Appeals No. 326378.

In re BARTLETT, No. 152098; Court of Appeals No. 323962.

Leave to Appeal Denied September 1, 2015:

PEOPLE v JANISH, No. 151834; Court of Appeals No. 325858.

Reconsideration Denied September 4, 2015:

In re BEELER/HALL, No. 151062; Court of Appeals No. 321648. Leave to appeal denied at 497 Mich 976.

In re NORFLEET/WINBUSH-BEY/NEWTON-BEY/NORFLEET-BEY, No. 151732; Court of Appeals No. 323110. Leave to appeal denied at 498 Mich 863.

In re NORFLEET/WINBUSH-BEY/NEWTON-BEY/NORFLEET-BEY, No.151734; Court of Appeals No. 323116. Leave to appeal denied at 498 Mich 863.

Leave to Appeal Denied September 4, 2015:

In re KRS, No. 152019; Court of Appeals No. 325134.

Summary Disposition September 9, 2015:

PEOPLE v LAWRENCE GIBBS, No. 151070; Court of Appeals No. 315652. 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 of the defendant's issue regarding the Ingham Circuit Court's assessment of court costs, which the Court of Appeals did not address during its initial review of the case. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY, No. 151350; Court of Appeals No. 319710. 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 of the issue of whether the insurance policy issued by QBE Insurance Corporation can be voided *ab initio*. On remand, the Court of Appeals shall hold this case in abeyance pending its decision in *Bazzi v Sentinel Ins Co* (Court of Appeals Docket No. 320518). After *Bazzi* is decided, the Court of Appeals shall reconsider this issue in light of *Bazzi*. In all other respects, the application for 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 September 9, 2015:

KINCAID v CROSKEY, Nos. 148412 and 148413; Court of Appeals Nos. 310148 and 311857.

DEPLAUNTY v TROY SCHOOL DISTRICT, No. 150229; Court of Appeals No. 321892.

PEOPLE v TROY JONES, No. 150450; Court of Appeals No. 322250.

PEOPLE v RIZK, No. 150455; Court of Appeals No. 321789.

PEOPLE v BRADLEY, No. 150468; Court of Appeals No. 323487.

PEOPLE v ROSIER, No. 150469; Court of Appeals No. 322803.

PEOPLE v ETCHISON, No. 150479; Court of Appeals No. 324235.

PEOPLE v HALL, No. 150516; Court of Appeals No. 322885.

PEOPLE v ROOSEVELT THOMAS, No. 150529; Court of Appeals No. 323666.

PEOPLE v ROUSH, No. 150535; Court of Appeals No. 322987.

PERUN v TROTT & TROTT, PC, No. 150549; Court of Appeals No. 315191.

PEOPLE v LINWOOD LEE, No. 150593; Court of Appeals No. 323575.

PEOPLE v CALVEY, No. 150681; Court of Appeals No. 323150.

PEOPLE v BERNARD HOWARD, No. 150685; Court of Appeals No. 322503.

PEOPLE v CHOATE, No. 150688; Court of Appeals No. 314438.

PEOPLE v MCCALLUM, No. 150705; Court of Appeals No. 316295.

PEOPLE v JURDUNN GARDNER, No. 150707; Court of Appeals No. 323701.

PEOPLE v SLAUGHTER, No. 150740; Court of Appeals No. 323852.

PEOPLE v PARKS, No. 150749; Court of Appeals No. 317191.

PEOPLE v FLYNN, No. 150750; Court of Appeals No. 316325.

PEOPLE v GRANDERSON, No. 150752; Court of Appeals No. 323248.

In re BROWN, No. 150762; Court of Appeals No. 322908.

PEOPLE v GEORGE, No. 150767; Court of Appeals No. 323904.

PEOPLE v DARNELL MITCHELL, No. 150768; Court of Appeals No. 322784.

PEOPLE v SOVIS, No. 150769; Court of Appeals No. 323639.

PEOPLE v WILLIE BASSETT, No. 150773; Court of Appeals No. 315568.

PEOPLE v THEODORE BELL, No. 150779; Court of Appeals No. 322600.

PEOPLE v VAN DIVER, No. 150797; Court of Appeals No. 323256.

PEOPLE v NEWELL, No. 150803; Court of Appeals No. 324391.

PEOPLE v LAWRENCE SCOTT, No. 150806; Court of Appeals No. 324450.

PEOPLE v HAYES, No. 150808; Court of Appeals No. 323574.

PEOPLE v MELL, No. 150892; Court of Appeals No. 316808.

STATEWIDE ELECTRICAL ENERGY SERVICES CORPORATION v BRAVERMAN, No. 150899; Court of Appeals No. 319511.

PLEASANTON TOWNSHIP v PARRAMORE, No. 150930; Court of Appeals No. 317908.

PEOPLE v WILLIAM CRUMP, No. 150978; Court of Appeals No. 316583.

PEOPLE v RALEIGH, No. 150989; Court of Appeals No. 317175.

PEOPLE v GREEN, No. 150993; Court of Appeals No. 323972.

PEOPLE v CALVIN GLOSTER, No. 151088; Court of Appeals No. 317069.

NEWELL v NEWELL, No. 151094; Court of Appeals No. 322835.

CAMERON v HURON CLINTON METROPOLITAN AUTHORITY, No. 151114; Court of Appeals No. 318887.

PEDERSEN v HURON CLINTON METROPOLITAN AUTHORITY, No. 151116; Court of Appeals No. 317898.

TELERICO v NOWATZKE, No. 151117; Court of Appeals No. 318574.

EASLEY v INGHAM CIRCUIT JUDGE, No. 151120; Court of Appeals No. 323759.

PEOPLE v JAMAL MOORE, No. 151124; Court of Appeals No. 318674.

JENKINS v JPMORGAN CHASE BANK, NA, No. 151144; Court of Appeals No. 318498.

SRVAN BRICK & STONE, INC v W B HUNT CORP, Nos. 151150 and 151151; Court of Appeals Nos. 316585 and 319213.

PEOPLE v RICARDO BLACK, No. 151152; Court of Appeals No. 324956.

PEOPLE v HOLLAND, No. 151160; Court of Appeals No. 318608.

PEOPLE v SIDNEY CALDWELL, No. 151183; Court of Appeals No. 318915.

PEOPLE v TAIT, No. 151184; Court of Appeals No. 318514.

SHEKOOHFAR v LA ROSA, No. 151187; Court of Appeals No. 319118.

FILAS v CULPERT, No. 151198; Court of Appeals No. 317972.

PEOPLE v COREY THOMPSON, No. 151209; Court of Appeals No. 318694.

AFFELDT v LAKE COURT BEACH ASSOCIATION, No. 151210; Court of Appeals No. 315277.

PEOPLE v OGILIVE, No. 151212; Court of Appeals No. 324327.

PEOPLE v OGILIVE, No. 151214; Court of Appeals No. 324328.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY, No. 151215; Court of Appeals No. 319709.

PEOPLE v DARRYL SANDERS, No. 151220; Court of Appeals No. 318432.

PEOPLE v SEAN PERKINS, No. 151222; Court of Appeals No. 324453.

PEOPLE v JAMAL BOWMAN, No. 151229; Court of Appeals No. 317535.

NOONAN v LANSING ORTHOPEDIC, PC, No. 151232; Court of Appeals No. 316731.

PEOPLE v BRADFORD, No. 151238; Court of Appeals No. 319012.

PEOPLE v MARIO DAVIS, No. 151240; Court of Appeals No. 318059.

PEOPLE v KENNETH TAYLOR, JR, No. 151245; Court of Appeals No. 319066.

PEOPLE v NASIR BANKS, No. 151246; Court of Appeals No. 317804.

PEOPLE v BREIDENBACH, No. 151248; Court of Appeals No. 324049.

PEOPLE v MCLEOD, No. 151250; Court of Appeals No. 325271.

PEOPLE v ANGELO YOUNG, No. 151259; Court of Appeals No. 317373.

PEOPLE v WINOWIECKI, No. 151262; Court of Appeals No. 317821.

PEOPLE v JUNELL MOBLEY, No. 151265; Court of Appeals No. 317482.

BOW NOT v WHITEHALL TWP, No. 151273; Court of Appeals No. 323152.

PEOPLE v VANNESTE, No. 151283; Court of Appeals No. 317683.

PEOPLE v DELNIECE WILLIAMS, No. 151284; Court of Appeals No. 311262.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

A & D DEVELOPMENT v MICHIGAN COMMERCIAL INSURANCE MUTUAL, No. 151286; Court of Appeals No. 317024.

PEOPLE v ROOT, No. 151305; Court of Appeals No. 318826.

PEOPLE v NERO, No. 151309; Court of Appeals No. 319320.

PEOPLE v KOHN, No. 151312; Court of Appeals No. 317919.

GANSTINE v SIGNATURE BANK, No. 151319; Court of Appeals No. 315352.

PEOPLE v HENRY BUSH, No. 151322; Court of Appeals No. 324935.

PEOPLE v PRUITT, No. 151323; Court of Appeals No. 318158.

PEOPLE v TRUDEAU, Nos. 151324 and 151325; Court of Appeals Nos. 317879 and 322028.

ACE AMERICAN INSURANCE COMPANY v WORKERS' COMPENSATION AGENCY DIRECTOR, Nos. 151327 and 151328; Court of Appeals Nos. 317501 and 317569.

CHURCH v CITADEL BROADCASTING COMPANY, No. 151331; Court of Appeals No. 319210.

PEOPLE v STEIN, No. 151335; Court of Appeals No. 314482.

PEOPLE v PUTNAM, No. 151336; reported below: 309 Mich App 240.

PEOPLE v GRAVES, No. 151340; Court of Appeals No. 325161.

PEOPLE v WORKMAN, No. 151348; Court of Appeals No. 325386.

VAUGHN v CENTRAL MICHIGAN CORRECTIONAL FACILITY WARDEN, No. 151353; Court of Appeals No. 323858.

HICKS v CHARTER HOUSE HOLDINGS, LLC, No. 151373; Court of Appeals No. 325755.

MITCHELL v MITCHELL, No. 151377; Court of Appeals No. 323069.

PEOPLE v AYALA, No. 151405; Court of Appeals No. 317924.

PEOPLE v REESE, No. 151407; Court of Appeals No. 323721.

PEOPLE v MCNEES, No. 151412; Court of Appeals No. 324639.

PEOPLE v KYLE STONE, No. 151425; Court of Appeals No. 325631.

FILAS v DEARBORN HEIGHTS SCHOOL DISTRICT #7, No. 151429; Court of Appeals No. 325172.

PEOPLE v STEEL, No. 151433; Court of Appeals No. 318561.

PEOPLE v CRAWFORD, No. 151437; Court of Appeals No. 325323.

PEOPLE v HATTEN, No. 151451; Court of Appeals No. 319417.

PEOPLE v JHERI CAMPBELL, No. 151452; Court of Appeals No. 319300.

PEOPLE v AVERY, No. 151456; Court of Appeals No. 325502.

PEOPLE v WILLIAM THOMAS, No. 151457; Court of Appeals No. 325673.

FILAS v CULPERT, No. 151463; Court of Appeals No. 317972.

PEOPLE v MCMAHAN, No. 151473; Court of Appeals No. 325765.

PEOPLE v CHARLES CRUMP, No. 151475; Court of Appeals No. 325808.

PEOPLE v HALSTEAD, No. 151477; Court of Appeals No. 325460.

PEOPLE v KAHLEY, No. 151484; Court of Appeals No. 324701.

PEOPLE v TRICE, No. 151489; Court of Appeals No. 319079.

LAPINE v DEPARTMENT OF CORRECTIONS, No. 151503; Court of Appeals No. 324949.

PEOPLE v FREDERICK NEAL, No. 151530; Court of Appeals No. 318969.

PEOPLE v SWANN, No. 151532; Court of Appeals No. 319107.

PEOPLE v SPANGLER, No. 151598; Court of Appeals No. 326184.

CORRION v THUMB CORRECTIONAL FACILITY WARDEN, No. 151608; Court of Appeals No. 324310.

STEFFKE v TAYLOR FEDERATION OF TEACHERS, No. 151622; Court of Appeals No. 317616.

KINCAID v CROSKEY, No. 151684; Court of Appeals No. 313218.

LEE v CROSKEY, No. 151695; Court of Appeals No. 313217.

PINCOMB v DIVERSFIED INVESTMENT VENTURES, LLC, No. 151700; Court of Appeals No. 324989.

PEOPLE v BALL, No. 151716; Court of Appeals No. 326719.

ADAIR v STATE OF MICHIGAN, No. 151798; Court of Appeals No. 311779.

WENNERS v CHISOLM, No. 151835; Court of Appeals No. 314938.

MORRISSETTE v DOE, No. 151845; Court of Appeals No. 324574.

PEOPLE v THOMAS WALLACE, No. 151868; Court of Appeals No. 325721.

MIRACLE v MIRACLE, No. 151917; Court of Appeals No. 324758.

HOLLIDAY v MULLETT, No. 152064; Court of Appeals No. 327892.

Reconsideration Denied September 9, 2015:

PEOPLE v JURICH, No. 149198; Court of Appeals No. 319506. Leave to appeal denied at 497 Mich 951.

VIVIANO, J., did not participate due to a familial relationship with the defendant's trial counsel.

PEOPLE v BEAGLE, No. 149530; Court of Appeals No. 320021. Leave to appeal denied at 497 Mich 970.

CHABAD-LUBAVITCH OF MICHIGAN v SCHUCHMAN, No. 149567; reported below: 305 Mich App 337. Summary disposition at 497 Mich 1021.

BERNSTEIN, J., did not participate.

PEOPLE v THOMAS HICKS, No. 149629; Court of Appeals No. 320963. Leave to appeal denied at 497 Mich 952.

PEOPLE v FORTENBERRY, No. 149826; Court of Appeals No. 320910. Leave to appeal denied at 497 Mich 954.

In re ESTATE OF PERUN, No. 149855; Court of Appeals No. 313869. Leave to appeal denied at 497 Mich 954.

PEOPLE v PITTMAN, No. 150012; Court of Appeals No. 322425. Leave to appeal denied at 497 Mich 1011.

VAJK v CITY OF IRON RIVER, No. 150015; Court of Appeals No. 320550. Leave to appeal denied at 497 Mich 1011.

PEOPLE v GRESHAM, No. 150020; Court of Appeals No. 321553. Leave to appeal denied at 497 Mich 1026.

PEOPLE v JOHN MARSHALL, No. 150165; Court of Appeals No. 313814. Summary disposition at 497 Mich 1023.

PEOPLE v ROBERT ANDERSON, No. 150140; Court of Appeals No. 322500. Leave to appeal denied at 497 Mich 1026.

THOMPKINS v BROWN, No. 150143; Court of Appeals No. 313554. Leave to appeal denied at 497 Mich 1026.

PEOPLE v RICE, No. 150234; Court of Appeals No. 322161. Leave to appeal denied at 497 Mich 1027.

In re GUARDIANSHIP OF GBH, No. 150260; Court of Appeals No. 322245. Leave to appeal denied at 497 Mich 1027.

PEOPLE v BRYANT, Nos. 150270 and 150271; Court of Appeals Nos. 306602 and 318765. Leave to appeal denied at 497 Mich 1041.

ADKINS v ADKINS, No. 151804; Court of Appeals No. 326742. Leave to appeal denied at 498 Mich 868.

Leave to Appeal before Decision by Court of Appeals Denied September 9, 2015:

MAKOWSKI v GOVERNOR, No. 151844; Court of Appeals No. 327396.

MCCORMACK, J., did not not participate due to her prior involvement in this case.

Superintending Control Denied September 9, 2015:

WIGNER v ATTORNEY GRIEVANCE COMMISSION, No. 151438.

THURMOND v ATTORNEY GRIEVANCE COMMISSION, No. 151498.

Superintending Control Dismissed September 9, 2015:

INTERNATIONAL BUSINESS MACHINES CORPORATION v MICHIGAN COURT OF CLAIMS, No. 151714. On order of the Court, the motion to intervene and the complaint for superintending control are considered. The complaint for superintending control is dismissed, because the plaintiff has appealed the Court of Claims order at issue in this case to the Court of Appeals and, in the event that the plaintiff is aggrieved by the decision of the Court of Appeals, an application for leave to appeal may be filed in this Court. Under these circumstances, superintending control is not an available remedy. MCR 3.302(D)(2); MCR 7.304(A); *Public Health Dep't v Rivergate Manor*, 452 Mich 495, 500 (1996). The motion to intervene is denied as moot.

Summary Disposition September 11, 2015:

STANKEVICH v MILLIRON, No. 148097; Court of Appeals No. 310710. By order of April 25, 2014, the application for leave to appeal the October 17, 2013 judgment of the Court of Appeals was held in abeyance pending the decision in *DeBoer v Snyder*, 772 F3d 388 (CA 6, 2014), and any attendant decision from the United States Supreme Court. On order of the Court, the case having been decided on June 26, 2015, sub nom *Obergefell v Hodges*, 576 US ___; 135 S Ct 2584; 192 L Ed 2d 609 (2015), 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 remand this case to the Court of Appeals for reconsideration in light of *Obergefell*. The motion to proceed on the application for leave to appeal is denied.

ALBION COLLEGE v STOCKADE BUILDINGS, INC, No. 151269; Court of Appeals No. 322917. 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. We do not retain jurisdiction.

Leave to Appeal Denied September 11, 2015:

In re JEZOWSKI, Nos. 152165 and 152166; Court of Appeals Nos. 325112 and 325116.

In re JACO/ROBINSON, No. 152178; Court of Appeals No. 323922.

Superintending Control Denied September 11, 2015:

BAKER v ATTORNEY GRIEVANCE COMMISSION, No. 151467.

Rehearing Denied September 11, 2015:

AROMA WINES AND EQUIPMENT, INC v COLUMBIAN DISTRIBUTION SERVICES, INC, Nos. 148907 and 148909; opinion at 497 Mich 337.

BEALS v STATE OF MICHIGAN, No. 149901; opinion at 497 Mich 363.

Leave to Appeal Granted September 16, 2015:

HECHT v NATIONAL HERITAGE ACADEMIES, INC, No. 150616; Court of Appeals No. 306870. The parties shall address whether the Court of Appeals erred: (1) when it found sufficient direct evidence of racial discrimination on the basis of a witness's interpretation or understanding of what the defendant's representative said to her; (2) when it

concluded that the burden-shifting analysis of *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), was not applicable and that there was sufficient circumstantial evidence that the plaintiff was similarly situated to African-American employees who had made race-based remarks in the past; and (3) when it held that the trial court did not abuse its discretion in admitting evidence of the defendant employer's disclosures, which were mandated by MCL 380.1230b, to the plaintiff's prospective employers.

The Labor and Employment 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 issues presented in this case may move the Court for permission to file briefs amicus curiae.

ROBERTS v SALMI, LPC, No. 150919; reported below: 308 Mich App 420. The parties shall address whether a mental health professional has a duty of care to third parties who might foreseeably be harmed by the mental health professional's use of techniques that cause a patient to have false memories of sexual abuse.

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.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered September 16, 2015:

CORL v HURON AND EASTERN RAILWAY COMPANY, INC, No. 150970; Court of Appeals No. 319004. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the Court of Appeals decision conflicts with *Paddock v Tuscola & Saginaw Bay Railway Company*, 225 Mich App 526 (1997), and MCL 462.317; and (2) whether *Paddock* was correctly decided. The parties should not submit mere restatements of their application papers.

WADE v MCCADIE, No. 151196; Court of Appeals No. 317531. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the 91-day extension provided in MCL 600.2912d(3) for filing an affidavit of merit applies where the plaintiff claims that the defendants did not produce all medical records within 56 days after receipt of the notice of intent as required by MCL 600.2912b(5); (2) whether the defendants were obligated, under MCL 600.2912b(5), to explain to the plaintiff that certain records could not be produced because they had been destroyed; and (3) whether billing records are medical records for purposes of MCL 600.2912b(5). The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied September 16, 2015:

NATIONAL WILDLIFE FEDERATION YELLOW DOG WATERSHED PRESERVE, INC v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 150120; reported below: 306 Mich App 336.

NATIONAL WILDLIFE FEDERATION YELLOW DOG WATERSHED PRESERVE, INC v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 150122; reported below: 306 Mich App 369.

WILLIAMS v ENJOI TRANSPORATION SOLUTIONS, LLC, Nos. 150483 and 150484; Court of Appeals Nos. 312782 and 312882.

BAHRI v NOURI, No. 150486; reported below: 308 Mich App 420.

PEOPLE v WITT, No. 150932; Court of Appeals No. 316272.

DOE v HENRY FORD HEALTH SYSTEM, Nos. 150937 and 150938; reported below: 308 Mich App 592.

PEOPLE v CUBER-TOCAY, No. 150984; Court of Appeals No. 325002.

PEOPLE v LIST, No. 151003; Court of Appeals No. 318094.

PEOPLE v MIDDLETON, No. 151478; Court of Appeals No. 324724.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered September 18, 2015:

HARDY v LAURELS OF CARSON CITY, LLC, No. 150882; Court of Appeals No. 317406. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the Court of Appeals erred in reversing the Montcalm Circuit Court's grant of summary disposition to the defendant pursuant to MCR 2.116(C)(10) of the plaintiff's false imprisonment claim based on its conclusion that genuine issues of material fact remained whether Margaret Roush's patient advocate designation became effective on October 24, 2012, see MCL 700.5506, and whether Roush subsequently revoked her patient advocate designation, see MCL 700.5510(1)(d); (2) whether the Court of Appeals erred in relying on an affidavit submitted by the plaintiff's attorney pursuant to MCR 2.116(H) to conclude that genuine issues of material fact remained; and (3) whether the Court of Appeals erred in addressing the plaintiff's remaining claims of intentional infliction of emotional distress, abuse of process, and civil conspiracy, where the plaintiff did not challenge that portion of the trial court's order granting summary disposition as to those claims. The parties should not submit mere restatements of their application papers.

The Elder Law and Disability Rights 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 issues presented in this case may move the Court for permission to file briefs amicus curiae.

Rehearing Denied September 18, 2015:

PEOPLE v TIMOTHY JACKSON, No. 149798; opinion at 498 Mich 246.

Order Enjoining Attorney from Practicing Law Entered September 18, 2015:

In re RIEMAN, No. 152094. On order of the Court, the petition for injunction pursuant to MCR 9.108(E)(4) is considered, and it is granted. We order that Kevin J. Rieman (P45548) is enjoined from practicing law in the State of Michigan until the felony charges pending against him have concluded. If the respondent is acquitted of all felony charges, this injunction shall automatically dissolve.

Summary Disposition September 23, 2015:

PEOPLE v TYRONE CLARK, No. 150226; Court of Appeals No. 322852. 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 September 23, 2015:

HARRELL v TITAN INDEMNITY COMPANY, No. 151134; Court of Appeals No. 318744. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the plaintiff, who was driving an uninsured vehicle titled in the name of her husband, is an "owner" under MCL 500.3101(2)(k)(*i*). The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied September 23, 2015:

SS v STATE OF MICHIGAN, Nos. 150678, 150679, and 150680; Court of Appeals Nos. 317071, 317072, and 317073.

LINDEN v CITIZENS INSURANCE COMPANY OF AMERICA, No. 150710; reported below: 308 Mich App 89.

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS, WAGE AND HOUR DIVISION v CONN, Nos. 150755 and 150756; reported below: 308 Mich App 155.

HARBOR WATCH CONDOMINIUM ASSOCIATION v EMMETT COUNTY TREASURER, No. 150841; reported below: 308 Mich App 380.

PEOPLE v JERROLDS, Nos. 151158 and 151159; Court of Appeals Nos. 318738 and 321800.

DEMSKI v PETLICK, No. 151401; reported below: 309 Mich App 404.

BARTLETT v ALLEGAN COUNTY DEPARTMENT OF HUMAN SERVICES, No. 152124; Court of Appeals No. 327201.

BARTLETT v KALAMAZOO COUNTY DEPARTMENT OF HUMAN SERVICES, No. 152126; Court of Appeals No. 327262.

Superintending Control Denied September 23, 2015:

REZLER v ATTORNEY GRIEVANCE COMMISSION, No. 151258.

Summary Disposition September 25, 2015:

WHITE v HUTZEL WOMEN'S HOSPITAL, No. 150397; Court of Appeals No. 304221. Pursuant to MCR 7.305(H)(1), in lieu of granting the application for leave to appeal, we reverse the judgment of the Court of Appeals and we remand this case to the Wayne Circuit Court for entry of judgment in the defendant's favor. To establish proximate cause, a plaintiff must prove two elements: (1) cause in fact, and (2) legal, or proximate, cause. *Skinner v Square D Co*, 445 Mich 153, 162-163 (1994). A plaintiff proves that the defendant's conduct was a cause in fact of his injuries only if he sets forth specific facts in evidence which support a reasonable inference of a logical cause and effect. *Craig v Oakwood Hosp*, 471 Mich 67, 87-88 (2004). Here, the plaintiff's expert witnesses have failed to prove any causal connection between non-reassuring heart tones on the fetal heart monitor and the plaintiff's child's resultant cerebral palsy. Any causal connection is speculative at best. When viewed in a light most favorable to the plaintiff, the evidence fails to establish her claim as a matter of law. *Wilkinson v Lee*, 463 Mich 388, 391 (2000). The defendant was therefore entitled to judgment notwithstanding the verdict. *Id*.

The application for leave to appeal as cross-appellant is denied as moot.

BERNSTEIN, J. (*dissenting*). I disfavor a peremptory reversal here because I believe that a jury is better suited than this Court to make the factual findings necessary for a determination of causation. I would deny leave to appeal and permit this case to continue to a new trial, as ordered by the Court of Appeals.

In re APPLICATION OF INDIANA MICHIGAN POWER COMPANY FOR A CERTIFICATE OF NECESSITY, Nos. 150555 and 150558; reported below: 307 Mich App 272. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate only the Court of Appeals statement that: "Since the term [singular] is subject to two interpretations, it is ambiguous and judicial construction is required to effectuate Legislative intent." This definition of ambiguity is not correct. A provision of law is ambiguous only if it "irreconcilably conflict[s]" with another provision or "when it is *equally* susceptible to more than a single meaning." *Mayor of Lansing v MPSC*, 470 Mich 154, 166 (2004). However, the Court of Appeals correctly considered the statutory context to assess the meaning of the term. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 318 (2002). In all other respects, leave to appeal is denied, because we are not persuaded that the question presented should be reviewed by this Court.

Order Directing Briefing and Oral Argument on a Request to Answer Certified Question Entered September 25, 2015:

In re CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (DEACON V PANDORA MEDIA, INC), No. 151104. On order of the Court, the question certified by the United States Court of Appeals for the Ninth Circuit is considered. We direct the Clerk to schedule oral argument on whether to grant the request to answer the certified question. MCR 7.308(A)(3). The parties shall file supplemental briefs within 42 days of the date of this order addressing whether Deacon has stated a claim against Pandora for violation of the Michigan Video Rental Privacy Act, MCL 445.1711 *et seq*., by adequately alleging that Pandora is in the business of "renting" or "lending" sound recordings, and that he is a "customer" of Pandora, because he "rents" or "borrows" sound recordings from Pandora. The parties should not submit mere restatements of their prior filings.

The Intellectual Property 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 issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied September 25, 2015:

MAIER V MAIER, No. 152119; Court of Appeals No. 322109.

In re MAGEE, No. 152148; Court of Appeals No. 324507.

Summary Disposition September 29, 2015:

GOEDKER V SCHRAM, No. 151341; Court of Appeals No. 324587. 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.

GOEDKER V SCHRAM, No. 151375; Court of Appeals No. 324074. 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.

GOEDKER V SCHRAM, No. 151415; Court of Appeals No. 324822. 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 September 29, 2015:

PEOPLE V JARVON BROWN, No. 148160; Court of Appeals No. 305794. By order of September 29, 2014, the application for leave to appeal the October 8, 2013 judgment of the Court of Appeals was held in abeyance

pending the decision in *People v Feronda Smith* (Docket No. 148305). On order of the Court, the case having been decided on July 30, 2015, 498 Mich 466 (2015), the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

KELLY, J., would grant leave to appeal for the reasons set forth in her concurrence/dissent in *People v Feronda Smith*, 498 Mich 466 (2015).

BP1, LLC v COVENTRY REAL ESTATE FUND II, LLC, No. 150348; Court of Appeals No. 312579.

PEOPLE v MATTHEW BELL, No. 150694; Court of Appeals No. 323675.

GUASTELLO v LAFON, No. 150709; Court of Appeals No. 313725.

PEOPLE v PABLO MARTINEZ, No. 150716; Court of Appeals No. 323669.

PEOPLE v SHELTON CARTER, No. 150735; Court of Appeals No. 323856.

PEOPLE v FRANK BENNETT, No. 150743; Court of Appeals No. 324013.

PEOPLE v PALMATEER, No. 150744; Court of Appeals No. 323480.

PEOPLE v MACK, No. 150748; Court of Appeals No. 322534.

PEOPLE v LAMAR CLARK, No. 150770; Court of Appeals No. 322925.

PEOPLE v LAPINE, No. 150772; Court of Appeals No. 323524.

PEOPLE v SAIN, No. 150776; Court of Appeals No. 323497.

PEOPLE v ROBERTS, No. 150782; Court of Appeals No. 322732.

PEOPLE v KULICK, No. 150783; Court of Appeals No. 323780.

PEOPLE v ANNON, No. 150784; Court of Appeals No. 324165.

PEOPLE v BISKNER, No. 150788; Court of Appeals No. 324002.

PEOPLE v JAMES WARE, No. 150790; Court of Appeals No. 324253.

PEOPLE v WILLIAM BROWN, No. 150817; Court of Appeals No. 323744.

PEOPLE v ASHLEY, No. 150829; Court of Appeals No. 323700.

GLAGOLA v MICHIGAN ADMINISTRATIVE HEARING SYSTEM, No. 150830; Court of Appeals No. 323331.

DTE ELECTRIC COMPANY v CONSTANT, No. 150846; Court of Appeals No. 317976.

PEOPLE v HALE, No. 150853; Court of Appeals No. 324623.

ORAY v CITY OF FARMINGTON HILLS, No. 150923; Court of Appeals No. 321440.

CITY OF CORUNNA v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 150939; Court of Appeals No. 316841.

PEOPLE v CARROLL, No. 151066; Court of Appeals No. 317174.

BUITENHUIS v HOLLAND CHARTER TOWNSHIP, No. 151139; Court of Appeals No. 323255.

GRONINGER v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 151179; Court of Appeals No. 318380.

MACOMB TWP v SVINTE, No. 151188; Court of Appeals No. 318064.

PEOPLE v FLINT, No. 151189; Court of Appeals No. 321213.

REHABITAT SYSTEMS OF MICHIGAN, INC v ETHERLY, No. 151197; Court of Appeals No. 317609.

PEOPLE v RODERICK GIBSON, No. 151218; Court of Appeals No. 313890.

PEOPLE v RODWELL, No. 151221; Court of Appeals No. 318386.

PEOPLE v MARCUS SIMMONS, No. 151247; Court of Appeals No. 318564.

PEOPLE v ABREY WILLIS, No. 151249; Court of Appeals No. 318341.

MCALPINE v DONALD A BOSCO BUILDING, INC, No. 151256; Court of Appeals No. 316323.

PEOPLE v HENRY WILLIAMS, No. 151266; Court of Appeals No. 325561.

MERCANTILE BANK OF MICHIGAN v CLMIA, LLC, No. 151268; Court of Appeals No. 316777.

LOUTTS v LOUTTS, No. 151276; reported below: 309 Mich App 203.

FEDERAL HOME LOAN MORTGAGE v JONES, No. 151279; Court of Appeals No. 325787.

HOLMES v HOLMES, No. 151297; Court of Appeals No. 315551.

PEOPLE v JERMAR GIBSON, No. 151302; Court of Appeals No. 315933.

PEOPLE v DUANE THOMAS, No. 151308; Court of Appeals No. 316473.

PEOPLE v KEITH CHARLESTON, No. 151316; Court of Appeals No. 316771.

PEOPLE v KIMPLE, No. 151318; Court of Appeals No. 318965.

PEOPLE v TAHRI SMITH, No. 151339; Court of Appeals No. 318383.

PEOPLE v DUANE WILLIAMS, No. 151346; Court of Appeals No. 318856.

TEALL v ONE WEST BANK, No. 151351; Court of Appeals No. 318815.

PEOPLE v WILLIE WILLIAMS, No. 151361; Court of Appeals No. 318211.

GATES v BRUBAKER, No. 151363; Court of Appeals No. 317939.

PEOPLE v ANSARI, No. 151379; Court of Appeals No. 318524.

PEOPLE v WALTERS, No. 151381; Court of Appeals No. 317923.

In re TAITT, No. 151389; Court of Appeals No. 326622.

HOARD v STEVENSON, No. 151391; Court of Appeals No. 318795.

PEOPLE v SANDS, No. 151394; Court of Appeals No. 325772.

HARRIS v CARSON CITY CORRECTIONAL FACILITY WARDEN, No. 151398; Court of Appeals No. 324325.

PEOPLE v AYERS, No. 151410; Court of Appeals No. 325915.

PEOPLE v RANDY SMITH, No. 151422; Court of Appeals No. 318205.

MCNEES v OWENS, No. 151436; Court of Appeals No. 324175.

PEOPLE v DAQUAVIS MARTIN, No. 151441; Court of Appeals No. 319154.

PEOPLE v LACEY, No. 151443; Court of Appeals No. 317964.

CHASTANG v SANDLES, No. 151446; Court of Appeals No. 318640.

PEOPLE v ANTHONY THOMPSON, No. 151455; Court of Appeals No. 319075.

LAUR v GENERAL MOTORS CORPORATION, No. 151458; Court of Appeals No. 324038.

JPMORGAN CHASE BANK, NA v ADAMS, No. 151464; Court of Appeals No. 326200.

PERRY v PORTAGE PUBLIC SCHOOLS BOARD OF EDUCATION, No. 151465; Court of Appeals No. 319170.

HOME-OWNERS INSURANCE COMPANY v SIMON, No. 151466; Court of Appeals No. 323726.

WELLS FARGO BANK, NA v ISHO, No. 151482; Court of Appeals No. 324498.

PEOPLE v SHUN HOWELL, No. 151483; Court of Appeals No. 318698.

PEOPLE v MICHAEL POOLE, No. 151491; Court of Appeals No. 319911.

PEOPLE v LYNN SCOTT, No. 151493; Court of Appeals No. 318554.

PEOPLE v MATTHEWS, No. 151494; Court of Appeals No. 319877.

NEWTON v CARVER, No. 151504; Court of Appeals No. 325678.

PEOPLE v SCHALK, No. 151506; Court of Appeals No. 325615.

JPMORGAN CHASE BANK, NA v FIRST MICHIGAN BANK, No. 151512; Court of Appeals No. 318763.

PEOPLE v ENOS, No. 151522; Court of Appeals No. 325865.

PEOPLE v COGBORN, No. 151528; Court of Appeals No. 324209.

PEOPLE v MCCASKILL, No. 151537; Court of Appeals No. 318257.

PEOPLE v PECK, No. 151538; Court of Appeals No. 319414.

PEOPLE v WOFFORD, No. 151542; Court of Appeals No. 318642.

PEOPLE v BLAYLOCK, No. 151544; Court of Appeals No. 319302.

PEOPLE v BAEZ, No. 151550; Court of Appeals No. 319251.

PEOPLE v SYKES, No. 151558; Court of Appeals No. 318964.

PEOPLE v SHANANAQUET, Nos. 151562, 151563, 151564, and 151565; Court of Appeals Nos. 318251, 318252, 318378, and 320342.

PEOPLE v SOLOMON, No. 151566; Court of Appeals No. 319248.

PEOPLE v ALLEN WALKER, No. 151569; Court of Appeals No. 318217.

PEOPLE v LINTZ, No. 151579; Court of Appeals No. 318778.

PEOPLE v KENNETH FRAZIER, No. 151584; Court of Appeals No. 319999.

PEOPLE v ROSEBURGH, No. 151586; Court of Appeals No. 325940.

PEOPLE v COLBERT, No. 151588; Court of Appeals No. 319452.

PEOPLE v TALISHA MOORE, No. 151593; Court of Appeals No. 319445.

PEOPLE v RODERICK HARRIS, No. 151594; Court of Appeals No. 318668.

PEOPLE v DAVID BLAIR, No. 151595; Court of Appeals No. 325844.

PEOPLE v CLAY, No. 151596; Court of Appeals No. 319978.

PEOPLE v DELON MILLER, No. 151599; Court of Appeals No. 319694.

OMIAN v CHRYLSER GROUP, LLC, No. 151602; reported below: 309 Mich App 297.

PEOPLE v SUPER, No. 151606; Court of Appeals No. 319736.

PEOPLE v DAMON WASHINGTON, No. 151607; Court of Appeals No. 319168.

PEOPLE v TERRENCE MILLER, Nos. 151613 and 151614; Court of Appeals Nos. 325942 and 325943.

PEOPLE v STEVEN STANLEY, No. 151615; Court of Appeals No. 319229.

PEOPLE v PATTON, No. 151626; Court of Appeals No. 325869.

PEOPLE v HAUSER, No. 151631; Court of Appeals No. 319808.

DOLLEN v DOLLEN, No. 151632; Court of Appeals No. 316457.

PEOPLE v BRIAN LEE, No. 151647; Court of Appeals No. 313302.

PEOPLE v STEWARD, No. 151648; Court of Appeals No. 323846.

PEOPLE v JORDAN, No. 151671; Court of Appeals No. 317644.

PEOPLE v AVEROFF, No. 151672; Court of Appeals No. 326487.

PEOPLE v SLY, No. 151675; Court of Appeals No. 326198.

PEOPLE v ARCAUTE, No. 151676; Court of Appeals No. 319667.

PEOPLE v HOCKING-SULLIVAN, No. 151685; Court of Appeals No. 315381.

PEOPLE v MAGEE, No. 151699; Court of Appeals No. 326174.

FEDERAL HOME LOAN MORTGAGE CORPORATION v MEDLEY, No. 151747; Court of Appeals No. 325664.

PEOPLE v BEELER, No. 151758; Court of Appeals No. 326736.

PEOPLE v CAIN, No. 151774; Court of Appeals No. 313303.

PEOPLE v VARNER, No. 151873; Court of Appeals No. 326974.

CONSUMERS ENERGY COMPANY v LENTZ, No. 151944; Court of Appeals No. 325705.

GRIEVANCE ADMINISTRATOR v SMITH, No. 151966.

GRIEVANCE ADMINISTRATOR v GORETA, No. 151972.

PEOPLE v RODNEY MCKEE, No. 152072; Court of Appeals No. 327286.

Reconsideration Denied September 29, 2015:

SNOW COUNTRY CONTRACTING, INC v IRONWOOD TOWNSHIP BOARD OF ZONING APPEALS, No. 149438; Court of Appeals No. 318671. Leave to appeal denied at 497 Mich 951.

SCOTT v CHRISTENSEN, No. 149721; Court of Appeals No. 312349. Leave to appeal denied at 497 Mich 953.

RUONAVAARA v DEPARTMENT OF COMMUNITY HEALTH, No. 149904; Court of Appeals No. 320897. Leave to appeal denied at 497 Mich 971.

PEOPLE v SENCER HOLLOWAY, No. 149956; Court of Appeals No. 319539. Leave to appeal denied at 497 Mich 1026.

PEOPLE v ANDRE DAVIS, No. 150109; Court of Appeals No. 322356. Leave to appeal denied at 497 Mich 1026.

PEOPLE v KYLE CLARK, No. 150202; Court of Appeals No. 313121. Summary disposition at 498 Mich 858.

KEYWORTH v STATE OF MICHIGAN, No. 150214; Court of Appeals No. 314861. Leave to appeal denied at 498 Mich 864.

MODZELEWSKI-SHEKOSKI v BINDIG, No. 150215; Court of Appeals No. 314830. Leave to appeal denied at 498 Mich 851.

WALSH v KRAFT FOODS GLOBAL, INC, No. 150360; Court of Appeals No. 312611. Leave to appeal denied at 497 Mich 1012.

PEOPLE v LEWIS HARRIS, No. 150380; Court of Appeals No. 322825. Leave to appeal denied at 498 Mich 864.

PEOPLE v BYRD, No. 150439; Court of Appeals No. 321821. Leave to appeal denied at 498 Mich 852.

PEOPLE v STEVENS, No. 150475; Court of Appeals No. 309831. Leave to appeal denied at 497 Mich 1012.

PEOPLE v HAROLD JOHNSON, No. 150509; Court of Appeals No. 323479. Leave to appeal denied at 498 Mich 864.

FILAS v MEEMIC INSURANCE COMPANY, No. 150510; Court of Appeals No. 316822. Leave to appeal denied at 497 Mich 1028.

BORMUTH v WEST BAY EXPLORATION COMPANY, No. 150512; Court of Appeals No. 316298. Leave to appeal denied at 498 Mich 852.

BATESON v ESTATE OF WARREN HAMILL, No. 150552; Court of Appeals No. 317116. Leave to appeal denied at 497 Mich 1014.

DEPARTMENT OF TRANSPORTATION v DETROIT INTERNATIONAL BRIDGE COMPANY, No. 150571; Court of Appeals No. 315453. Leave to appeal denied at 498 Mich 852.

PEOPLE v RICKEY WHITE, No. 150670; Court of Appeals No. 315579. Leave to appeal denied at 497 Mich 1015.

ZAMMIT v CITY OF NEW BALTIMORE, No. 150754; Court of Appeals No. 322188. Leave to appeal denied at 497 Mich 1029.

HUSTED v EATON CORPORATION, No. 150796; Court of Appeals No. 322884. Leave to appeal denied at 497 Mich 1028.

ANDERSON v ATTORNEY GRIEVANCE COMMISSION, No. 150872. Superintending control denied at 498 Mich 856.

In re PATULSKI ESTATE Nos. 150885 and 150886; Court of Appeals Nos. 317275 and 317449. Leave to appeal denied at 498 Mich 866.

FRITZ v SANDY PINES WILDERNESS TRAILS, No. 151105; Court of Appeals No. 317144. Leave to appeal denied at 498 Mich 867.

PEOPLE v WARD, No. 151175; Court of Appeals No. 323857. Leave to appeal denied at 498 Mich 855.

Superintending Control Denied September 29, 2015:

RANDY PATTERSON v ATTORNEY GRIEVANCE COMMISSION, No. 150085.

DOLLEN v COURT OF APPEALS, No. 151306.

Summary Disposition September 30, 2015:

HARRISON v MUNSON HEALTHCARE, INC, Nos. 148898 and 148899; reported below: 304 Mich App 1. By order of June 20, 2014, the applica-

tions for leave to appeal the January 30, 2014 judgment of the Court of Appeals were held in abeyance pending the decision in *Krusac v Covenant Medical Center, Inc* (Docket No. 149270). On order of the Court, the case having been decided on April 21, 2015, 497 Mich 251 (2015), the applications are again considered. In *Krusac*, we overruled that part of the Court of Appeals opinion in this case (*Harrison v Munson Healthcare, Inc*), in which the court held that factual information recorded on the first page of the incident report was not immune from disclosure as material protected pursuant to MCL 333.21515. In light of our decision in *Krusac*, we vacate the remainder of the Court of Appeals opinion. In addition, we vacate the April 8, 2011 Decision and Order Regarding Motion for Sanctions of the Grand Traverse Circuit Court, and we remand this case to the circuit court for further proceedings. The circuit court erroneously relied on *Centennial Healthcare Mgt Corp v Dep't of Consumer & Industry Services*, 254 Mich App 275 (2002), to conclude that the facts recorded in the incident report should not have been kept from the jury. Because it is unclear from the circuit court's Decision and Order Regarding Motion for Sanctions whether this conclusion was central to its decision to sanction defendant Hospital and its counsel, we remand for reconsideration of the sanctions award. If it chooses to again impose sanctions, the court shall explain why the specific facts on which it relies to conclude that defendant Hospital and its counsel were precluded from arguing that the Bovie was inadvertently or accidentally unholstered justify its sanctions award. We do not retain jurisdiction.

ROBINSON v ST JOHN HEALTH, No. 150573; Court of Appeals No. 324905. By order of December 19, 2014, the application for leave to appeal prior to decision by the Court of Appeals was held in abeyance pending the decision in *Krusac v Covenant Medical Center, Inc* (Docket No. 149270). On order of the Court, the case having been decided on April 21, 2015, 497 Mich 251 (2015), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the December 3, 2014 order of the Oakland Circuit Court that ordered production of an incident report prepared by Providence Hospital. We remand this case to the Oakland Circuit Court for further proceedings consistent with our opinion in *Krusac*. The stay of proceedings in the trial court and the Court of Appeals, ordered on December 19, 2014, is dissolved.

PEOPLE v MARSHA SPRINGER, No. 150692; Court of Appeals No. 323617. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate in part the St. Joseph Circuit Court order of July 24, 2014 denying the defendant's motion for relief from judgment. The issue of entrapment by estoppel was not addressed in the circuit court or by the Court of Appeals in the defendant's appeal of right. Therefore, MCR 6.508(D)(2) does not apply. We remand this case to the trial court to hold a hearing on the defendant's ineffective assistance of counsel arguments pertaining to the issue of entrapment by estoppel. We further order the St. Joseph Circuit Court, in accord with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint

counsel to represent the defendant at the hearing. In all other respects, leave to appeal is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

In re ATTORNEY FEES OF UJLAKY, No. 150887; Court of Appeals No. 316494. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals as to Docket No. 316494, and we remand this case to the Kent Circuit Court for a determination of the reasonableness of the attorney fees requested. The trial court applied the county's fee schedule, which capped compensation for plea cases at $660, but did not address at all the reasonableness of the fee in relation to the actual services rendered, as itemized by the appellant. See *In re Recorder's Court Bar Ass'n*, 443 Mich 110, 131 (1993). Although the expenditure of any amount of time beyond that contemplated by the schedule for the typical case does not, ipso facto, warrant extra fees, spending a significant but reasonable number of hours beyond the norm may. On remand, the trial court shall either award the requested fees, or articulate on the record its basis for concluding that such fees are not reasonable. See, e.g., *In re Attorney Fees of Mullkoff*, 176 Mich App 82, 85-88 (1989), and *In re Attorney Fees of Jamnik*, 176 Mich App 827, 831 (1989). We do not retain jurisdiction.

BREDOW V LAND & CO, No. 150894; Court of Appeals No. 315219. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals opinion discussing plaintiff Gordon Bredow's status as an invitee or a licensee. We nevertheless affirm the result reached by the Court of Appeals because we conclude that, assuming arguendo that the plaintiff remained an invitee throughout his time on the property, the danger was open and obvious and contained no special aspects excepting it from the open and obvious doctrine. See *Hoffner v Lanctoe*, 492 Mich 450, 473 (2012).

PEOPLE V BROCHU, No. 151780; Court of Appeals No. 326479. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the Court of Appeals order granting leave to appeal in part and we remand this case to the Genesee Circuit Court to state whether the court accepted the sentencing agreement that the parties reached for a minimum sentence of eight years for the plea-based armed robbery conviction, pursuant to *People v Killebrew*, 416 Mich 189 (1982), because the present record is insufficient to make this determination. If the agreement was accepted by the trial court, it shall impose the agreed-upon sentence. If the trial court did not accept the agreement, the defendant shall be given the opportunity to withdraw his plea. *Id*. at 194-195.

Leave to Appeal Granted September 30, 2015:

PEOPLE V SWAIN, No. 150994; Court of Appeals No. 314564. The parties shall include among the issues to be briefed: (1) whether the test set forth in *People v Cress*, 468 Mich 678, 692 (2003), for determining whether a defendant is entitled to a new trial based on newly discovered

evidence applies in determining whether a second or subsequent motion for relief from judgment is based on "a claim of new evidence that was not discovered before the first such motion" under MCR 6.502(G)(2); (2) whether the defendant is entitled to a new trial premised on the prosecution's violation of the rule set forth in *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963); (3) by what standard(s) Michigan courts consider a defendant's assertion that the evidence demonstrates a significant possibility of actual innocence in the context of a motion brought pursuant to MCR 6.502(G), and whether the defendant in this case qualifies under that standard; (4) whether the Michigan Court Rules, MCR 6.500, et seq. or another provision, provide a basis for relief where a defendant demonstrates a significant possibility of actual innocence; (5) whether, if MCR 6.502(G) does bar relief, there is an independent basis on which a defendant who demonstrates a significant possibility of actual innocence may nonetheless seek relief under the United States or Michigan Constitutions; and (6) whether the defendant is entitled to a new trial pursuant to MCL 770.1.

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.

MCCORMACK, J., did not participate because of her prior involvement in this case as counsel for a party.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered September 30, 2015:

In re CONTEMPT OF DORSEY, No. 150298; reported below: 306 Mich App 571. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the appellant's challenge to the trial court's order holding her in criminal contempt amounts to an impermissible collateral attack on the trial court's January 14, 2011 order requiring her to submit to drug testing. See *In re Hatcher*, 443 Mich 426, 438 (1993). The parties should not submit mere restatements of their application papers.

CITY OF COLDWATER V CONSUMERS ENERGY COMPANY, No. 151051; Court of Appeals No. 320181. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers. 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 *City of Holland v Consumers Energy Co* (Docket No. 151053).

Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these two cases should be filed in *City of Coldwater v Consumers Energy Co* (Docket No. 151051) only.

CITY OF HOLLAND V CONSUMERS ENERGY COMPANY, No. 151053; Court of Appeals No. 315541. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere

restatements of their application papers. 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 *City of Coldwater v Consumers Energy Co* (Docket No. 151051).

Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these two cases should be filed in *City of Coldwater v Consumers Energy Co* (Docket No. 151051) only.

BOARD OF TRUSTEES OF THE CITY OF PONTIAC POLICE AND FIRE RETIREE PREFUNDED GROUP HEALTH & INSURANCE TRUST v CITY OF PONTIAC, No. 151717; reported below: 309 Mich App 590. The parties shall file supplemental briefs within 42 days of the date of this order addressing the meaning and applicability of the language "to continue to make contributions" in the Emergency Manager's August 1, 2012 order No. 225. The parties should not submit mere restatements of their applications papers.

Leave to Appeal Denied September 30, 2015:

STEPHENS v WORDEN INSURANCE AGENCY, LLC, Nos. 150476 and 150513; Court of Appeals No. 314700.

RICHARD v COMPASSIONATE CARE HOME HEALTH SERVICES, INC, No. 150637; Court of Appeals No. 311767.

In re PORTUS, No. 150753; Court of Appeals No. 309197.

In re ATTORNEY FEES OF UJLAKY, No. 150888; Court of Appeals No. 316809.

PEOPLE v OLRICH, Nos. 150975 and 150976; Court of Appeals Nos. 324580 and 324581. The application is denied without prejudice to the defendant pursuing, through a motion for relief from judgment under MCR subchapter 6.500, his challenge to the circuit court's imposition of consecutive sentences for his pleas, which he failed to timely raise with the circuit court. See MCR 6.429(B)(3). The motion for peremptory reversal and the motion for appeal bond are denied.

PANTALL GALLUP, LLC v ALNOURI and EXPRESS OIL CO v PANTALL GALLUP, LLC, Nos. 151018 and 151019; Court of Appeals Nos. 314852 and 314855.

PEOPLE v ZUGARO, No. 151027; Court of Appeals No. 319335.

WEST MICHIGAN FILM LLC v METZ, No. 151205; Court of Appeals No. 319119.

PEOPLE v WILLIAM WHITE, No. 151349; Court of Appeals No. 325215.

In re WATTERS/JORDAN, No. 152202; Court of Appeals No. 326418.

In re MOTTWEILER, Nos. 152208 and 152209; Court of Appeals Nos. 325278 and 325279.

In re WARE, No. 152300; Court of Appeals No. 322566.

In re JUAREZ/CLARK, No. 152341; Court of Appeals No. 328746.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered October 9, 2015:

PEOPLE v URIBE, No. 151899; reported below: 310 Mich App 467. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the Eaton Circuit Court abused its discretion in denying the admission of testimony offered under MCL 768.27a and whether the Court of Appeals properly applied *People v Watkins*, 491 Mich 450 (2012), in reversing the circuit court. The parties should not submit mere restatements of their application papers.

LARSEN, J. Although I intend to participate in the forthcoming oral argument on the application for leave to appeal, I did not participate in the entry of this order because the Court considered it before I assumed office and my vote is not outcome-determinative.

Leave to Appeal Denied October 9, 2015:

MAGDICH & ASSOCIATES, PC v NOVI DEVELOPMENT ASSOCIATES, LLC, No. 149546; reported below: 305 Mich App 272.

VIVIANO, J. (*dissenting*). I respectfully dissent from the Court's order denying defendant's application for leave to appeal. I would grant leave to appeal to consider whether the Court of Appeals erred in interpreting and applying the plain language of MCR 2.403(M) and *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549; 640 NW2d 256 (2002), to dismiss defendant's counterclaims that were not yet added to the case at the time of case evaluation.

In this case, defendant moved to amend its countercomplaint to add certain new claims that arose while the action was pending. The trial court took the motion under advisement and, several months later, while the motion was still pending, the parties proceeded to case evaluation. The panel issued an award, which both parties accepted without qualification, and plaintiff timely paid the award. Thereafter, the trial court granted defendant's motion to amend the countercomplaint. Plaintiff then moved to dismiss the action with prejudice, arguing that a dismissal under MCR 2.403(M)(1) is "deemed to dispose of all claims in the action . . . ." However, the trial court denied the motion with respect to the newly added claims, explaining that the court had created the situation by failing to rule on the motion to amend sooner.

On appeal, the Court of Appeals issued a published opinion, reversing the trial court's denial order, and concluding that, under MCR 2.403(M)(1) and *CAM Constr*, dismissal was required on all claims in the action, including those claims that were added after the parties had accepted the case evaluation. *Magdich & Assoc, PC v Novi Dev Assoc, LLC*, 305 Mich App 272; 851 NW2d 585 (2014).

Defendant has now sought leave to appeal in this Court, and I write separately because, in my view, neither the plain language of MCR 2.403(M) nor *CAM Constr* support a conclusion that claims that a party seeks to add by filing a motion to amend but that are not yet added to the case by the court at the time of case evaluation are "claims in the action."

In *CAM Constr*, before the case was submitted for case evaluation, the trial court summarily dismissed one of the plaintiff's claims. *CAM Constr*, 465 Mich at 551. After accepting the case evaluation, the plaintiff sought to challenge the trial court's partial summary dismissal. *Id*. at 552. Relying on the dictionary definitions of "claim" and "action," this Court concluded that "the action encompasses the claims asserted." *Id*. at 555. This Court then held that a party may not challenge a summarily dismissed claim after the party has accepted a case evaluation because "[t]he language of MCR 2.403(M)(1) could not be more clear that accepting a case evaluation means that *all claims* in the *action*, even those summarily disposed, are dismissed." *Id*.

Extending the rationale of *CAM Constr* to this case, the Court of Appeals cursorily interpreted "all claims in the action" to include claims that a party seeks to add by filing a motion to amend, even though the claims were not actually added to the action until after case evaluation. *Magdich*, 305 Mich App at 279-280. The Court of Appeals also noted that while "claims seeking equitable relief" may be exempted from case evaluation, the rule "does not exempt any other type of claim . . . ." *Id*. at 279. However, in my view, this analysis does not in any way inform the relevant inquiry: whether claims not yet added by the court are "claims in the action" in the first place. I believe the Court of Appeals missed the critical distinction between the facts of *CAM Constr* and those in this case. *CAM Constr* involved claims that were disposed of in some fashion before case evaluation, whereas this case involved claims that had never been substantively addressed by the court.

A more accurate interpretation of "all claims in the action" would be all claims that were actually made part of the action at some point before the parties accepted the case evaluation. As this Court explained in *CAM Constr*, an "action" is a "judicial proceeding" and a "claim" "consists of facts giving rise to a right asserted in a judicial proceeding." *CAM Constr*, 465 Mich at 555. At the time the parties accepted the case evaluation, defendant's only claims asserted in the action were those raised in the original countercomplaint because defendant's motion to amend was still pending before the trial court. In other words, the additional claims had yet to formally become part of the action. Thus, contrary to *CAM Constr*, the claims at issue had not yet been "asserted" or made part of the case. I therefore view the Court of Appeals' opinion as an improper extension of *CAM Constr*.

Moreover, as this case shows, the rule established by the Court of Appeals does not comport with logic or common sense. I disagree with the Court of Appeals that defendant was obligated to move "to remove [the matter from case evaluation] or adjourn the matter until a ruling was rendered on the motion to amend its counterclaim." *Magdich*, 305 Mich App at 280. Defendant acted timely to add new claims to a

pending action between the same parties (a practice that should be encouraged).[1] The trial judge took the motion under advisement but did not rule on it for several months (something defendant had no control over). Had the trial court timely ruled on defendant's motion, defendant could have pursued its claims in this action (if the motion had been granted) or by filing a separate complaint (if it had been denied). Instead, simply because the trial court "dragged its feet," defendant's right to prosecute its new claims was extinguished. I believe that contorting MCR 2.403(M)(1) as the Court of Appeals has done here is unfair to litigants, like defendant, who are entitled to rely on the plain language of our court rules.[2]

As the Court of Appeals stated, "[t]he purpose of the case evaluation rule is to expedite and simplify the final settlement of cases to avoid a trial." *Magdich*, 305 Mich App at 279. But contrary to the Court of Appeals' opinion, I believe that purpose would be more aptly met by requiring trial courts to dismiss only those claims that were formally made part of the action at or before the time the parties accepted the case evaluation. This would ensure that the parties understand what claims they are agreeing to dismiss when they accept the case evaluation, particularly when, as here, there are pending motions to amend complaints or countercomplaints.

For these reasons, I would grant leave to appeal.

BERNSTEIN, J., joined the statement of VIVIANO, J.

PEOPLE v SWEENEY, No. 152355; Court of Appeals No. 329335.

Summary Disposition October 15, 2015:

PEOPLE v CUMMINGS, No. 150116; Court of Appeals No. 312583. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate in part the judgment of the Court of Appeals, and we remand this case to the Kent Circuit Court. A sentencing judge may make a sentence imposed for first-degree criminal sexual conduct consecutive to any term of imprisonment imposed for any other criminal offense arising from the same transaction. MCL 750.520b(3). The sentencing judge in this case failed to identify any evidence from which one could conclude that the imposition of consecutive sentences was warranted. On remand, the trial court shall either issue an order that provides a basis for its conclusion that the two criminal offenses arose from the same transaction, or resentence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions

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[1] Because the new claims did not arise out of the same transaction or occurrence as the pending claims, defendant was not required to bring them in the same action. See MCR 2.203(A).

[2] It is well established that a court rule is to be interpreted according to its plain language. *Fraser Trebilcock Davis & Dunlap PC v Boyce Trust 2350*, 497 Mich 265, 271; 870 NW2d 494 (2015).

presented should be reviewed by this Court. The motion to file a rebuttal to the prosecution's answer is granted. We do not retain jurisdiction.

Leave to Appeal Denied October 15, 2015:

In re THOMPSON, No. 151033; Court of Appeals No. 322228.

PEOPLE V JAMES COOPER, No. 151211; reported below: 309 Mich App 155.

PEOPLE V ROYSTER, No. 151357; Court of Appeals No. 318025.

PEOPLE V DEMETRIUS EDWARDS, No. 151785; Court of Appeals No. 318000.

PEOPLE V BAILEY, No. 152001; reported below: 310 Mich App 703.

Summary Disposition October 16, 2015:

COALITION PROTECTING AUTO NO-FAULT V MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION, No. 150001; reported below: 305 Mich App 301. On October 13, 2015, the Court heard oral argument on the application for leave to appeal the May 20, 2014 judgment of the Court of Appeals. The application 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 opinion holding that MCL 500.134(4) does not violate art 4, § 25 of the Michigan Constitution. In its opinion, the Court of Appeals assumed without deciding that the Michigan Catastrophic Claims Association (MCCA) is a "public body." We remand this case for reconsideration of this issue. On remand, the Court of Appeals is directed to decide the issue whether the MCCA is a "public body" subject to the Freedom of Information Act, MCL 15.231 *et seq*., under MCL 15.232(d). Compare MCL 15.232(d)(*iv*) (a "public body" includes "[a]ny other body which is created by state or local authority") and *League Gen Ins Co v Michigan Catastrophic Claims Ass'n*, 435 Mich 338, 351 (1990) (holding that the MCCA is not a "state agency" but a "private association"); see also 1988 PA 349, § 2 (providing "legislative intent" pertaining to the status of the MCCA). The Court of Appeals shall then reconsider whether MCL 500.134(4) violates art 4, § 25 in light of its resolution of that issue. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

Leave to Appeal Denied October 16, 2015:

KING V PARK WEST GALLERIES, INC, No. 151115; Court of Appeals No. 314188.

MARKMAN, J. (*dissenting*). Plaintiff purchaser sued defendant art merchant in 2010 for an allegedly fraudulent transaction, accompanied by a certificate of authenticity, that occurred in 1999. I would grant leave to appeal to address the extent to which a false representation by

a merchant, express or implied, including but not limited to the issuance of a certificate of authenticity by that merchant, can under the fraudulent concealment statute, MCL 600.5855, serve to toll, potentially indefinitely, the period of limitations as to the underlying fraudulent transaction. See MCL 600.5807(8) (providing the lengthiest potential period of limitations in this case, six years for breach of contract); see also MCL 442.322(a) (providing that a certificate of authenticity from an art merchant to a purchaser, as in this case, creates an express warranty of authenticity).

LARSEN, J., did not participate in the disposition of this matter because the Court considered it before she assumed office and her vote is not outcome-determinative.

PEOPLE v ANTONIO LEWIS, No. 151514; Court of Appeals No. 318294.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal and would instead grant leave to address how trial courts should evaluate a defendant's request for self-representation after trial has started.

Defendant was charged with first-degree murder. He requested court-appointed counsel, but between jury empanelment and opening statements, defendant requested to represent himself. He expressed his belief that his lawyer did not fully understand aspects of his case and that it would be more effective for him to represent himself than to explain everything to her. The trial court denied defendant's request, asserting that although defendant's waiver of counsel was unequivocal and intelligently made, proceeding without counsel would unduly burden and inconvenience the proceeding.

Following trial, defendant was convicted, but his conviction was vacated by the Court of Appeals. The Court concluded that the trial court had abused its discretion in failing to articulate facts showing that defendant's waiver would unduly burden or inconvenience the trial. It further noted that nothing on the record suggested that defendant did not fully understand the proceedings, that he would be disruptive or overly emotional, or that he sought to advance a markedly different theory of defense than his lawyer had developed. *People v Lewis*, unpublished opinion per curiam of the Court of Appeals, issued March 5, 2015 (Docket No. 318294), pp 16-17.

This Court addressed a similar situation in *People v Hill*, 485 Mich 912 (2009) (*Hill I*); see also *Hill v Curtin*, 792 F3d 670 (CA 6, 2015) (en banc) (denying habeas corpus relief) (*Hill II*). In *Hill I*, the trial court denied as untimely the defendant's day-of-trial request to represent himself. The defendant then appealed his conviction in the Court of Appeals, arguing that he had been denied his constitutional right of self-representation. That Court upheld the conviction, and this Court affirmed in part with respect to the self-representation issue, albeit for a different reason, observing that the "defendant's request was not timely and granting the request at that moment would have disrupted, unduly inconvenienced, and burdened the administration of the court's

business." *Hill I*, 485 Mich at 912. Hill then unsuccessfully petitioned for a writ of habeas corpus in federal district court. On appeal, after a panel of the United States Court of Appeals for the Sixth Circuit reversed the district court and vacated Hill's conviction, the Sixth Circuit, sitting en banc, vacated the panel's decision and affirmed the district court. *Hill II*, 792 F3d at 674. See also *Jones v Bell*, 801 F3d 556 (CA 6, 2015) (Docket No. 14-1014, issued August 13, 2015) (reversing a grant of habeas corpus relief when the defendant sought on the day of trial to represent himself).

The en banc court explained in *Hill II* that the governing United States Supreme Court case, *Faretta v California*, concerned a defendant seeking to represent himself "weeks before trial." *Hill II*, 792 F3d 678-679, quoting *Faretta v California*, 422 US 806, 835 (1975). *Faretta* thus afforded no guidance concerning whether a day-of-trial request for self-representation is untimely. *Hill II*, 792 F3d at 678-679. By contrast, the Court of Appeals in this case relied heavily on *Faretta* in vacating defendant's conviction and gave little attention to the interpretation of the constitutional right of self-representation articulated in our *Hill I* order.

The record shows that defendant (1) had earlier requested appointed counsel, (2) had months to decide whether to represent himself, (3) stated that he had not seriously considered self-representation until the start of trial, (4) stated that he had done no preparation to represent himself, (5) stated that he was satisfied with his lawyer's representation, (6) could not cogently articulate how he could do better than his appointed lawyer, and (7) was ill-informed about the rules of evidence and procedure. Given these facts, I would grant leave to more closely assess the trial court's decision to deny defendant's motion for self-representation. I believe both that trial courts generally could benefit from our guidance about how to evaluate requests for self-representation after trial has started and that this case specifically deserves closer review.

LARSEN, J., did not participate in the disposition of this matter because the Court considered it before she assumed office and her vote is not outcome-determinative.

In re LJN, Nos. 152306 and 152307; Court of Appeals Nos. 324256 and 324283.

Leave to Appeal Denied Following Oral Argument October 16, 2015:

BERNSTEIN v SEYBURN, KAHN, GINN, BESS, & SERLIN, PC, No. 149032; Court of Appeals No. 313894. 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 December 12, 2014. The application for leave to appeal the February 20, 2014 judgment of the Court of Appeals is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court.

Appeal Dismissed on Stipulation October 16, 2015:

GLAUBIUS v GLAUBIUS, No. 150206; reported below: 306 Mich App 157.

Reconsideration Denied October 20, 2015:

In re BARTLETT, No. 152098; Court of Appeals No. 323962. Leave to appeal denied at 498 Mich 869.

BARTLETT v ALLEGAN COUNTY DEPARTMENT OF HUMAN SERVICES, No. 152124; Court of Appeals No. 327201. Leave to appeal denied at 498 Mich 880.

BARTLETT v KALAMAZOO COUNTY DEPARTMENT OF HUMAN SERVICES, No. 152126; Court of Appeals No. 327262. Leave to appeal denied at 498 Mich 880.

Leave to Appeal Denied October 21, 2015:

PEOPLE v EDWARD PINKNEY, No. 152425; Court of Appeals No. 325856.

Leave to Appeal Denied October 23, 2015:

WILLIAMS v FANNIE MAE, No. 152356; Court of Appeals No. 321677.

Reconsideration Denied October 23, 2015:

In re JEZOWSKI, Nos. 152165 and 152166; Court of Appeals Nos. 325112 and 325116. Leave to appeal denied at 498 Mich 877.

In re JACO/ROBINSON, No. 152178; Court of Appeals No. 323922. Leave to appeal denied at 498 Mich 877.

Summary Disposition October 28, 2015:

PEOPLE v VICTOR CORPUZ, No. 150320; Court of Appeals No. 315068. 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 that vacated the defendant's sentences and remanded for resentencing, and we remand this case to the Court of Appeals for reconsideration in light of *Lockridge*. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

CONSUMERS ENERGY COMPANY v DEPARTMENT OF TRANSPORTATION, Nos. 150520 and 150521; Court of Appeals Nos. 316038 and 316131. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part Parts III.A. and III.B. of the Court of Appeals opinion, and we remand this case to the Court of Claims for reconsideration and application of the Detroit Edison decision and of the defendant's

reasonable formula or method for determining the percentage of exempt use to total use. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

In re CM, No. 150647; Court of Appeals No. 322913. 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 GASTON, Nos. 151257 and 151296; Court of Appeals No. 319018. 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 that vacated the defendant's sentence and remanded for resentencing, and we remand this case to the Court of Appeals for reconsideration in light of *People v Lockridge*, 498 Mich 358 (2015). In all other respects, leave to appeal is denied because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v JASON DONALD JOHNSON, No. 151813; Court of Appeals No. 326504. 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 defendant's preserved issue.

PEOPLE v TROY BUSH, No. 152293; Court of Appeals No. 326658. 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 Remanding Cases to Trial Courts for Further Proceedings in Light of People v Lockridge, *498 Mich 358 (2015) Entered October 28, 2015:*

PEOPLE v BANNISTER, No. 147920; Court of Appeals No. 317265.

PEOPLE v CARLOS BRAGG, No. 147978; Court of Appeals No. 310200.

PEOPLE v SCHWEBACH, No. 148151; Court of Appeals No. 314839.

PEOPLE v CARSWELL, No. 148244; Court of Appeals No. 316807.

PEOPLE v PAQUETTE, No. 148258; Court of Appeals No. 315907.

PEOPLE v HULTBERG, No. 148303; Court of Appeals No. 314845.

PEOPLE v SAVAGE, No. 148330; Court of Appeals No. 317783.

PEOPLE v SUSORNEY, No. 148447; Court of Appeals No. 317685.

PEOPLE v NARD, No. 148533; Court of Appeals No. 318527.

PEOPLE v ROBY, No. 148544; Court of Appeals No. 311221.

PEOPLE v ERICKSON, No. 148589; Court of Appeals No. 318832.

PEOPLE v O'KEEFE, No. 148656; Court of Appeals No. 319135.

PEOPLE v HERRON, No. 148677; Court of Appeals No. 309320.

PEOPLE v HARRELL, No. 148693; Court of Appeals No. 318728.

PEOPLE v RYAN, No. 148714; Court of Appeals No. 318579.

PEOPLE v REED, No. 148744; Court of Appeals No. 310803.

PEOPLE v BYERS, No. 148758; Court of Appeals No. 314021.

PEOPLE v YANNA, No. 148794; Court of Appeals No. 318881.

PEOPLE v ODOM, No. 148818; Court of Appeals No. 304699.

PEOPLE v KOHLHOFF, No. 148833; Court of Appeals No. 312456.

PEOPLE v DEWEESE, No. 148839; Court of Appeals No. 319125.

PEOPLE v WALLS, No. 148896; Court of Appeals No. 307647.

PEOPLE v FRISKEY, No. 148908; Court of Appeals No. 318562.

PEOPLE v COTTON, No. 148930; Court of Appeals No. 306454.

PEOPLE v SALTSMAN, No. 148938; Court of Appeals No. 319333.

PEOPLE v TAYATA DAVIS, No. 148993; Court of Appeals No. 320025.

PEOPLE v HENDRICKS, No. 149103; Court of Appeals No. 311573.

PEOPLE v MELTON, No. 149104; Court of Appeals No. 319918.

PEOPLE v DANGELO OWENS, No. 149206; Court of Appeals No. 313073.

PEOPLE v BREWER, No. 149232; Court of Appeals No. 319549.

PEOPLE v MALM, No. 149313; Court of Appeals No. 312486.

PEOPLE v LESTER, No. 149359; Court of Appeals No. 320461.

PEOPLE v PIPES, No. 149442; Court of Appeals No. 312751.

PEOPLE v OCTAVIOUS DEAN, No. 149447; Court of Appeals No. 313817.

PEOPLE v TERRELL LEWIS, No. 149463; Court of Appeals No. 313451.

PEOPLE v COLEMAN, No. 149534; Court of Appeals No. 321029.

PEOPLE v RUIZ, No. 149588; Court of Appeals No. 313087.

PEOPLE v EARNEST, No. 149628; Court of Appeals No. 321095.

PEOPLE v LABADIE, No. 149697; Court of Appeals No. 313883.

PEOPLE v BUCKNER, No. 149706; Court of Appeals No. 321327.

PEOPLE v MICHEAU, No. 149713; Court of Appeals No. 310471.

PEOPLE v SCRUGGS, No. 149719; Court of Appeals No. 321950.

PEOPLE v DAVID NEAL, No. 149726; Court of Appeals No. 314788.

PEOPLE v MANN, No. 149738; Court of Appeals No. 321407.

PEOPLE v MAZZIO, No. 149744; Court of Appeals No. 314685.

PEOPLE v ORRICK, No. 149789; Court of Appeals No. 321499.

PEOPLE v TRON ROBINSON, No. 149809; Court of Appeals No. 313131.

PEOPLE v AARONN OWENS, No. 149817; Court of Appeals No. 315046.

PEOPLE v RAFEAL DEAN, No. 149837; Court of Appeals No. 316101.

PEOPLE v JESSIE, No. 149849; Court of Appeals No. 310869.

PEOPLE v CEDRIC DAVIS, No. 149982; Court of Appeals No. 310542.

PEOPLE v DOLLEY, No. 150000; Court of Appeals No. 321759.

PEOPLE v PAYNE, No. 150021; Court of Appeals No. 322030.

PEOPLE v JEFFREY ALLEN, No. 150035; Court of Appeals No. 322579.

PEOPLE v PARHAM, No. 150044; Court of Appeals No. 322502.

PEOPLE v LANOUE, No. 150123; Court of Appeals No. 315720.

PEOPLE v SLONE, No. 150131; Court of Appeals No. 315026.

PEOPLE v ROSALINDA MARTINEZ, No. 150149; Court of Appeals No. 322937.

PEOPLE v CHARLES EDWARD JACKSON, No. 150184; Court of Appeals No. 313455.

PEOPLE v MICHAEL CORPUZ, No. 150187; Court of Appeals No. 315059.

PEOPLE v RODRICK JACKSON, No. 150188; Court of Appeals No. 322273.

PEOPLE v UYEDA, No. 150203; Court of Appeals No. 315170.

PEOPLE v KEITH HOWELL, No. 150205; Court of Appeals No. 322627.

PEOPLE v DERRIEN BROWN, No. 150244; Court of Appeals No. 321720.

PEOPLE v WIGGINS, No. 150258; Court of Appeals No. 316049.

PEOPLE v MANN, No. 150272; Court of Appeals No. 322717.

PEOPLE v COATES, No. 150285; Court of Appeals No. 322638.

PEOPLE v TATUM, No. 150289; Court of Appeals No. 322649.

PEOPLE v DENZEL SIMMONS, No. 150299; Court of Appeals No. 316426.

PEOPLE v DIETZ, No. 150356; Court of Appeals No. 323008.

PEOPLE v GUTIERREZ, No. 150368; Court of Appeals No. 315057.

PEOPLE v GALLOWAY, No. 150454; reported below: 307 Mich App 151.

PEOPLE v KYLE COOPER, No. 150463; Court of Appeals No. 315919.

PEOPLE v FONTYN, No. 150477; Court of Appeals No. 322755.

PEOPLE v GLASPIE, No. 150478; Court of Appeals No. 323632.

PEOPLE v PLONSKI, No. 150500; Court of Appeals No. 323282.

PEOPLE v LINDSLEY, No. 150504; Court of Appeals No. 323216.

PEOPLE v MINOR, No. 150595; Court of Appeals No. 315281.

PEOPLE v ISAAC, No. 150673; Court of Appeals No. 323605.

PEOPLE v LEONARD, No. 150737; Court of Appeals No. 317378.

PEOPLE v THOMAS LOPEZ, No. 150739; Court of Appeals No. 316866.

PEOPLE v SCARBERRY, No. 150812; Court of Appeals No. 317183.

PEOPLE v JAMES HORN, No. 150833; Court of Appeals No. 316757.

PEOPLE v BREWER, No. 150909; Court of Appeals No. 316638.

PEOPLE v DERSHEM, No. 150948; Court of Appeals No. 324051.

PEOPLE v RUSSEY, No. 150959; Court of Appeals No. 324147.

PEOPLE v STOCKS, No. 150998; Court of Appeals No. 324513.

PEOPLE v SIDNEY EDWARDS, No. 151035; Court of Appeals No. 318023.

PEOPLE v MITCHELL YOUNG, No. 151059; Court of Appeals No. 317981.

PEOPLE v HURSLEY, No. 151163; Court of Appeals No. 324866.

PEOPLE v MARTEZ CLEMONS, No. 151208; Court of Appeals No. 314335.

PEOPLE v GUNN, No. 151242; Court of Appeals No. 318065.

PEOPLE v GILYARD, No. 151320; Court of Appeals No. 325455.

PEOPLE v NGUYEN, No. 151354; Court of Appeals No. 325086.

PEOPLE v JOHN CHARLESTON, No. 151360; Court of Appeals No. 320128.

PEOPLE v SAEJAR PARKER, No. 151372; Court of Appeals No. 319089.

PEOPLE v CHRISTOPHER SIMPSON, No. 151399; Court of Appeals No. 325645.

PEOPLE v MATSEY, No. 151403; Court of Appeals No. 319076.

PEOPLE v KELWIN EDWARDS, No. 151409; Court of Appeals No. 318092.

PEOPLE v HAGGARD, No. 151418; Court of Appeals No. 318625.

PEOPLE v SHIFLETT, No. 151561; Court of Appeals No. 325758.

PEOPLE v BRIAN MILLER, No. 151642; Court of Appeals No. 324398.

PEOPLE v ROMAYA, No. 151673; Court of Appeals No. 319388.

PEOPLE v DEMETRIUS HUDSON, No. 151682; Court of Appeals No. 319569.

PEOPLE v ADAMS, No. 151770; Court of Appeals No. 326269.

PEOPLE v MASSENGALE, No. 151880; Court of Appeals No. 326576.

Leave to Appeal Denied October 28, 2015:

PEOPLE v RACINE, No. 148629; Court of Appeals No. 318449.

PEOPLE v MOSBY, No. 148643; Court of Appeals No. 318792.

PEOPLE v SOLERNORONA, No. 148761; Court of Appeals No. 311641.

PEOPLE v DETRICK WILLIAMS, No. 148809; Court of Appeals No. 319277.

PEOPLE v FELTON, No. 148829; Court of Appeals No. 319327.

VIVIANO, J., did not participate due to a familial relationship with a presiding circuit court judge in this case.

PEOPLE v PRUITTE, No. 148917; Court of Appeals No. 319543.

PEOPLE v MICHAEL COOPER, No. 148939; Court of Appeals No. 313562.

PEOPLE v ROMERO NEAL, No. 148969; Court of Appeals No. 319545.

PEOPLE v MARIO LEE, No. 148985; Court of Appeals No. 320094.

PEOPLE v LINDEMEYER, No. 149261; Court of Appeals No. 320401.

PEOPLE v MENEREY, No. 149543; Court of Appeals No. 321093.

PEOPLE v HULLIHEN, No. 149625; Court of Appeals No. 315371.

PEOPLE v WOODSON, No. 150049; Court of Appeals No. 322034.

PEOPLE v LEE BARNES, No. 150090; Court of Appeals No. 322341.

PEOPLE v MORTON, No. 150251; Court of Appeals No. 315765.

PEOPLE v DONALD TAYLOR, No. 150409; Court of Appeals No. 321927.

PEOPLE v KUPRES, No. 150443; Court of Appeals No. 316044.

PEOPLE v MORGAN, No. 150460; Court of Appeals No. 310643.

PEOPLE v BEARD, No. 150503; Court of Appeals No. 323164.

PEOPLE v TARUS RICHARDSON, No. 150544; Court of Appeals No. 323366.

PEOPLE v SAUMIER, No. 150605; Court of Appeals No. 317694.

PEOPLE v JAMES STANLEY, No. 150682; Court of Appeals No. 323571.

PEOPLE v DEWAUN SMITH, No. 150706; Court of Appeals No. 324221.

PEOPLE v IRWIN, No. 150733; Court of Appeals No. 315852.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v TOLBERT, No. 150778; Court of Appeals No. 324236.

PEOPLE v GOODWIN, No. 150958; Court of Appeals No. 320591.

PEOPLE v KENDRICK CAMPBELL, No. 151020; Court of Appeals No. 324556.

GONZALEZ v RUSTY WALLACE RACING EXPERIENCE, No. 151052; Court of Appeals No. 319471.

PEOPLE v MIRANDA BUTLER, No. 151074; Court of Appeals No. 325205.

BONACCI v FERRIS STATE UNIVERSITY, Nos. 151098 and 151099; Court of Appeals Nos. 318136 and 319101.

CITY OF RIVER ROUGE v EES COKE BATTERY COMPANY, LLC, and EES COKE BATTERY, LLC v CITY OF RIVER ROUGE, and DETROIT EDISON COMPANY v CITY OF RIVER ROUGE, Nos. 151164, 151170, 151165, 151166, 151167, 151168, and 151169; Court of Appeals Nos. 314789, 315638, 315621, 315632, 315633, 315634, and 315635.

FORD MOTOR COMPANY v CITY OF ALLEN PARK, Nos. 151224 and 151225; Court of Appeals Nos. 322628 and 323340.

MARJORIE R BROWN TRUST v MORGAN STANLEY SMITH BARNEY, LLC, No. 151261; Court of Appeals No. 317993.

PEOPLE v RODEA, No. 151313; Court of Appeals No. 308935.

PEOPLE v MARDIS, No. 151314; Court of Appeals No. 325646.

SIMS TOWNSHIP v ARENAC COUNTY DRAIN COMMISSIONER, Nos. 151329 and 151330; Court of Appeals Nos. 318041 and 318096.

COURTS OF HOLT NURSING AND REHABILITATION v JENKINS, No. 151388; Court of Appeals No. 324233.

PEOPLE v KIRKLAND, No. 151404; Court of Appeals No. 325729.

PEOPLE v HOUDE, No. 151413; Court of Appeals No. 325587.

DEUTSCHE BANK NATIONAL TRUST COMPANY v JONES, No. 151423; Court of Appeals No. 319231.

PEOPLE v STALLARD, No. 151431; Court of Appeals No. 318708.

PEOPLE v AARON WASHINGTON, No. 151435; Court of Appeals No. 318941.

PEOPLE v KENNETH ANTHONY TAYLOR, No. 151442; Court of Appeals No. 318526.

PEOPLE v RAY, No. 151450; Court of Appeals 325911.

CHAMBLISS v WELLS FARGO BANK, NA, No. 151487; Court of Appeals No. 324159.

PEOPLE v BENVENUTO, No. 151497; Court of Appeals No. 318896.

PEOPLE v LANCE, No. 151502; Court of Appeals No. 318478.

LEONARD v WAYNE STATE UNIVERSITY, Nos. 151507 and 151508; Court of Appeals Nos. 323569 and 323588.

BERNSTEIN, J., did not participate.

PEOPLE v CRAIG LEWIS, No. 151509; Court of Appeals No. 319640.

PEOPLE v MARCOS MARTINEZ, No. 151518; Court of Appeals No. 319629.

LEONARD v WAYNE STATE UNIVERSITY, No. 151525; Court of Appeals No. 323569.

BERNSTEIN, J., did not participate.

PEOPLE v GRADY HUDSON, No. 151527; Court of Appeals No. 318732.

PEOPLE v GIBBINS, No. 151533; Court of Appeals No. 317442.

PEOPLE v ODELL, No. 151541; Court of Appeals No. 325964.

PEOPLE v OLIVER, No. 151559; Court of Appeals No. 318411.

PEOPLE v HOGAN, No. 151575; Court of Appeals No. 321214.

PEOPLE v CHARLES ANTHONY JACKSON, No. 151603; Court of Appeals No. 319254.

PEOPLE v BARTNICK, No. 151609; Court of Appeals No. 325779.

PEOPLE v TATE, No. 151637; Court of Appeals No. 324399.

PEOPLE v DWIGHT THOMPSON, No. 151643; Court of Appeals No. 324532.

RAINBOW CONSTRUCTION, INC v HOWELL TWP, No. 151651; Court of Appeals No. 318591.

PEOPLE v NYE, No. 151652; Court of Appeals No. 325093.

REVERSE MORTGAGE SOLUTIONS, INC v ESTATE OF OSCAR L BATCHELOR, No. 151655; Court of Appeals No. 322927.

PEOPLE v ROY BLACK, No. 151670; Court of Appeals No. 313449.

PEOPLE v DEWEY, No. 151678; Court of Appeals No. 326116.

HODNETT v ALRO STEEL CORPORATION, No. 151690; Court of Appeals No. 320302.

BERNSTEIN, J., did not participate due to his prior relationship with the Sam Bernstein Law Firm.

PEOPLE v BRIAN RICHARDSON, No. 151705; Court of Appeals No. 325954.

PEOPLE v WICKWARE, No. 151721; Court of Appeals No. 318170.

PEOPLE v BRASSEUR, No. 151736; Court of Appeals No. 319285.

PEOPLE v ELZER, No. 151738; Court of Appeals No. 320569.

PEOPLE v GUZMAN-CORTEZ, No. 151739; Court of Appeals No. 319212

PEOPLE v CHRISTOPHER WALLACE, No. 151742; Court of Appeals No. 321096.

PEOPLE v ANDRE BROWN, No. 151749; Court of Appeals No. 325419.

PEOPLE v MCKNIGHT, No. 151759; Court of Appeals No. 319979.

PEOPLE v JOHN SANDERS, No. 151771; Court of Appeals No. 320247.

US BANK NATIONAL ASSOCIATION v CARSWELL, No. 151789; Court of Appeals No. 320416.

MARKS v REVERSE MORTGAGE SOLUTIONS, INC, No. 151803; Court of Appeals No. 320211.

PEOPLE v MICHAEL LEWIS, No. 151819; Court of Appeals No. 320219.

PEOPLE v LANDERS, No. 151821; Court of Appeals No. 320069.

PEOPLE v VILLANUEVA, No. 151825; Court of Appeals No. 326498.

PEOPLE v CHRISTIAN BELL, No. 151826; Court of Appeals No. 315196.

PEOPLE v SHAW, No. 151828; Court of Appeals No. 326804.

PEOPLE v MALOY, No. 151833; Court of Appeals No. 317929.

PEOPLE v FARRSIAR, No. 151838; Court of Appeals No. 320376.

PEOPLE v HOWE, No. 151846; Court of Appeals No. 326439.

PEOPLE v VINCENT, No. 151853; Court of Appeals No. 326807.

PEOPLE v CLAUDE HENDERSON, No. 151854; Court of Appeals No. 326490.

PEOPLE v FRANKIE DAVIS, No. 151859; Court of Appeals No. 320326.

PEOPLE v BLACK-WICKLIFFE, No. 151863; Court of Appeals No. 326472.

PEOPLE v TAMAINE FOSTER, No. 151903; Court of Appeals No. 320136.

PEOPLE v HARTMAN, No. 151931; Court of Appeals No. 320032.

GARVIN v DETROIT BOARD OF EDUCATION, No. 151997; Court of Appeals No. 319557.

PEOPLE v IANNUCCI, No. 152023; Court of Appeals No. 323604.

PEOPLE v PLAIN, No. 152129; Court of Appeals No. 322358.

WEHBE v WEHBE, No. 152285; Court of Appeals No. 325847.

Reconsideration Denied October 28, 2015:

PEOPLE v WAGNER, No. 150702; Court of Appeals No. 316316. Leave to appeal denied at 497 Mich 1041.

BEGININ v THOMAS HOSPITALITY GROUP, INC, No. 150845; Court of Appeals No. 317515. Leave to appeal denied at 498 Mich 853.

AARON v CBS OUTDOORS, INC, No. 150900; Court of Appeals No. 317552. Leave to appeal denied at 498 Mich 853.

In re JMD, No. 151718; Court of Appeals No. 324899. Leave to appeal denied at 498 Mich 868.

In re JSF, No. 151733; Court of Appeals No. 322859. Leave to appeal denied at 498 Mich 868.

Summary Disposition October 29, 2015:

PEOPLE v ANTHONY SPRINGER, No. 150645; Court of Appeals No. 323616. On the Court's own motion, we vacate our order of July 28, 2015. On order of the Court, the application for leave to appeal the October 27, 2014 order of the Court of Appeals is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate in part the St. Joseph Circuit Court order of July 24, 2014 denying the defendant's motion for relief from judgment. The issue of entrapment by estoppel was not addressed in the circuit court or by the Court of Appeals in the defendant's appeal of right. Therefore, MCR 6.508(D)(2) does not apply. We remand this case to the trial court to hold a hearing on the defendant's ineffective assistance of counsel arguments pertaining to the issue of entrapment by estoppel. We further order the St. Joseph Circuit Court, in accord with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint counsel to represent the defendant at the hearing. In all other respects, leave to appeal is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

Summary Disposition October 30, 2015:

PEOPLE v LYLES, No. 150040; Court of Appeals No. 315323. On October 14, 2015, the Court heard oral argument on the application for leave to appeal the July 22, 2014 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 vacate the Court of Appeals judgment and we remand this case to that court.

The Court of Appeals panel correctly stated that "[r]eversal for failure to provide a jury instruction requested by a defendant is unwarranted unless it appears that it is more probable than not that the error was outcome determinative." *People v Lyles*, unpublished opinion per curiam of the Court of Appeals, issued July 22, 2014 (Docket No. 315023), p 4, citing *People v McKinney*, 258 Mich App 157, 163 (2003); MCL 769.26. However, the panel below did not clearly apply that standard. Instead, the panel cited several older cases from this Court that antedated our current harmless error standard for the proposition that a trial court's failure to give a requested and appropriate character evidence instruction "has been repeatedly held as error requiring reversal." *Lyles*, unpub op at 5.

None of these cases applied our current harmless error standard interpreting MCL 769.26, which holds that a "miscarriage of justice" occurs where it " 'affirmatively appear[s]' that it is more probable than

not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 496 (1999). The Court of Appeals panel erred in relying on cases that did not apply the current standard in holding that a miscarriage of justice occurred in this case. On remand, we direct the Court of Appeals to apply our governing standard to the defendant's claim for relief. We do not retain jurisdiction.

PEOPLE v MUHAMMAD, No. 150119; Court of Appeals No. 317054. On October 15, 2015, the Court heard oral argument on the application for leave to appeal the July 29, 2014 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 vacate the Court of Appeals judgment and remand this case to that court for reconsideration. The Court of Appeals erred by applying harmless error analysis without first determining whether the trial court's order dismissing the habitual offender notice was erroneous. See MCR 2.613(A) (stating that a judgment or order of the court may not be vacated, modified, or otherwise disturbed "unless refusal to take this action appears to the court inconsistent with substantial justice"). The prosecutor has conceded that it did not timely serve the habitual offender notice under MCL 769.13. On remand, we direct the Court of Appeals to determine whether the trial court erred by concluding that the proper remedy for the prosecutor's statutory violation was dismissal of the habitual offender notice. See *In re Forfeiture of Bail Bond*, 496 Mich 320 (2014). We do not retain jurisdiction.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered October 30, 2015:

PEOPLE v DOUGLAS, No. 150789; Court of Appeals No. 315027. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether *People v Lockridge*, 498 Mich 358 (2015), by rendering the sentencing guidelines advisory and/or by employing a remedy that does not mandate resentencing, affects (1) whether a defendant can be afforded relief for an unpreserved meritorious challenge to the scoring of offense variables through a claim of ineffective assistance of counsel, see *People v Francisco*, 474 Mich 82, 89 n 8 (2006); and (2) the scope of relief, if any, to which a defendant is entitled when the defendant raises a meritorious challenge to the scoring of an offense variable, whether preserved or unpreserved, and the error changes the applicable guidelines range, whether the defendant's sentence falls within the corrected range or not. See *id*. at 89-90; see also *People v Kimble*, 470 Mich 305, 310 (2004). 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 ANTONIO GLOSTER, No. 151048; Court of Appeals No. 316553. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the defendant was properly assigned 15 points for offense variable (OV) 10, MCL 777.40, for predatory conduct, and in particular, whether the scoring of OV 10 was proper based on the defendant's own conduct, or alternatively, based on the conduct of the defendant's accomplices. See MCL 767.39; cf. *People v Hunt*, 290 Mich App 317, 325-326 (2010) (conviction not based on aiding and abetting), cited in *People v Hardy*, 494 Mich 430, 442 n 32 (2013). 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 October 30, 2015:

In re BARROS/MCEACHERN/STURMAN, No. 152405; Court of Appeals No. 325753.

Reconsideration Denied October 30, 2015:

PEOPLE v SHEENA, No. 149691; Court of Appeals No. 309522. Summary disposition at 497 Mich 1021.

Summary Disposition November 4, 2015:

ZWIERS v GROWNEY, No. 149815; Court of Appeals No. 312133. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the August 6, 2012 order of the Kent Circuit Court granting summary disposition to the defendants on the basis of *Driver v Naini*, 490 Mich 239 (2011). See *Furr v McLeod*, 498 Mich 68 (2015). A medical malpractice complaint filed before the expiration of the 182-day notice period is ineffective to toll the statute of limitations. We remand this case to the Court of Appeals for consideration of the issues raised by the plaintiff but not addressed by that court during its initial review of this case.

FINGERLE v CITY OF ANN ARBOR, No. 150819; reported below: 308 Mich App 318. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the majority opinion and affirm the judgment of the Court of Appeals for the reasons stated in the concurring opinion, to wit, that the plaintiff cannot make the requisite showing of "substantial proximate cause." MCL 691.1416(l).

Leave to Appeal Granted November 4, 2015:

PEOPLE v FLOYD ALLEN, No. 151843; Court of Appeals No. 318560. The parties shall address whether the second-offense habitual-offender

enhancement set forth under MCL 769.10 may be applied to the sentence prescribed under MCL 28.729(1)(b).

Leave to Appeal Denied November 4, 2015:

KEMP v HAYES GREEN BEACH MEMORIAL HOSPITAL and KUDZIA v AVASI SERVICES, INC, Nos. 150589 and 150590; reported below: 307 Mich App 340.

PERKINS v HENRY FORD COMMUNITY COLLEGE, No. 150699; Court of Appeals No. 317643.

PEOPLE v LOVE, No. 150831; Court of Appeals No. 323352.

TRUSTEES OF METROPOLITAN DETROIT PLUMBING INDUSTRY TRAINING TRUST FUND v RIDENOUR, No. 151376; Court of Appeals No. 323041.

MARKMAN, J. I would remand this case to the Court of Appeals for consideration as on leave granted of the meaning of the contract in dispute, in particular the significance of the term "engaged" in that contract.

BERNSTEIN, J., joined the statement of MARKMAN, J.

PEOPLE v THIBEAULT, No. 151461; Court of Appeals No. 318216.

PEOPLE v PLATT, No. 151677; Court of Appeals No. 326357.

PEOPLE v JAMAR MCKEE, No. 151886; Court of Appeals No. 324341.

Summary Disposition November 6, 2015:

In re WANGLER/PASCHKE, No. 149537; reported below: 305 Mich App 438. 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 May 27, 2014 judgment of the Court of Appeals for the reason that it is unclear when the trial court issued its initial dispositional order, which is the first order appealable by right. See MCR 3.993(A). Under the circumstances of this case, in which the court purported to issue dispositional orders without first adjudicating the respondent-mother, the respondent-mother's appeal should not be regarded as an impermissible collateral attack on jurisdiction. See *In re Hatcher*, 443 Mich 426, 444 (1993). As to the merits of the respondent-mother's challenge, we conclude that the trial court violated MCR 3.971(C)(1) by failing to satisfy itself that the respondent-mother's plea was knowingly, understandingly, and voluntarily made, and violated MCR 3.971(C)(2) by failing to establish support for a finding that one or more of the statutory grounds alleged in the petition were true. Therefore, the manner in which the trial court assumed jurisdiction violated the respondent-mother's due process rights. See *In re Sanders*, 495 Mich 394, 415 (2014). Accordingly, we set aside the respondent-mother's plea and the subsequent adjudication and termination, and

remand this case to the Sanilac Circuit Court, Family Division for further proceedings not inconsistent with this order. We do not retain jurisdiction.

MARKMAN, J. (*dissenting*). Because I agree with the Court of Appeals that respondent's challenge constitutes "an impermissible collateral attack on the trial court's exercise of jurisdiction," I would affirm its decision. *In re Wangler*, 305 Mich App 438, 440 (2014). Respondent's plea, and therefore her formal adjudication, was held in "abeyance" by the trial court and, because of the confusion this caused, I agree with my colleagues that "it is unclear when the trial court issued its initial dispositional order, which is the first order appealable by right. See MCR 3.993(A)." However, it *is* clear that the trial court accepted respondent's plea and adjudicated respondent *no later* than in its February 4, 2013 dispositional order (and quite arguably at an earlier juncture). That is, it is clear that *at least* by that date, the trial court had *both* adjudicated respondent and entered its initial dispositional order. Therefore, if respondent had concerns about the manner in which she had been adjudicated, i.e., the manner in which the trial court had exercised its jurisdiction, she clearly should have appealed its February 4, 2013 order. But she did not do so. Instead, respondent waited until after the June 26, 2013 termination hearing and after the July 16, 2013 order terminating her parental rights to file an appeal challenging the trial court's adjudication. This, in my judgment, was clearly an impermissible collateral attack on the trial court's exercise of jurisdiction. *In re Hatcher*, 443 Mich 426, 439-440 (1993).

Reconsideration Denied November 6, 2015:

In re MOTTWEILER, Nos. 152208 and 152209; Court of Appeals Nos. 325278 and 325279. Leave to appeal denied at 498 Mich 892.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered November 13, 2015:

ALTOBELLI V HARTMANN, No. 150656; reported below: 307 Mich App 612. The defendants in this case are principal members of a law firm. The operating agreement for the law firm contains a mandatory arbitration agreement covering any dispute, controversy or claim between the law firm and a current or former principal. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the Court of Appeals correctly affirmed the trial court's denial of the defendants' motion to dismiss based on the operating agreement's mandatory arbitration provision because the plaintiff's claims are directed at the individual defendants, rather than the law firm. In addressing that issue, the parties may also address whether, under theories including but not limited to agency or equitable estoppel, a mandatory arbitration provision covering disputes "between the Firm . . . and any current or former Principal" may properly be invoked

to resolve disputes between managing principals and a former principal. The parties should not submit mere restatements of their application papers.

The application for leave to appeal as cross-appellant remains pending.

Leave to Appeal Denied November 13, 2015:

LANDIN v HEALTHSOURCE SAGINAW, INC, No. 149663; reported below: 305 Mich App 519. 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 3, 2015. The application for leave to appeal the June 3, 2014 judgment of the Court of Appeals is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court.

PEOPLE v WOOTEN, No. 149917; Court of Appeals No. 314315. On November 4, 2015, the Court heard oral argument on the application for leave to appeal the June 26, 2014 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

CULLUM v LOPATIN, No. 149955; Court of Appeals No. 313739. On November 5, 2015, the Court heard oral argument on the application for leave to appeal the July 10, 2014 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

PEOPLE v BRIAN EVANS, No. 150969; Court of Appeals No. 317577.

OOSTDYK v AUTO OWNERS INS CO, No. 151026; Court of Appeals No. 317221. On order of the Court, the application for leave to appeal the December 30, 2014 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. The Court of Appeals erred by relying on the "almost any causal connection" standard of *Scott v State Farm Mut Auto Ins Co*, 278 Mich App 578, 586 (2008). The "almost-any" standard is discredited and inconsistent with current law to the extent it suggests a plaintiff may meet the statutory causation requirement without proving the causal connection was "more than incidental, fortuitous, or but for." See *McPherson v McPherson*, 493 Mich 294, 299 (2013). However, denial is warranted because the trial court correctly instructed the jury that under MCL 500.3105(1), the plaintiff had to prove the causal connection between the injury and the use of the motor vehicle was "more than incidental, fortuitous, or but for." See *Thornton v Allstate Ins Co*, 425 Mich 643, 646 (1986).

Summary Disposition November 24, 2015:

PEOPLE v BYLSMA, No. 148440; Court of Appeals No. 317904. 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, who possessed, cultivated, manufactured, or delivered marijuana to a patient or caregiver to whom he was not connected through the registration process of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., "may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a)." MCL 333.26428(b). Cf., *State v McQueen,* 493 Mich 135, 156 ns 59 & 60 (2013). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

We further order that this case be argued and submitted to the Court of Appeals together with the case of *People v Overholt* (Docket No. 149795), which we remanded to the Court of Appeals for consideration as on leave granted by order of the same date, at such future session of the Court of Appeals as both cases are ready for submission. We do not retain jurisdiction.

PEOPLE V OVERHOLT, No. 149795; Court of Appeals No. 321556. 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, who sold, transferred, or delivered marijuana to a patient or caregiver to whom he was not connected through the registration process of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., "may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a)." MCL 333.26428(b). Cf., *State v McQueen*, 493 Mich 135, 156 ns 59 & 60 (2013). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

We further order that this case be argued and submitted to the Court of Appeals together with the case of *People v Bylsma* (Docket No. 148440), which we remanded to the Court of Appeals for consideration as on leave granted by order of the same date, at such future session of the Court of Appeals as both cases are ready for submission. We do not retain jurisdiction.

PEOPLE V WOOD, No. 150684; reported below: 307 Mich App 485. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment that added a requirement of defendant diligence to the traditional test for ascertaining whether there has been a violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). See *People v Chenault*, 495 Mich 142 (2014). However, because the defendant otherwise failed to demonstrate a *Brady* violation, we leave intact the result reached by the Court of Appeals. In all other requests, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

Orders Remanding Cases to Trial Courts for Further Proceedings in Light of People v Lockridge, *498 Mich 358 (2015), Entered November 24, 2015:*

PEOPLE v DICKENS, No. 149906; Court of Appeals No. 314267. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the Oakland 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, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v SAMUELS, No. 150038; Court of Appeals No. 322619. 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 because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v STUDIER, No. 151217; Court of Appeals No. 317351. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the St. Clair 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, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v VINSON, No. 151371; Court of Appeals No. 317778. On order of the Court, the motion to supplement application for leave to appeal is

granted. On order of the Court, the application for leave to appeal the February 12, 2015 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the Kalamazoo 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, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v MELINDA WATKINS, No. 151378; Court of Appeals No. 325255. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Shiawassee 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. We further order on remand that the trial court shall ensure that all of the corrections to the presentence reports that were discussed at sentencing are made. In all other respects, leave to appeal is denied because we are not persuaded that the remaining questions should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v CURTIS, No. 151393; Court of Appeals No. 318699. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the Barry 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, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v VERSLUYS, No. 151496; Court of Appeals No. 326195. 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 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, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v CORRION, No. 151730; Court of Appeals No. 326196. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Chippewa 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, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v DARRELL CARTER, No. 151731; Court of Appeals No. 326700. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the St. Clair 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. We do not retain jurisdiction.

PEOPLE v REYNALDO LOPEZ, No. 151814; Court of Appeals No. 326339. 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 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 because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE V VALLEJO, No. 151827; Court of Appeals No. 326182. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Ingham 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, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE V NACCARATO, No. 152137; Court of Appeals No. 320571. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court. The Court of Appeals, in the course of issuing two opinions in this case, correctly held that Offense Variables 1 and 2 should have been scored at 20 points and 15 points, respectively, and that the circuit court erred by failing to do so. On remand, the circuit court shall determine whether it would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015), upon correction of the error in scoring the offense variables. If the trial court determines that it would have imposed the same sentence absent the scoring error, it may reaffirm the original sentence, stating its reason for departing from the guidelines on the record. If, however, the trial court determines that it would not have imposed the same sentence, it shall resentence the defendant.

Leave to Appeal Denied November 24, 2015:

PEOPLE V MCCRAY, No. 150345; Court of Appeals No. 322985.

PEOPLE V LYNDS, No. 150540; Court of Appeals No. 323751.

PEOPLE V HUSSAIN, No. 150802; Court of Appeals No. 323758.

PEOPLE V JAMES THOMAS, No. 150855; Court of Appeals No. 323572.

PEOPLE V DOUGLAS BARNES, No. 150863; Court of Appeals No. 324523.

PEOPLE v MOENCH, No. 150898; Court of Appeals No. 323775.

PEOPLE v PEACOCK, No. 150902; Court of Appeals No. 324072.

PEOPLE v DANIELS, No. 150921; Court of Appeals No. 324200.

PEOPLE v BUNKLEY, No. 150951; Court of Appeals No. 323826.

PEOPLE v WEAVER, No. 150961; Court of Appeals No. 324629.

PEOPLE v MELVIN ANDERSON, No. 150964; Court of Appeals No. 324044.

PEOPLE v CRUZ-RIVERA, No. 150966; Court of Appeals No. 324335.

PEOPLE v RODNEY HICKS, No. 150979; Court of Appeals No. 323645.

PEOPLE v CARL WATKINS, No. 150987; Court of Appeals No. 323608.

PEOPLE v STERMER, No. 150997; Court of Appeals No. 323443.

PEOPLE v WEST, No. 150999; Court of Appeals No. 317109.

PEOPLE v DAVARRIO WEBB, No. 151000; Court of Appeals No. 323635.

PEOPLE v MCCUNE, No. 151011; Court of Appeals No. 324254.

PEOPLE v KEATON, No. 151064; Court of Appeals No. 324526.

PEOPLE v HUDGINS, No. 151068; Court of Appeals No. 324862.

PEOPLE v BOWLING, No. 151085; Court of Appeals No. 324613.

PEOPLE v EDWARD TAYLOR, No. 151089; Court of Appeals No. 323960.

PEOPLE v TERRY BROWN, No. 151101; Court of Appeals No. 324396.

PEOPLE v SWACKHAMMER, No. 151107; Court of Appeals No. 324486.

PEOPLE v WILLIE SCOTT, No. 151109; Court of Appeals No. 323880.

HARGROW v DEUTSCHE BANK TRUST COMPANY AMERICAS, No. 151366; Court of Appeals No. 324036.

WALLACE v CITY OF DETROIT, No. 151385; Court of Appeals No. 316799.

CACH, LLC v VELIVELLI, No. 151424; Court of Appeals No. 324967.

PEOPLE v ALVIN GIBBS, No. 151453; Court of Appeals No. 318967.

PEOPLE v MCCOY, No. 151485; Court of Appeals No. 318820.

TAYLOR v MCCARTHY, No. 151523; Court of Appeals No. 317766.

PEOPLE v RANDALL, No. 151531; Court of Appeals No. 318740.

In re PETITION OF KALAMAZOO COUNTY TREASURER FOR FORECLOSURE, No. 151539; Court of Appeals No. 324952.

PEOPLE v TYRONE JOHNSON, Nos. 151567 and 151568; Court of Appeals Nos. 319152 and 320852.

D'ITRI v HOBBS, Nos. 151571 and 151572; Court of Appeals Nos. 315869 and 319038.

PEOPLE v TOWNSEND, No. 151578; Court of Appeals No. 319604.

THOR REAL ESTATE, LLC v SHANNON, No. 151580; Court of Appeals No. 323600.

PEOPLE v PICKLESIMER, No. 151590; Court of Appeals No. 326145.

PEOPLE v COSTNER, No. 151597; Court of Appeals No. 326407.

PEOPLE v WELLS, No. 151605; Court of Appeals No. 325122.

PEOPLE v MATTHEW MILLER, No. 151611; Court of Appeals No. 325950.

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN v SUSIN, No. 151616; Court of Appeals No. 322017.

PEOPLE v ABU-JEBREEL, No. 151624; Court of Appeals No. 319059.

ROSEMBERG v ROSEMBERG, No. 151634; Court of Appeals No. 323747.

RANKIN v CITY OF HIGHLAND PARK, No. 151656; Court of Appeals No. 318385.

GREAT LAKES EYE INSTITUTE, PC v KREBS, No. 151658; Court of Appeals No. 320086.

PEOPLE v RELERFORD, No. 151659; Court of Appeals No. 319060.

PEOPLE v DARLING, No. 151674; Court of Appeals No. 326190.

PEOPLE v BRADFORD MITCHELL, No. 151688; Court of Appeals No. 320003.

PEOPLE v DAVIS-ROWLAND, No. 151706; Court of Appeals No. 320731.

PEOPLE v ARTHUR CLEMONS, No. 151707; Court of Appeals No. 319997.

PEOPLE v CHAVEZ YOUNG, No. 151709; Court of Appeals No. 320422.

PEOPLE v MCKINNON, No. 151711; Court of Appeals No. 326143.

PEOPLE v LECLAIRE, No. 151712; Court of Appeals No. 326373.

BAFNA v BRYNMAWR CONDOMINIUM ASSOCIATION, No. 151720; Court of Appeals No. 325864.

PEOPLE v CASNAVE, No. 151722; Court of Appeals No. 325967.

PEOPLE v DALSHONE JOHNSON, Nos. 151726 and 151727; Court of Appeals Nos. 319015 and 319063.

FIFTH THIRD MORTGAGE-MI, LLC v FIRST AMERICAN TITLE INSURANCE COMPANY, No. 151757; Court of Appeals No. 318037.

MCCORMICK v HANOVER GROUP, INC, No. 151765; Court of Appeals No. 318920.

PEOPLE v MARCUS WILLIAMS, No. 151769; Court of Appeals No. 320217.

PEOPLE v BRAND, No. 151786; Court of Appeals No. 319090.

PEOPLE v LEAHY, No. 151788; Court of Appeals No. 326296.

GREEN v ZIEGELMAN, No. 151799; reported below: 310 Mich App 436.

PEOPLE v BROOKS, No. 151801; Court of Appeals No. 318995.

PEOPLE v PEARSON, No. 151805; Court of Appeals No. 319590.

PEOPLE v BUNING, No. 151816; Court of Appeals No. 320140.

PEOPLE v NIKO LEWIS, No. 151829; Court of Appeals No. 326509.

WATZ v WAL-MART STORES EAST, LP, No. 151842; Court of Appeals No. 320883.

PEOPLE v DAUNDREA ANDERSON, No. 151847; Court of Appeals No. 325752.

PEOPLE v MUSHATT, No. 151855; Court of Appeals No. 319343.

CARTER v BAC HOME LOANS SERVICING LP, No. 151858; Court of Appeals No. 318622.

PEOPLE v DUBOIS, No. 151864; Court of Appeals No. 320009.

PEOPLE v HAYNES, No. 151877; Court of Appeals No. 320409.

GILROY v SPEIDEL, No. 151883; Court of Appeals No. 320916.

PEOPLE v FREDERICK HAWKINS, No. 151884; Court of Appeals No. 326549.

PEOPLE v MORRIS, No. 151887; Court of Appeals No. 318678.

PEOPLE v BERRY, No. 151891; Court of Appeals No. 320793.

PEOPLE v HUFFMAN, No. 151902; Court of Appeals No. 326868.

PEOPLE v SCHROEDER, No. 151907; Court of Appeals No. 326488.

PEOPLE v NATHANIEL WALLACE, No. 151908; Court of Appeals No. 320348.

PEOPLE v TYREE AUSTIN, No. 151915; Court of Appeals No. 318838.

PEOPLE v MCNINCH, No. 151918; Court of Appeals No. 326834.

PEOPLE v RICKEY SMITH, No. 151921; Court of Appeals No. 326449.

PEOPLE v RYMES, No. 151923; Court of Appeals No. 320224.

PEOPLE v DOHERTY, No. 151926; Court of Appeals No. 319391.

WHITE v MATTHEWS, No. 151927; Court of Appeals No. 320174.

PEOPLE v MARKS, No. 151935; Court of Appeals No. 326358.

PEOPLE v ACKAH-ESSIEN, No. 151936; reported below: 311 Mich App 13.

PEOPLE v SUMMERS, No. 151950; Court of Appeals No. 320839.

DAILY v CZERNESKI, No. 151953; Court of Appeals No. 325709.

PEOPLE v DEON SCOTT, No. 151960; Court of Appeals No. 320290.

PEOPLE v BRIGGS-CODY, No. 151964; Court of Appeals No. 319985.

PEOPLE v PEDERSEN, No. 151974; Court of Appeals No. 320132.

PEOPLE v FORSYTH, No. 152002; Court of Appeals No. 326828.

In re FORSYTH, No. 152004; Court of Appeals No. 326726.

HEAD v CHRYSLER GROUP, LLC, No. 152011; Court of Appeals No. 325904.

PEOPLE v RONNIE GILMORE, No. 152012; Court of Appeals No. 326453.

HATFIELD v HOME-OWNERS INSURANCE COMPANY, No. 152014; Court of Appeals No. 325170.

PEOPLE v JEFFERSON, No. 152016; Court of Appeals No. 326922.

BOOTH v DEPARTMENT OF CORRECTIONS, No. 152020; Court of Appeals No. 324319.

PEOPLE v FERRELL, No. 152043; Court of Appeals No. 326433.

PEOPLE v SCHNEIDER, No. 152044; Court of Appeals No. 326796.

PEOPLE v MARLENE HUGHES, No. 152120; Court of Appeals No. 326967.

PEOPLE v WALTER BANKS, No. 152223; Court of Appeals No. 327516.

PEOPLE v GILBERT POOLE, No. 152244; reported below: 311 Mich App 296.

Reconsideration Denied November 24, 2015:

PEOPLE v CEDRIC SIMPSON, No. 149929; Court of Appeals No. 315777. Leave to appeal denied at 497 Mich 954.

PEOPLE v SHAWN ROSS, No. 150059; Court of Appeals No. 322252. Leave to appeal denied at 497 Mich 955.

PEOPLE v GIPSON, No. 150114; Court of Appeals No. 320828. Leave to appeal denied at 497 Mich 1011.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v STURGIS, No. 150224; Court of Appeals No. 314821. Leave to appeal denied at 497 Mich 983.

PEOPLE v MATTISON, No. 150255; Court of Appeals No. 321810. Leave to appeal denied at 497 Mich 1012.

PEOPLE v TERLISNER, No. 150297; Court of Appeals No. 315670. Leave to appeal denied at 497 Mich 1035.

PEOPLE v CHRISTOPHER JOHNSON, No. 150936; reported below: 309 Mich App 22. Summary disposition at 497 Mich 1042.

JONES v BELLAMY CREEK CORRECTIONAL FACILITY WARDEN, No. 150946; Court of Appeals No. 323796. Leave to appeal denied at 497 Mich 1030.

PEOPLE v BREIDENBACH, No. 151248; Court of Appeals No. 324049. Leave to appeal denied at 498 Mich 873.

FEDERAL HOME LOAN MORTGAGE CORPORATION v JONES, No. 151279; Court of Appeals No. 325787.Leave to appeal denied at 498 Mich 884.

A&D DEVELOPMENT v MICHIGAN COMMERCIAL INSURANCE MUTUAL, No. 151286; Court of Appeals No. 317024. Leave to appeal denied at 498 Mich 873.

PEOPLE v TRUDEAU, Nos. 151324 and 151325; Court of Appeals Nos. 317879 and 322028. Leave to appeal denied at 498 Mich 873.

CORRION v THUMB CORRECTIONAL FACILITY WARDEN, No. 151608; Court of Appeals No. 324310. Leave to appeal denied at 498 Mich 875.

Superintending Control Denied November 24, 2015:

DONALD PATTERSON v ATTORNEY GRIEVANCE COMMISSION, No. 151778.

MORRIS v ATTORNEY GRIEVANCE COMMISSION, No. 151860.

ALEXANDER v ATTORNEY GRIEVANCE COMMISSION, No. 151929.

Order of Public Censure Entered November 25, 2015:

In re MAZUR, No. 152430. The Judicial Tenure Commission has issued a Decision and Recommendation, to which the respondent, Honorable R. Darryl Mazur, 12th District Court Judge, consents. It is accompanied by a settlement agreement, in which the respondent waived his rights and consented to a sanction of a public censure and 30-day suspension without pay.

In resolving this matter, we are mindful of the standards set forth in *In re Brown*, 461 Mich 1291 (2000):

> Everything else being equal:
>
> (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
>
> (2) misconduct on the bench is usually more serious than the same misconduct off the bench;

(3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;

(4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;

(5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;

(6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery;

(7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.

In the present case, those standards are being applied in the context of the following stipulated findings of fact and conclusions of law of the Judicial Tenure Commission, which, following our de novo review, we adopt as our own:

A. PEOPLE v [***][1]

1. The case of *People v* [***], Jackson District Court Case No. [***] was assigned to Respondent.

2. [The defendant] was charged with domestic violence (MCL 750.81[2]), and she was arraigned on June 9, 2014. On August 7, 2014, [the defendant] pled guilty. With the prosecutor's consent, pursuant to MCL 769.4a, [the defendant] was placed on probation for 12 months, and she was assessed fines and costs.

3. In December of 2014, after seeing [the defendant] in the hallway of the courthouse, Respondent received a Christmas card from her, wishing him a [M]erry Christmas and thanking him for being "an extremely firm yet fair judge."

4. Respondent wrote back to [the defendant], on court stationery, indicating that he was also pleased to have run into her in the hall at the courthouse. In that same handwritten note, he said,

"You continue to sound well. No need to thank me. Well, maybe you can.

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[1] The name of the individual and case number are redacted pursuant to MCL 769.4a.

"I am not sure of your marital status. But if you are not, would you be interested in seeing me? Being on probation is a complication. I am interested if you are."

5. Respondent and [the defendant] continued to e-mail each other through the month of January 2015.

B. PEOPLE v JORDEN GRIFFIN

6. The case of *People v Jorden Griffin*, Jackson District Court Case No. 14-1326 SM was assigned to Respondent's colleague, Judge Klaeren.

7. Ms. Griffin was a former neighbor of Respondent's, and Respondent remained friends with her father, Paul Griffin.

8. Mr. Griffin called Respondent to tell him that his daughter Jorden had been arrested by the Jackson Police Department.

9. Respondent advised Mr. Griffin about pre-trial procedures, that the city attorney would likely negotiate a plea agreement, and that he, Respondent, would speak to the assigned judge about the case.

10. Respondent did, in fact, contact Judge Klaeren and discussed the matter with him. He also told Judge Klaeren that he (Respondent) wanted to discuss the matter further with him (Klaeren) and the city attorney.

11. Respondent also sent Judge Klaeren an e-mail asking him to "PR [release on a personal recognizance bond] her [Defendant, Jorden Griffin] and set a pre-trial and then direct her down to see [Respondent.]"

12. Judge Klaeren was disturbed by all of this and discussed his discomfort with Respondent.

13. Respondent is extremely remorseful over these matters, he has co-operated [sic] throughout the investigation, and he is desirous of resolving this grievance.

We adopt the Commission's conclusion that these facts demonstrate that the respondent breached the standards of judicial conduct in the following ways:

The parties have stipulated, and this Commission agrees and separately finds as well that Respondent's conduct violates the Code of Judicial Conduct and the standards of discipline for judges. The commission further finds that Respondent's conduct constitutes:

(a) Misconduct in office, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30 and MCR 9.205;

(b) Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30, and MCR 9.205;

(c) Failure to establish, maintain, enforce and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to the Code of Judicial Conduct, Canon 1;

(d) Irresponsible or improper conduct which erodes public confidence in the judiciary, in violation of the Code of Judicial Conduct, Canon 2A;

(e) Conduct involving impropriety and the appearance of impropriety, in violation of the Code of Judicial Conduct, Canon 2A;

(f) Failure to respect and observe the law and to conduct himself at all times in a manner which would enhance the public's confidence in the integrity and impartiality of the judiciary, contrary to the Code of Judicial Conduct, Canon 2B;

(g) Engage[ment] in *ex parte* communications with a party and with a judge, contrary to Canon 3(A)(4);

(h) Conduct which exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2);

(i) Lack of personal responsibility for his own behavior and for the proper conduct and administration of the court in which he presides, contrary to MCR 9.205(A); and

(j) Conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court, contrary to MCR 9.104(4).

After review of the Judicial Tenure Commission's recommendation, the settlement agreement, the standards set forth in *Brown*, and the above findings and conclusions, we order that the Honorable R. Darryl Mazur be publicly censured and suspended without pay for 30 days, effective 21 days from the date of this order. This order further stands as our public censure.

We further order that the Judicial Tenure Commission remove the name of the individual in the first matter addressed above from any public record it maintains or controls. MCL 769.4a.

Summary Disposition November 25, 2015:

PEOPLE v ALGER, No. 150746; Court of Appeals No. 322473. 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 GUNNELLS, No. 151096; Court of Appeals No. 317326. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse

in part the judgment of the Court of Appeals, and we remand this case to the 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, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

STIMPSON v GFI MANAGEMENT SERVICES, INC, No. 151368; Court of Appeals No. 319165. 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 a reasonable jury could find that the plaintiff had no choice but to confront the hazard posed by the snow and ice. In *Hoffner v Lanctoe*, 492 Mich 450, 468-469 (2012), this Court clarified that, for an unreasonably dangerous hazard to be "effectively unavoidable," it must be essentially "inescapable." Effective unavoidability is characterized by "an inability to be avoided, an inescapable result, or the inevitability of a given outcome." *Id*. In this instance, it is undisputed that plaintiff selected the location where she parked her truck, chose to use that vehicle even though she had a second vehicle parked under a carport, and did not attempt to use the salt near her apartment door. The Oakland Circuit Court correctly granted summary disposition to the defendants and the Court of Appeals erred by reversing. We therefore remand this case to the circuit court for reinstatement of the judgment in favor of the defendants. We do not retain jurisdiction.

TYRONE TWP v RUFLI, No. 151392; Court of Appeals No. 324108. 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, limited to whether the district court abused its discretion in awarding sanctions to the plaintiff and whether the circuit court erred in affirming that decision. 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.

PEOPLE v HUNTER, No. 151521; Court of Appeals No. 324590. 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 costs imposed were reasonably related to actual costs, as required by MCL 769.1k(l)(b)(*iii*), and, if not, to assess and impose court costs, if any, under MCL 769.1k(l)(b)(*iii*). The circuit court's order shall be filed with this Court within 60 days of the date of this order. We retain jurisdiction.

PEOPLE v BROYLES, No. 151556; Court of Appeals No. 326205. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the Kent Circuit Court's order denying the defendant's motion for plea

withdrawal and/or to correct an invalid sentence and we remand this case to the Kent Circuit Court. That court shall treat the defendant's January 26, 2015 supplemental brief and February 20, 2015 supplemental motion as timely filed and evaluate the defendant's issues on the merits. The defendant's attorney acknowledges that the defendant did not contribute to the delay in filing a proper motion and admits her sole responsibility for the error. Because a motion to withdraw a plea or correct an invalid sentence is a prerequisite to substantive review on direct appeal under MCR 6.310 and MCR 6.429, the defendant was effectively deprived of his direct appeal as a result of constitutionally ineffective assistance of counsel. See *Roe v Flores-Ortega*, 528 US 470, 477; 120 S Ct 1029; 145 L Ed 2d 985 (2000); *Peguero v United States,* 526 US 23, 28; 119 S Ct 961; 143 L Ed 2d 18 (1999).

Costs are imposed against the attorney, only, in the amount of $500, to be paid to the Clerk of this Court. We do not retain jurisdiction.

COMPAU V PIONEER RESOURCE COMPANY, LLC, No. 151618; Court of Appeals No. 320615. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals and we reinstate the February 19, 2014 order of the Iosco Circuit Court that granted the defendants' motion for summary disposition. The plaintiffs' injuries arose when plaintiff Michele Compau tripped over a railroad tie on the defendants' property. When a plaintiff's injury arises from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence, even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury. *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692 (2012). The railroad tie was an allegedly dangerous condition on the land, but it was open and obvious. Thus, the plaintiffs' recovery is barred by the open and obvious danger doctrine. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516-519, 522 (2001). Because plaintiff Michele Compau testified that she had seen the railroad tie when she arrived to watch the lawn mower races, the plaintiffs have failed to present evidence to support that the lawn mower races were so distracting as to preclude application of the open and obvious danger doctrine. See *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 717-718 (2007).

BERNSTEIN, J., would deny leave to appeal.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered November 25, 2015:

BRONSON METHODIST HOSPITAL V MICHIGAN ASSIGNED CLAIMS FACILITY, Nos. 151343 and 151344; Court of Appeals Nos. 317864 and 317866. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the Court of Appeals erred when it concluded that the defendant Michigan Assigned Claims Plan could not deny the plaintiff hospital's application for assignment of its claim for benefits as "an obviously ineligible claim," MCL 500.3173a. The parties should not submit mere restatements of their application papers.

BITTERMAN v BOLF, No. 151520; Court of Appeals No. 319663. The parties shall file supplemental briefs within 35 days of the date of this order addressing only the question of how this Court should define the term "public official" under Section 13(1) of the Open Meetings Act, MCL 15.273(1). The parties should not submit mere restatements of their application papers.

The Public Corporation 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.

PEOPLE v ABREGO, No. 152111; Court of Appeals No. 320973. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the Court of Appeals erred in holding that, pursuant to *People v Spanke*, 254 Mich App 642 (2003), Offense Variable 8, MCL 777.38, should not have been scored in this case where the movement was "incidental" to the offense of operating while intoxicated (second offense) with a passenger under 16. See also *People v Hardy*, 494 Mich 430, 442 (2013) ("[A]bsent an express prohibition, courts may consider conduct inherent in a crime when scoring offense variables."). 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.

PEOPLE v ALEMU, No. 152247; Court of Appeals No. 320560. The parties shall file supplemental briefs within 42 days of the date of this order, and shall include among the issues to be briefed: (1) whether the plea bargain's stipulation that the People would take "no position on 7411" precludes the People from filing this application; and (2) whether the People's formal adoption of "no position" in the Court of Appeals waived their ability to request relief in this Court. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied November 25, 2015:

PEOPLE v COFFER, No. 148731; Court of Appeals No. 318726.

ABBO v WIRELESS TOYZ FRANCHISE, LLC, No. 149536; Court of Appeals No. 304185. On November 4, 2015, the Court heard oral argument on the application for leave to appeal the May 13, 2014 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

ZAHRA, J. (*dissenting*). After a breakdown in the relationship between the franchisee-plaintiffs (David Abbo and related persons) and the franchisor-defendants (Wireless Toyz Franchise, LLC, and related persons), plaintiffs filed suit against defendants, alleging that defendants

had failed to disclose certain costs and expenses of operating a franchise. Specifically, this allegation of "silent fraud" was based on defendants' failure to disclose "chargebacks"[1] and "hits."[2] This Court was sufficiently concerned about the substance of the Court of Appeals' opinion to order oral argument on the application for leave to appeal. *Abbo v Wireless Toyz Franchise, LLC*, 497 Mich 1032 (2015). After hearing the parties' arguments, the majority has elected to deny leave.

I write separately because, despite the factual complexities of this case and the fact that the Court of Appeals opinion' is unpublished and of no precedential value, I would reverse. The opinion below cuts against a fundamental tenet of this Court's jurisprudence that requires the enforcement of unambiguous contracts freely executed by the parties. This proposition is so central to our jurisprudence that it has become "an unmistakable and ineradicable part of the legal fabric of our society." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 52 (2003) ("The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable."); *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 370 (2003) ("[T]he freedom to contract principle is served by requiring courts to enforce unambiguous contracts according to their terms . . . ."); *Rory v Continental Ins Co*, 473 Mich 457, 461 (2005) ("[A] court must construe and apply unambiguous contract provisions as written."); *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 212 (2007) ("We 'respect[] the freedom of individuals freely to arrange their affairs via contract' by upholding the 'fundamental tenet of our jurisprudence . . . that unambiguous contracts are not open to judicial construction and must be *enforced as written*' . . . .") (citation omitted) (alteration in original).

Silent fraud arises "from the suppression of the truth . . . with the intent to defraud." *Tompkins v Hollister*, 60 Mich 470, 483 (1886). But silent fraud requires more than simply a failure to disclose material information. It must be coupled with a duty to disclose. *M&D, Inc v McConkey*, 231 Mich App 22, 29 (1998) ("Michigan courts have recognized that silence cannot constitute actionable fraud *unless* it occurred under circumstances where there was a legal duty of disclosure.") (quotation marks and citation omitted). Further, in asserting silent fraud, "[a] plaintiff cannot merely prove that the defendant failed to disclose something; instead, a plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive." *Lucas v Awaad*, 299 Mich App 345, 364 (2013) (quotation marks and citation omitted). Therefore, a silent-fraud claim cannot be maintained unless it can be established that there was (1) a duty to disclose, (2) an omission of a material fact from an otherwise

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[1] Chargebacks are described as revocations of a franchise store owner's commission that take effect when a customer prematurely cancels a telephone service contract.

[2] Hits are described as discounts awarded to customers as incentives to purchase a telephone.

truthful statement, and (3) the intent to mislead. See *US Fidelity & Guaranty Co v Black*, 412 Mich 99 (1981); *Roberts v Saffell*, 280 Mich App 397 (2008), aff'd 483 Mich 1089 (2009).

To establish defendants' duty to disclose, plaintiffs rely on MCL 445.1505 of the Michigan Franchise Investment Law, which provides:

> A person shall not, in connection with the filing, offer, sale, or purchase of any franchise, directly or indirectly:
>
> * * *
>
> (b) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

This statute requires either an affirmative untrue statement or a misleading omission coupled with an otherwise true statement. Plaintiffs argue that the latter occurred when defendants made incomplete statements during the negotiation process about the various chargebacks and hits. According to plaintiffs, these incomplete statements, coupled with defendants' duty to disclose complete information, constituted silent fraud.

But here, plaintiffs and defendants entered into unambiguous written agreements containing broad disclaimers. For instance, the development agent agreement expressly acknowledged that no prior representations had been made:

> [N]either Wireless Toyz nor any of its agents have made or are authorized to make any oral, written or visual representations or projections of potential earnings, sales, profits, costs, expenses, prospects or chances of success . . . . Development Agent agrees that it has not relied on and that Wireless Toyz will not be bound by allegations of any representations as to potential earnings, sales, profits, costs, expenses, prospects or chances of success . . . .

A similar disclaimer was also included in the franchise agreement. Accordingly, for the purposes of the agreements between plaintiffs and defendants, there were no prior representations made, including specifically about costs and expenses. Plaintiffs and the Court of Appeals majority failed to indicate why these disclaimers are not dispositive.

Both the duty to disclose, arising in this case under MCL 445.1505, and silent fraud require a prior representation in order for an omitted material fact to render misleading that otherwise truthful representation. Notwithstanding whether prior representations were actually made, two sophisticated entities negotiated contracts and determined that no prior representations had been made. Moreover, the parties agreed that defendants were not authorized to make representations

regarding costs or expenses. Simply stated, as a matter of contract, the parties agreed that no prior representations had been made. We should respect that agreement. This Court's contract-law jurisprudence requires lower courts to accept that agreement. And without any prior representations, there can be no claim for silent fraud or a breach of any duty arising out of MCL 445.1505.

The Court of Appeals' quick dismissal of the pertinent contract language is a jurisprudentially significant error, and one that I would correct, notwithstanding the factual complexities of the record. The Court of Appeals' opinion is unpublished and has no precedential value. Nor should it be considered for its persuasiveness because the conclusion is inconsistent with this Court's longstanding contract-law jurisprudence. I would reverse.

MARKMAN, J., joined the statement of ZAHRA, J.

SPARTAN STORES, INC v CITY OF GRAND RAPIDS, No. 151016; reported below: 307 Mich App 565. On order of the Court, the application for leave to appeal the October 30, 2014 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 prior to the completion of the proceedings ordered by the Court of Appeals. This denial is without prejudice to the ability of the City of Grand Rapids to raise a challenge, on remand, to whether the Tax Tribunal's jurisdiction was timely invoked, where Family Fare, LLC did not file the initial petition, but was added as copetitioner at a later date.

NEW PRODUCTS CORPORATION v HARBOR SHORES BHBT LAND DEVELOPMENT, LLC, No. 151288; reported below: 308 Mich App 638.

LAKELAND HOSPITALS AT NILES AND ST JOSEPH, INC v AUTO-OWNERS INSURANCE COMPANY, No. 151292; Court of Appeals No. 318440.

In re BEACH, No. 152454; Court of Appeals No. 325962.

Reconsideration Denied November 25, 2015:

WILLIAMS v FANNIE MAE, No. 152356; Court of Appeals No. 321677. Leave to appeal denied at 498 Mich 899.

Leave to Appeal Granted December 9, 2015:

PEOPLE v HORTON, No. 150815; Court of Appeals No. 324071. The parties shall include among the issues to be briefed: (1) whether the defendant's unconditional no contest plea waived his claim of ineffective assistance of trial counsel based on trial counsel's failure to make a motion to dismiss for a 180-day rule violation, MCL 780.131 and 780.133, in light of *People v Lown*, 488 Mich 242, 267-270 (2011), or for constitutional speedy trial violations; (2) whether the defendant's unconditional no contest plea waived his claim of ineffective assistance of trial counsel for trial counsel's failure to inform the defendant that an

unconditional no contest plea would waive his right to appeal on the basis of a 180-day rule violation or constitutional speedy trial violations; and (3) whether trial counsel's failure to inform the defendant that his unconditional no contest plea would waive his right to appeal on the basis of a 180-day rule violation and constitutional speedy trial violation made defendant's plea unknowing and involuntary. We further order the Oakland 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 to represent the defendant in this Court.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered December 9, 2015:

HOBSON v INDIAN HARBOR INSURANCE COMPANY, No. 151447; Court of Appeals No. 316714. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the Total Pollution Exclusion Endorsement is ambiguous, and (2) whether there was a discharge, dispersal, seepage, migration, release, or escape of a pollutant that caused the plaintiffs' injuries. The parties should not submit mere restatements of their application papers.

BERNSTEIN, J., did not participate due to his prior relationship with The Sam Bernstein Law Firm.

PILGRIM'S REST BAPTIST CHURCH v PEARSON, No. 151680; reported below: 310 Mich App 318.

Summary Disposition December 9, 2015:

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN v HOLSTINE, No. 150624; Court of Appeals No. 314652. 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 the coverage issue under the subject policy's Property Coverage section. That section of the policy was irrelevant to the issue of liability coverage in this case. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE v VALDEZ, No. 150663; Court of Appeals No. 313075. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the Kent 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 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, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v NICHOLLS, No. 151038; Court of Appeals No. 318090. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the Wayne Circuit Court to determine whether it 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, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

MARKETPLACE OF ROCHESTER HILLS PARCEL B, LLC v COMERICA BANK, No. 151715; reported below: 309 Mich App 579. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate those parts of the Court of Appeals judgment stating that the same transaction test for compulsory joinder and res judicata is "if the same facts or evidence are essential to the maintenance of the two actions" and whether the two claims "concern identical evidence or essential facts." The proper test is " 'whether the facts are related in time, space, origin or motivation, [and] whether they form a convenient trial unit . . . .' " *Adair v Michigan*, 470 Mich 105, 125 (2004), quoting 46 Am Jur 2d, Judgments § 533, p 801. When the same transaction test is properly applied to this case, the result reached by the Court of Appeals is correct. In all other respects, leave to appeal is denied, because we are not persuaded that the question presented should be reviewed by this Court.

BERNSTEIN, J., did not participate due to a familial relationship with one of the named guarantors in this case.

PEOPLE v HARTMAN, No. 151959; Court of Appeals No. 320032. 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 found the evidence insufficient to convict the defendant of possession of methamphetamine, MCL 333.7403(2)(b)(*i*), and we reinstate that conviction, for the reasons stated in the Court of Appeals dissenting opinion.

Leave to Appeal Denied December 9, 2015:

FRY v SAFE MANAGEMENT OF MICHIGAN, LLC, No. 150227; Court of Appeals No. 321239.

PEOPLE v GEMBE, No. 150777; Court of Appeals No. 316911.

MIDAMERICAN ENERGY COMPANY v DEPARTMENT OF TREASURY, Nos. 151145, 151146, 151147, 151148, and 151149; reported below: 308 Mich App 362.

CARL v MUSKEGON COUNTY, No. 151311; Court of Appeals No. 319017.

PEOPLE v BLAISDELL, No. 151315; Court of Appeals No. 316835.

SIMS v THE KROGER COMPANY, No. 151400; Court of Appeals No. 319297.

PEOPLE v ANTONIO SMITH, No. 151560; Court of Appeals No. 325720.

ADER v DELTA COLLEGE BOARD OF TRUSTEES, No. 151681; Court of Appeals No. 320096.

PEOPLE v MILLS, No. 151777; Court of Appeals No. 319838.

PEOPLE v KONSCHUH, No. 151930; Court of Appeals No. 326225.

PEOPLE v RAAP, No. 152075; Court of Appeals No. 327015.

Leave to Appeal Denied December 11, 2015:

PEOPLE v STEPHANIE WHITE, No. 150661; Court of Appeals No. 318654. On October 21, 2015, the Court heard oral argument on the application for leave to appeal the October 21, 2014 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court.

MCCORMACK, J. (*concurring*). Because I believe that, when the evidence is viewed in a light most favorable to the prosecution, a rational jury could have found that there was sufficient evidence to conclude beyond a reasonable doubt that Officer Brent Green reasonably believed that Stephen White lived at the defendant's home, I concur in the majority's decision to deny leave to appeal. The denial is without prejudice to the defendant to raise any questions regarding her trial counsel's constitutional effectiveness in a motion for relief from judgment with respect to counsel's handling of the only issue she contests—whether Officer Green's presence in her home was lawful. The effect of trial counsel's failure to understand the legal standard governing his or her client's case is not before us here. I write separately to more fully explain my views.

On September 5, 2012, Officer Green arrived at the home of the defendant, Stephanie White. Officer Green was looking for the defendant's son, Stephen White, who had outstanding arrest warrants. When Officer Green knocked on the defendant's back door, Mr. White came to it. Mr. White started to open the door, but upon seeing Officer Green, he turned and walked quickly toward the front of the home. Officer Green stopped the door from closing and entered the home.

When Officer Green entered the dining room, he could no longer see Mr. White, and it was unclear whether Mr. White had left the home

through the front door or gone upstairs. When the defendant entered the dining room, Officer Green informed her that he was looking for her son. The defendant told the officer that her son did not live there and that he needed a search warrant to be in her home. Officer Green replied that he did not need a search warrant because he had just seen Mr. White. The defendant insisted on seeing a warrant and attempted to block Officer Green from searching the home. When the defendant attempted to prevent Officer Green from searching upstairs, Officer Green handcuffed her and put her in the back of his patrol car.

The defendant was convicted of resisting or obstructing a police officer under MCL 750.81d(1). The elements of this offense are " '(1) the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a police officer, and (2) the defendant knew or had reason to know that the person that the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered was a police officer performing his or her duties.' " *People v Quinn*, 305 Mich App 484, 491 (2014), quoting *People v Corr*, 287 Mich App 499, 503 (2010). In addition, as this Court made clear in *People v Moreno*, 491 Mich 38, 52 (2012), the prosecution must also establish that the officer's actions were lawful.[1]

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[1] It is not clear from post-*Moreno* caselaw whether the second element of resisting and obstructing implicitly requires that the officer be "lawfully" performing his or her duties or whether lawful action by the officer is a separate, third element.

In *Quinn*, the Court of Appeals concluded that *Moreno* resurrected what has been a third element:

> Additionally, according to *Moreno*, 491 Mich at 52, "the prosecution must establish that the officers' actions were lawful" as an element of resisting or obstructing a police officer under MCL 750.81d. We note that in *Moreno,* our Supreme Court did not explicitly state, in so many words, that the lawfulness of the officers' actions is an "element" of resisting or obstructing a police officer. However, it was clear from context and the Court's discussion of the history of the right to resist unlawful arrest that such lawfulness had been considered an "element" before [*People v*] *Ventura* [262 Mich App 370 (2004)]. Furthermore, cases before *Ventura* explicitly held that the lawfulness of the arrest was an "element." See, e.g., *People v Dalton*, 155 Mich App 591, 598, 400 NW2d 689 (1986). Consequently, it is clear that under *Moreno,* as at common law, the prosecution must establish that the officers acted lawfully as an actual element of the crime of resisting or obstructing a police officer under MCL 750.81d. [*Quinn*, 305 Mich App at 491-492.]

I see no functional difference between understanding *Moreno* as concluding that the officer's actions must be lawful as an implicit part of the

The defendant does not dispute that she resisted and obstructed Officer Green or that she knew Officer Green was a police officer performing his duties. She argues only that there was insufficient evidence from which the jury could have concluded that the officer had a reasonable belief that her son lived at her house.

"[A]n arrest warrant alone is not sufficient authority for entry into the home of a third party to arrest the subject of an arrest warrant." *People v Oliver*, 417 Mich 366, 376 (1983), citing *Steagald v United States*, 451 US 204, 205-206 (1981). But "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton v New York*, 445 US 573, 603 (1980).

Under *Payton*, an officer executing an arrest warrant may enter a dwelling only if the officer has "reason to believe," or a "reasonable belief," that (1) the location is the defendant's residence and (2) the defendant is present at the time of entry. See, e.g., *United States v Graham*, 553 F3d 6, 12 (CA 1, 2009) ("Whether Graham actually 'resided' at the apartment, then, is not dispositive so long as the police 'reasonably believed' prior to entry that he (1) resided at the apartment and (2) would be present."); *United States v Gay*, 240 F3d 1222, 1226 (CA 10, 2001) ("In a *Payton* analysis, this court recognizes a two-prong test: officers must have a reasonable belief the arrestee (1) lived in the residence, and (2) is within the residence at the time of entry.").[2]

The federal circuits have employed varying approaches to defining reasonable belief and its relationship to probable cause. Some have indicated that reasonable belief requires a lesser degree of knowledge than probable cause, see, e.g., *United States v Thomas*, 368 US App DC 285, 289 (2005), and *United States v Lauter*, 57 F3d 212, 215 (CA 2, 1995), but some have indicated that reasonable belief is functionally the same as probable cause, see *United States v Gorman*, 314 F3d 1105, 1111 (CA 9, 2002), and *United States v Barrera*, 464 F3d 496, 501 (CA 5, 2006). While the United States Court of Appeals for the Sixth Circuit has stated that whether *Payton*'s "reason to believe" language creates a lesser standard than probable cause "remains an open question in our circuit," the court did explain that " '[r]easonable belief is established by looking at common sense factors and evaluating the totality of the circumstances.' " *United States v Hardin*, 539 F3d 404, 420, 426 (CA 6, 2008), quoting *United States v Pruitt*, 458 F3d 477, 482 (CA 6, 2006) (alteration in original). See *United States v Magluta*, 44 F3d 1530, 1535 (CA 11, 1995) ("[I]n order for law enforcement officials to enter a

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second element or as a separate, third element of the crime, so this uncertainty does not affect my analysis.

[2] See also *United States v Thomas*, 368 US App DC 285, 289 (2005); *United States v Lovelock*, 170 F3d 339, 343 (CA 2, 1999); *United States v Veal*, 453 F3d 164, 167 (CA 3, 2006); *United States v Hill*, 649 F3d 258, 262 (CA 4, 2011); *United States v Route*, 104 F3d 59, 62 (CA 5, 1997); *United States v Risse*, 83 F3d 212, 216 (CA 8, 1996); *United States v Magluta*, 44 F3d 1530, 1535 (CA 11, 1995).

residence to execute an arrest warrant for a resident of the premises, the facts and circumstances within the knowledge of the law enforcement agents, when viewed in the totality, must warrant a reasonable belief that the location to be searched is the suspect's dwelling, and that the suspect is within the residence at the time of entry.").

There is no doubt that the trial testimony supported a finding that when Officer Green entered the defendant's home, he had an arrest warrant for her son and had actual knowledge that her son was present. The only question, therefore, is whether the testimony supports a finding beyond a reasonable doubt that Officer Green reasonably believed that the defendant's son lived at her home.

Normally when reviewing sufficiency-of-the-evidence claims we defer to the fact-finder regarding credibility determinations and weight-of-the-evidence determinations. See *People v Wolfe*, 440 Mich 508, 513-516 (1992). Here, however, we know that the jury did not make any findings on this particular question. It appears that the prosecutor, the defendant's counsel, and the court all misunderstood the controlling Fourth Amendment standard, and therefore all agreed that the officer's conduct was lawful merely because he had arrest warrants for the defendant's son.

In closing, the prosecutor told the jury, "I believe the Judge is going to instruct you that the officer had the lawful authority to enter the house based on the LEIN [Law Enforcement Information Network] information that he had." Additionally, the prosecutor told the jury that the officer had a "valid arrest warrant for the person Stephen White who he believed was at that residence." The prosecutor highlighted that the defendant admitted "that, yeah, I knew if he saw my son in there that he's able to enter into my apartment and try to make that arrest . . . ." He concluded that the defendant "resisted, obstructed, opposed, and endangered [Officer] Green when he's attempting to legally do what he was sworn to do, and part of it is to effectuate arrest warrants of those who have valid arrest warrants against them."

Defense counsel did no better. Counsel told the jury, "Because [Officer Green] had a warrant he had the legal right to go into the house to get [Mr. White]." Counsel explained that, as Officer Green had told them, when "there's an arrest warrant out there, . . . you go to where you believe they are and make an arrest."

The trial court instructed the jury consistently with the attorneys' incorrect statements of the law: "An officer who relies on LEIN information has the legal authority to enter a house to effectuate an arrest warrant."

Not so; this instruction was erroneous. Not only is an arrest warrant insufficient to provide an officer the legal authority to enter the home of a third party, *Steagald*, 451 US at 205-206, the prosecution is required to establish that the officer's actions were lawful, and the lawfulness of the officer's actions is a question for the jury, see *Quinn*, 305 Mich App at 494, citing *Moreno*, 491 Mich at 51-52. In this case, the lawfulness of the officer's presence in the defendant's home depended on a finding that the officer had a reasonable belief that the location entered was the suspect's dwelling.

In her application for leave to appeal, the defendant has raised only the claim that there is insufficient evidence to support a finding that the officer reasonably believed Mr. White lived at 2855 Germain. To rule on this sufficiency claim, then, we must consider what testimony a rational jury could have believed to support a finding, had they been asked to make one, that Officer Green reasonably believed Mr. White lived at the defendant's home. See *Wolfe*, 440 Mich at 515. Further, when determining whether sufficient evidence has been presented to sustain a conviction, we must view the evidence in a light most favorable to the prosecution. *Id*.

From the trial record we know that Officer Green had been to the defendant's address "a couple different times when [Mr. White] and his girlfriend had had arguments," but he had never been inside the house. On the day of the incident giving rise to this case, Officer Green received a warrant request from his supervisor telling him that Mr. White had an outstanding domestic violence warrant. The address listed on this warrant was the defendant's address, 2855 Germain. Officer Green was never asked whether he believed Mr. White lived at that address.

Given this record, even though the trial court applied an erroneous legal standard when it instructed the jury that the existence of an arrest warrant provides an officer the lawful authority to enter a house to effectuate the arrest warrant, there nonetheless was sufficient evidence from which the jury could have concluded, had it been asked, that Officer Green reasonably believed that Mr. White lived at the defendant's house. Because the only claim before us is that the evidence was insufficient to support the conviction, I concur in the majority's decision to deny leave to appeal.

The defendant has not asked us to consider the propriety of the court's jury instruction or her lawyer's constitutional effectiveness for failing to properly understand the elements of the crime with which she was charged, failing to properly understand that an arrest warrant alone is insufficient under *Steagald* for an officer to enter a third party's dwelling, or failing to properly understand that the prosecution was required to prove, at minimum, that the officer reasonably believed the dwelling to be her son's residence and therefore failing to litigate that element of the charge in a motion to dismiss or litigate it properly at trial so that the jury could have decided it.

The Court's denial of the defendant's application for leave to appeal on her sufficiency claim today does not prevent the defendant from filing a motion under Subchapter 6.500 of the Michigan Court Rules for relief from the judgment on the basis of any claim that her counsel was constitutionally ineffective.

BERNSTEIN, J., joined the statement of MCCORMACK, J.

KENT COUNTY PROSECUTING ATTORNEY v CITY OF GRAND RAPIDS, No. 151067; Court of Appeals No. 316422.

MARKMAN, J. (*dissenting*). I would grant leave to appeal for the reasons set forth by Justice VIVIANO, as well as to address whether, given that MCL 117.36 of the Home Rule City Act provides that "[n]o provision of any city charter shall conflict with or contravene the provisions of any

general law of the state," the November 2012 amendment of the Grand Rapids City Charter, by rendering certain marijuana offenses in Grand Rapids punishable by a $25 fine, can be reasonably said to "contravene," although not necessarily "conflict with," state laws that punish equivalent offenses "by imprisonment for not more than 1 year or a fine of not more than $2,000.00, or both." MCL 333.7403(2)(d).

VIVIANO, J. (*dissenting*). I respectfully dissent from the Court's order denying the application for leave to appeal by the Kent County Prosecuting Attorney (the County Prosecutor). I would have granted the application because I believe this case presents an important constitutional question concerning whether a home rule city may, through its charter, encroach upon a county prosecutor's broad power to enforce state law.

In November 2012, the voters of the city of Grand Rapids approved an amendment of the Grand Rapids City Charter (the Amendment) that purportedly renders the possession, control, use, or giving away of marijuana a civil infraction.[1] The Amendment also prohibits city police officers and the city attorney from referring complaints of such conduct to the County Prosecutor.[2] The County Prosecutor sought a declaratory judgment that the Amendment usurps his authority and is preempted by state law. On appeal, the Court of Appeals affirmed the trial court's order that granted summary disposition to the city and intervening defendant DecriminalizeGR on the grounds that the Amendment is not preempted by state law and does not interfere with the County Prosecutor's rights, powers, or duties.[3] The County Prosecutor then sought leave to appeal in this Court.

I believe this case presents a conflict between the authority of a local municipality to govern its affairs and a county prosecutor's broad constitutional discretion as "the chief law enforcement officer of the county" to decide whether to prosecute or what charges to file.[4] The city

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[1] Grand Rapids Charter, tit XVIII, § 292(a) and (b).

[2] *Id*. at § 292(d).

[3] *Kent Co Prosecuting Attorney v Grand Rapids*, unpublished opinion per curiam of the Court of Appeals, issued January 8, 2015 (Docket No. 316422).

[4] *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683 (1972) (stating that "[t]he prosecutor is a constitutional officer whose duties are as provided by law" and as "the chief law enforcement officer of the county . . . has the right to exercise broad discretion in determining under which of two applicable statutes a prosecution will be instituted."); see also Const 1963, art 7, § 4; *People v Gillis*, 474 Mich 105, 141 n 19 (2006) ("The power to determine whether to charge a defendant [with a criminal offense] and what charge should be brought is an executive power, which vests exclusively in the prosecutor."); *People v Williams*, 244 Mich App 249, 254 (2001) ("[T]he prosecutor alone possesses the authority to determine whether to prosecute the accused.").

of Grand Rapids, as a home rule city, is granted constitutional authority to create a plan of government regarding local matters.[5] And its police officers are permitted by state law the discretion to decide whether to make an arrest.[6] But the County Prosecutor is the proper constitutional officer to decide whether to pursue charges for violations of state law, not the city police or city officials.[7] Allowing "non-elected, non-prosecutorial public officials to administer an ad hoc system of criminal justice" undermines the prosecutorial function.[8]

Therefore, I write separately to encourage the Legislature to clarify the rights and responsibilities of the city police and the County Prosecutor once an arrest is made. Or, if it so chooses, the Legislature could simply amend § 4*l* of the Home Rule City Act, MCL 117.4*l*, to include charter provisions within its ambit. That provision now states that "[a]n *ordinance* shall not make an act or omission a municipal civil infraction . . . if that act or omission constitutes a crime under . . . Article 7 of the public health code, 1978 PA 368, MCL 333.7101 to 333.7545."[9] However, as the Court of Appeals properly held, MCL 117.4*l*(3)(a) in its

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[5] Const 1963, art 7, § 22; *Detroit v Walker*, 445 Mich 682, 690 (1994) ("Home rule cities are empowered to form for themselves a plan of government suited to their unique needs and, upon local matters, exercise the treasured right of self-governance.").

[6] MCL 764.15 (stating that "[a] peace officer . . . *may* arrest a person" in any of the various situations listed in the statute) (emphasis added).

[7] See *People v Evans*, 94 Mich App 4, 6 (1979) ("[The prosecutor] is the chief law enforcement officer of the county from which he is elected, not the police . . . or the courts."); *People v Matulonis*, 60 Mich App 143, 149 (1975) ("As the chief law enforcement officer in the county, the prosecuting attorney, not the police nor the court, decides the initial charge."); see also *People v Gallego*, 430 Mich 443, 452 (1988) ("[T]he police lack[] the authority to make a binding promise . . . not to prosecute.").

[8] *Gallego*, 430 Mich at 452, 454. Indeed, an argument can be made that the power to direct local law enforcement agencies to provide investigative materials related to felony arrests within the county must necessarily be implied from a county prosecutor's constitutional power to determine what charges should be brought in a given case. See *Presnell v Wayne Bd of Co Rd Comm'rs*, 105 Mich App 362, 368 (1981) (" 'The general rule, with regard to municipal officers, is that they have only such powers as are expressly granted by statute or by sovereign authority or those which are necessarily to be implied from those granted.' "), quoting 56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions, § 276. The quoted language is now found in § 237 of that encyclopedia.

[9] MCL 117.4*l*(3)(a) (emphasis added). Article 7 of the Public Health Code criminalizes the possession and use of marijuana. See MCL 333.7403 and MCL 333.7404.

current form does not prevent the enactment of a *city charter* provision making the possession or use of marijuana a municipal civil infraction.[10] Thus, this apparent loophole could easily be closed by amending § 4*l* to include charter provisions within the statutory prohibition.[11]

In re HERNANDEZ, No. 152523; Court of Appeals No. 324359.

In re R D JOHNSON, No. 152586; Court of Appeals No. 325564.

Leave to Appeal Granted December 18, 2015:

PEOPLE v TEMELKOSKI, No. 150643; Court of Appeals No. 313670. 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); (2) whether the answer to that question is different when applied to the class of individuals who have successfully completed probation under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*.; (3) whether MCL 28.722(b) (defining HYTA status to be a "conviction" for purposes of SORA) provides the defendant constitutionally sufficient due process where the defendant is required to register pursuant to SORA as if he had been convicted of an offense, notwithstanding that upon successful completion of HYTA the court is required to "discharge the individual and dismiss the proceedings" without entering an order of conviction for the crime; MCL 762.14(1); US Const, Am XIV; Const 1963, art 1, § 17; (4) whether, assuming that the requirements of SORA do not amount to "punishment" as applied to the defendant, application of the civil regulatory scheme established by SORA to the defendant otherwise violates guarantees of due process; (5) 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 instant offense and pled guilty under HYTA, US Const, art I, § 10; Const 1963, art 1, § 10; and (6) 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.

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 December 18, 2015:

SHIRVELL v DEPARTMENT OF THE ATTORNEY GENERAL, No. 151065; reported below: 308 Mich App 702.

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[10] Kent Co Prosecuting Atty, unpub op at 4.

[11] See *Walker*, 445 Mich at 690 ("[H]ome rule cities . . . may . . . exercise all powers not expressly denied.").

SHIRVELL v DEPARTMENT OF THE ATTORNEY GENERAL; Nos. 151071 and 151072; reported below: 308 Mich App 702.

In re JACKSON, No. 152404; Court of Appeals No. 325838. On order of the Court, the application for leave to appeal the July 28, 2015 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.

The Court has become aware that, during the pendency of this appeal, the trial court finalized the adoption of the minor child, in violation of *In re JK*, 468 Mich 202 (2003). It appears that no one informed the trial court of the father's appeal of the termination of his parental rights. In order to prevent any recurrence of the problem, we order any trial court finalizing an adoption to provide the following findings on the record:

> I have determined 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.

MCCORMACK, J. (*concurring*). I concur with the Court's decision to deny leave to appeal because I believe that the respondent-father received sufficient notice that the prior termination of his parental rights could be used as a ground for terminating his parental rights in this case. I write separately, however, to articulate more generally my reservations about using MCL 712A.19b(3)(*l*) as a statutory basis for termination.

"[T]he interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests . . . ." *Troxel v Granville*, 530 US 57, 65 (2000) (opinion by O'Connor, J.) (punctuation omitted). Parents are constitutionally entitled to have their fitness adjudicated before the state may infringe on this constitutionally protected relationship. See, e.g., *In re Sanders*, 495 Mich 394, 422 (2014); *Stanley v Illinois*, 405 US 645, 658 (1972). And when the state seeks to adjudicate a parent's fitness it must be done through fundamentally fair procedures. See, e.g., *Santosky v Kramer*, 455 US 745, 769 (1982) (requiring the state to establish a parent's unfitness with clear and convincing evidence); see also MCL 712A.19b(3).

MCL 712A.19b(3)(*l*) permits termination of a parent's rights to his or her child if the state can establish that the parent's rights to *another* child were involuntarily terminated in a *prior* proceeding. There is no requirement that the prior adjudication be proved relevant or material to the current allegations against the respondent. By requiring only that the state establish a prior involuntary termination, MCL 712A.19b(3)(*l*) creates a statutory presumption that a parent is unfit to parent a child presently before the court. In my view, this presumption excuses the state from having to meet its evidentiary burden before infringing on a parent's constitutionally protected relationship with his or her child.

Other state courts have addressed this concern when their states' analogous statutory presumptions were challenged by requiring the state to proffer additional evidence of the parent's unfitness to parent the child currently at issue. See, e.g., *In re JL*, 20 Kan App 2d 665, 672-673 (1995) (holding that a Kansas statute creating a statutory presumption of unfitness based on a prior termination can be rebutted by any evidence supporting a finding of fitness); *Florida Dep't of Children & Families v FL,* 880 So 2d 602, 609 (Fla, 2004) (holding that a parent's rights may only be terminated on the basis of a similar Florida statutory presumption if the state also establishes that there is "a substantial risk of significant harm to the current child").

The statutory presumption at issue in MCL 712A.19b(3)(*l*)—that a parent's unfitness may be based solely on a prior involuntary termination—raises significant constitutional questions that are not complained of in this case but nevertheless trouble me. When someone is accused of a crime, due process does not permit the state to put forth evidence of a prior conviction as sufficient proof to convict him or her of the new charge. To the contrary, we go to great lengths to provide an accused with fair process that does not allow his or her criminal history to play a role in the present adjudication. I do not see why similar process is not due a parent in jeopardy of losing the constitutional right to control the care and custody of his or her children.

My concerns regarding the constitutionality of MCL 712A.19b(3)(*l*) notwithstanding, I concur with the Court's decision to deny leave to appeal in this case because the respondent-father has complained only of the Court of Appeals' sua sponte use of his prior termination as grounds to uphold the trial court's result specifically because, the respondent argued, there was no finding that his prior termination did not violate *Sanders*, 495 Mich 394. There is no evidence, however, that the respondent-father's prior termination was impermissible under *Sanders* or that he was unaware his prior termination could be used to terminate his parental rights. The respondent-father directly appealed the trial court's termination of his parental rights under MCL 712A.19b(3)(i), which permits the state to terminate a parent's rights on the basis of a prior termination that involved serious and chronic neglect or physical or sexual abuse and a showing that the parent has not been rehabilitated; thus, the respondent was plainly aware that his prior termination was at issue in the present proceeding. Accordingly, I am not persuaded that the respondent-father's arguments merit further review.

Summary Disposition December 22, 2015:

PEOPLE V REDDING, No. 151540; Court of Appeals No. 319255. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the 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, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v MCGILARY, No. 151629; Court of Appeals No. 319975. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the 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, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v PRATT, No. 151745; Court of Appeals No. 319639. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals and we remand this case to the Kalamazoo 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, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v TILLERY, No. 151836; Court of Appeals No. 326753. Pursuant to MCR 7.305(H)(1), and in lieu of granting leave to appeal, we remand this case to the Lapeer 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 procedures 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 resen-

tence the defendant. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v RODRIGUEZ, No. 151866; Court of Appeals No. 326181. Pursuant to MCR 67.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Kalamazoo 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, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v BLOUNT, No. 151892; Court of Appeals No. 326971. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Macomb 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 because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v GEROU, No. 151893; Court of Appeals No. 326942. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Allegan 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 because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v DOUGLAS AUSTIN, No. 151920; Court of Appeals No. 326815. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, 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 *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, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v JAMES HOLLOWAY, No. 152134; Court of Appeals No. 321228. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the Macomb 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, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v MARIO WILLIS, No. 152553; Court of Appeals No. 320659. 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 Lockridge*, 498 Mich 358 (2015).

Leave to Appeal Denied December 22, 2015:

PEOPLE v SHALECSHA MOORE, No. 150431; Court of Appeals No. 321863.

PEOPLE v JEFFREY HAWKINS, No. 150457; Court of Appeals No. 321158.

TRADER v COMERICA BANK, No. 150828; Court of Appeals No. 317622.

PEOPLE v HANSERD, No. 150858; Court of Appeals No. 322993.

PEOPLE v DINWIDDIE, No. 150881; Court of Appeals No. 323807.

PEOPLE v BANKSTON, No. 150903; Court of Appeals No. 323954.

PEOPLE v RASHOD BROWN, No. 150905; Court of Appeals No. 324474.

PEOPLE v PATTENAUDE, No. 150908; Court of Appeals No. 323790.

PEOPLE v PHILLIP MITCHELL, No. 150911; Court of Appeals No. 322954.

PEOPLE v STRANDBERG, No. 150914; Court of Appeals No. 324177.

PEOPLE v TERRY WILLIAMS, No. 151010; Court of Appeals No. 324243.

PEOPLE v EAGLE, No. 151015; Court of Appeals No. 325014.

PEOPLE v WITHERSPOON, No. 151032; Court of Appeals No. 317382.

PEOPLE v COPPEDGE, No. 151040; Court of Appeals No. 323145.

PEOPLE v MCNAMEE, No. 151043; Court of Appeals No. 324635.

HIGHLAND APARTMENTS, LLC v GOLDEN, No. 151092; Court of Appeals No. 318204.

PEOPLE v RIDDLE, No. 151136; Court of Appeals No. 324196.

PEOPLE v JOHN BARNES, No. 151140; Court of Appeals No. 324850.

PEOPLE v WATSON, No. 151141; Court of Appeals No. 306989.

PEOPLE v JUSTICE, No. 151142; Court of Appeals No. 324015.

PEOPLE v NICHOLAS SEALS, No. 151154; Court of Appeals No. 324642.

PEOPLE v HOMBERG, No. 151178; Court of Appeals No. 325019.

PEOPLE v JOBEY HENDERSON, No. 151185; Court of Appeals No. 325191.

PEOPLE v COX, No. 151192; Court of Appeals No. 324230.

PEOPLE v COREY CLARK, No. 151202; Court of Appeals No. 325581.

PEOPLE v LEON TAYLOR, No. 151203; Court of Appeals No. 325573.

PEOPLE v WILL JACKSON, No. 151233; Court of Appeals No. 325151.

PEOPLE v JERRY SMITH, No. 151241; Court of Appeals No. 324637.

PEOPLE v TRUITTE, No. 151303; Court of Appeals No. 322930.

PEOPLE v DERRY THOMAS, No. 151304; Court of Appeals No. 324205.

PEOPLE v STEWART, No. 151337; Court of Appeals No. 324437.

PEOPLE v RONALD MARTIN, No. 151338; Court of Appeals No. 324098.

PEOPLE v MICHAEL BLAIR, No. 151356; Court of Appeals No. 324814.

PEOPLE v TRINITY DAVIS, No. 151359; Court of Appeals No. 324054.

PEOPLE v MILNER, No. 151362; Court of Appeals No. 325571.

PEOPLE v MATTHEW MOORE, No. 151406; Court of Appeals No. 324618.

PEOPLE v REYNOLDS, No. 151408; Court of Appeals No. 323839.

PEOPLE v KOLLER, No. 151420; Court of Appeals No. 324660.

PEOPLE v QUINN, No. 151427; Court of Appeals No. 324709.

PEOPLE v COREY HORN, Nos. 151444 and 151445; Court of Appeals Nos. 318972 and 318975.

PEOPLE v HOWARD HUGHES, No. 151448; Court of Appeals No. 323458.

PEOPLE v KEVIN BOWMAN, No. 151468; Court of Appeals No. 325961.

PEOPLE v DOCKETT, No. 151486; Court of Appeals No. 326798.

PEOPLE v SEBASTIAN WILLIAMS, No. 151492; Court of Appeals No. 325280.

PEOPLE v GREGORY HARRIS, No. 151495; Court of Appeals No. 323554.

PEOPLE v SAUNDERS, No. 151529; Court of Appeals No. 325823.

KIMBLE v NEWCO INDUSTRIES LLC, No. 151551; Court of Appeals No. 324796.

PEOPLE v COWPER, No. 151557; Court of Appeals No. 325897.

AUTO-OWNERS INSURANCE COMPANY v SEILS, No. 151570; reported below: 310 Mich App 132.

SEILS v PINK, Nos. 151573 and 151574; Court of Appeals Nos. 315901 and 316511.

BROWN v POLICE OFFICERS LABOR COUNCIL, No. 151686; Court of Appeals No. 318687.

JACKSON v JONES, No. 151689; Court of Appeals No. 324246.

MACOMB MECHANICAL, INC v LASALLE GROUP, INC, No. 151704; Court of Appeals No. 319357.

PEOPLE v LAUBE, No. 151725; Court of Appeals No. 319268.

PEOPLE v KOONCE, No. 151740; Court of Appeals No. 320361.

PEOPLE v WARD, No. 151746; Court of Appeals No. 326562.

PEOPLE v WILLIAM WEBB, No. 151779; Court of Appeals No. 326941.

WILLIAMS-INNER v LIBERTY MUTUAL INSURANCE COMPANY No. 151809; Court of Appeals No. 319217.

WILLIAMS-INNER v LIBERTY MUTUAL INSURANCE COMPANY, No. 151811; Court of Appeals No. 320677.

PEOPLE v VAZQUEZ, No. 151831; Court of Appeals No. 320175.

PEOPLE v POSEY, No. 151837; Court of Appeals No. 319593.

PEOPLE v COMPEAU, No. 151841; Court of Appeals No. 325301.

HENDON v DEPARTMENT OF CORRECTIONS, No. 151850; Court of Appeals No. 326434.

PEOPLE v WESLEY, No. 151851; Court of Appeals No. 326639.

PEOPLE v BECKHAM, No. 151862; Court of Appeals No. 320057.

HARD LUCK DISTRIBUTORS, LLC v TEMPERANCE DISTILLING COMPANY, No. 151885; Court of Appeals No. 319392.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v RADCLIFFE, No. 151896; Court of Appeals No. 319175.

PEOPLE v GRIFFIN, No. 151906; Court of Appeals No. 320407.

PEOPLE v DICKERSON, No. 151910; Court of Appeals No. 320554.

COLEMAN v FOAMADE INDUSTRIES, INC, No. 151924; Court of Appeals No. 327255.

POPE v CENTRAL MICHIGAN CORRECTIONAL FACILITY WARDEN, No. 151949; Court of Appeals No. 326137.

PEOPLE v GANTT, No. 151951; Court of Appeals No. 326421.

RAWLS v DEPARTMENT OF CORRECTIONS, No. 151952; Court of Appeals No. 327121.

PEOPLE v KAPLAN, No. 151956; Court of Appeals No. 317826.

PEOPLE v PETERSON, No. 151958; Court of Appeals No. 320079.

SUMMER v SOUTHFIELD BOARD OF EDUCATION, No. 151962; reported below: 310 Mich App 660.

PEOPLE v POLZIN, No. 151967; Court of Appeals No. 326018.

PEOPLE v HOUTHOOFD, No. 151970; Court of Appeals No. 322592.

PEOPLE v FOLDEN, No. 151981; Court of Appeals No. 319907.

PEOPLE v BYWATER, No. 151992; Court of Appeals No. 320338.

PEOPLE v GIANNOLA, No. 151993; Court of Appeals No. 320223.

PEOPLE v FARMER, No. 151995; Court of Appeals No. 320076.

PEOPLE v DIEMOND, No. 152003; Court of Appeals No. 320034.

PEOPLE v OSTRANDER, No. 152008; Court of Appeals No. 326238.

PEOPLE v DARIUS WILSON, No. 152013; Court of Appeals No. 320202.

RIOS v PNC MORTGAGE, No. 152017; Court of Appeals No. 320762.

PEOPLE v KINARD, No. 152032; Court of Appeals No. 327381.

PEOPLE v GUILE, No. 152037; Court of Appeals No. 319939.

PEOPLE v JOMONTE SIMPSON, No. 152049; Court of Appeals No. 320939.

PEOPLE v SAMUEL JACKSON, No. 152052; Court of Appeals No. 319398.

PEOPLE v WILLIAM WEBB, No. 152057; Court of Appeals No. 327571.

PEOPLE v WILLIAM WEBB, No. 152059; Court of Appeals No. 327588.

PEOPLE v BUTTS, No. 152066; Court of Appeals No. 327281.

BIDASARIA v CENTRAL MICHIGAN UNIVERSITY, No. 152073; Court of Appeals No. 319596.

FRIEND v CLARKSTON COMMUNITY SCHOOL DISTRICT, No. 152074; Court of Appeals No. 319826.

PEOPLE v HAACK, No. 152079; Court of Appeals No. 327114.

PEOPLE v KYLAN PERKINS, No. 152080; Court of Appeals No. 326966.

PEOPLE v STEVEN MOSS, No. 152082; Court of Appeals No. 319954.

EDDINGTON v TORREZ, No. 152083; reported below: 311 Mich App 198.

PEOPLE v CRAGGETTE-SMITH, No. 152084; Court of Appeals No. 321683.

PEOPLE v CRYSLER, No. 152086; Court of Appeals No. 320675.

PEOPLE v OMAR ROSS, No. 152087; Court of Appeals No. 327227.

PEOPLE v SALDANA, No. 152088; Court of Appeals No. 320796.

PEOPLE v STEWARD, No. 152102; Court of Appeals No. 325468.

PEOPLE v WESLEY SANDERS, No. 152103; Court of Appeals No. 326647.

PEOPLE v DUGAN, No. 152108; Court of Appeals No. 327216.

MIDGYETTE v THUMB CORRECTIONAL FACILITY WARDEN, No. 152110; Court of Appeals No. 326189.

PEOPLE v VARNES, No. 152115; Court of Appeals No. 325253.

PEOPLE v MADDOX, No. 152135; Court of Appeals No. 321584.

PEOPLE v ELDRIDGE, No. 152144; Court of Appeals No. 318473.

PEOPLE v COUNTRYMAN, No. 152151; Court of Appeals No. 316913.

STATE TREASURER v HOUTHOOFD, No. 152155; Court of Appeals No. 321975.

PEOPLE v NIPHORATOS, No. 152157; Court of Appeals No. 327158.

GREGERSON v GREGERSON, No. 152159; Court of Appeals No. 325494.

HALL v CARSON CITY CORRECTIONAL FACILITY WARDEN, No. 152162; Court of Appeals No. 327064.

PEOPLE v HERRERA, No. 152184; Court of Appeals No. 327280.

STRICKLAND v SECRETARY OF STATE, No. 152240; Court of Appeals No. 327466.

CITY OF GRAND RAPIDS v STRICKLAND, No. 152242; Court of Appeals No. 327467.

PEOPLE v KNIGHT, No. 152255; Court of Appeals No. 327532.

PEOPLE v JOSEPH JOHNSON, No. 152374; Court of Appeals No. 327092.

DEBOER v STRICKLAND, No. 152401; Court of Appeals No. 327867.

PEOPLE v CAIN, No. 152407; Court of Appeals No. 314342.

PEOPLE v JONATHAN HICKS, No. 152469; Court of Appeals No. 328059.

In re REINSTATEMENT OF RISHAR, No. 152471.

PEOPLE v RACETTE, No. 152476; Court of Appeals No. 314895.

PEOPLE v KELEL, No. 152485; Court of Appeals No. 321926.

PEOPLE v LAWRENCE, No. 152565; Court of Appeals No. 321433.

BANK OF NEW YORK MELLON v DUSSEAU, No. 152571; Court of Appeals No. 321438.

Superintending Control Denied December 22, 2015:

ROULEAU v ATTORNEY GRIEVANCE COMMISSION, No. 151999.

Reconsideration Denied December 22, 2015:

PEOPLE v MAURICE LEWIS, No. 150621; Court of Appeals No. 323536. Leave to appeal denied at 498 Mich 865.

BANK OF NEW YORK MELLON v JAAFAR, No. 150957; Court of Appeals No. 316521. Summary disposition at 498 Mich 860.

PEOPLE v CHARLES FRAZIER, No. 151100; Court of Appeals No. 317087. Leave to appeal denied at 498 Mich 867.

PEOPLE v PYNE, No. 151138; Court of Appeals No. 314684. Leave to appeal denied at 498 Mich 867.

MCALPINE v DONALD A BOSCO BUILDING, INC, No. 151256; Court of Appeals No. 316323. Leave to appeal denied at 498 Mich 884.

PEOPLE v BEAMON, No. 151291; Court of Appeals No. 324682. Leave to appeal denied at 498 Mich 868.

GRIEVANCE ADMINISTRATOR v DUNCHOCK, No. 151395. Leave to appeal denied at 498 Mich 868.

Summary Disposition December 23, 2015:

PEOPLE v SELMAN, No. 147689; Court of Appeals No. 316389. By order of June 11, 2014, the application for leave to appeal the July 18, 2013 order of the Court of Appeals was held in abeyance pending the decisions in *People v Hartwick* (Docket No. 148444) and *People v Tuttle* (Docket No. 148971). On order of the Court, the cases having been decided on July 27, 2015, 498 Mich 192 (2015), 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 trial court's ruling that allows the defendant to present at trial his § 8 affirmative defense under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. Because the defendant failed to present prima facie evidence of each element of § 8(a), the defendant is not entitled to present a § 8 defense at trial. *Hartwick*, 498 Mich at 203. We remand this case to the Oakland Circuit Court for further proceedings not inconsistent with *Hartwick* or this order.

PEOPLE v TOMASIK, No. 149372; Court of Appeals No. 279161. 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 in part the April 22, 2014 judgment of the Court of Appeals and we remand this case to the Kent Circuit Court for a new trial. The trial court abused its discretion by admitting the recording of the defendant's interrogation. See *People v Musser*, 494 Mich 337 (2013). Because nothing of any relevance was said during the interrogation, it was simply not relevant evidence, and thus was not admissible evidence. See MRE 401. The admission of this evidence amounted to plain error that affected the defendant's substantial rights and seriously affected the fairness, integrity or public reputation of judicial proceedings. See *People v Carines*, 460 Mich 750, 763 (1999). In a trial in which the evidence essentially presents a 'one-on-one' credibility contest between the complainant and the defendant, the prosecutor cannot improperly introduce statements from the investigating detective that vouch for the veracity of the complainant and indicate that the detective believes the defendant to be guilty. On retrial, if the parties seek to admit expert testimony, the trial court shall conduct a *Daubert* hearing to ensure that the proposed testimony is both relevant and reliable as is required under MRE 702. See *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579 (1993). In light of this disposition, we decline to address the other issues presented in our order granting leave to appeal.

MORRIS v MORRIS, SCHNOOR & GREMEL, INC, Nos. 149631, 149632, and 149633; Court of Appeals Nos. 315007, 315702, and 315742. On December 9, 2015, the Court heard oral argument on the application for leave to appeal the May 29, 2014 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 affirm on alternate grounds the result reached by the Court of Appeals in affirming the Kent Circuit Court judgment against appellant New York Private Insurance Agency, LLC (NYPIA).

NYPIA claims that it became a nonparty when the circuit court entered orders granting it summary disposition on October 22, 2009 and February 4, 2010, in plaintiff Morris's suit, and on February 16, 2010, in the suit brought by plaintiff Morris, Schnoor & Gremel Properties, LLC. NYPIA argued on appeal that the circuit court erred by later entering judgment against it pursuant to MCL 566.38 because NYPIA was at that time no longer a party to this action. See MCR 2.205; *Estes v Titus*, 481 Mich 573, 592 (2008). NYPIA, the parties, and the Court of Appeals all failed to recognize that, under MCR 2.604, NYPIA remained a party until the circuit court issued its final judgment in each case. The orders of summary disposition dismissing the claims against NYPIA "adjudicat[ed] fewer than all the claims, or the rights and liabilities of fewer than all the parties." See *id*. NYPIA, therefore, remained a party to both actions until the "entry of final judgment adjudicating all the claims and the rights and liabilities of all the parties" under MCR 2.604. NYPIA was afforded all the process it was due under the circumstances presented here.

We vacate any portion of the judgment of the Court of Appeals that is inconsistent with this order. 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.

PEOPLE V HOYLE, No. 151281; Court of Appeals No. 325547. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Ingham 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, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE V ARNETT, No. 151694; Court of Appeals No. 320095. 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 the defendant's witness-vouching and associated ineffective-assistance arguments, and we remand this case to the Court of Appeals to further consider those arguments under the principles set forth in *People v Douglas*, 496 Mich 557 (2014). 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.

PEOPLE V DEMARCUS ALLEN, No. 151941; Court of Appeals No. 326839. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the Saginaw Circuit Court's order denying the defendant's motion for plea withdrawal and we remand this case to the Saginaw Circuit Court for reconsideration of the defendant's motion to withdraw

his plea. The defendant filed his motion before he was sentenced. MCR 6.310(B) permits the defendant to withdraw his plea before sentencing if withdrawal is in the interest of justice, unless withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. MCR 6.310(B)(1); see also *People v Jackson*, 203 Mich App 607, 611-612 (1994). The trial court applied an erroneous legal standard when it concluded that there was no legal basis for the court to allow the defendant to withdraw his plea unless there was a defect in the plea-taking process. See *People v Spencer*, 192 Mich App 146, 150-151 (1991) ("Under MCR 6.310(B), the use of the term 'may' denotes that the trial court has discretion to allow the withdrawal of the plea before sentencing if withdrawal is in the interest of justice and the withdrawal does not substantially prejudice the prosecutor because of reliance on the plea."). Cf MCR 6.310(C); *People v Brown*, 492 Mich 684, 693 (2012) ("A defendant seeking to withdraw his or her plea after sentencing must demonstrate a defect in the plea-taking process."). We do not retain jurisdiction.

SMITH v MICHIGAN PALLET, INC, No. 151963; Court of Appeals No. 318702. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we remand this case to the Lenawee Circuit Court for entry of an order granting the motion for summary disposition filed by the defendants-appellants. The Court of Appeals erred by finding that the plaintiff established a prima facie case of an intentional tort falling within the exception to the worker's compensation exclusive remedy that is found at MCL 418.131(1). There is no evidence in this case that the defendants had a specific intent to injure the plaintiff. Nor does the evidence establish that the defendants "had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." *Id*. See also *Travis v Dreis & Krump Mfg Co,* 453 Mich 149 (1996).

PEOPLE v LIONEL WRIGHT, No. 152328; Court of Appeals No. 319724. 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. On remand, while retaining jurisdiction, the Court of Appeals shall remand this case to the Wayne Circuit Court to conduct an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), to determine whether the defendant was deprived of his right to the effective assistance of counsel when his attorney failed to file a motion to suppress. At the conclusion of the hearing, the circuit court shall then forward the record and its findings to the Court of Appeals, which shall address the issues presented by the defendant. We do not retain jurisdiction.

Leave to Appeal Granted December 23, 2015:

In re APPLICATION OF MICHIGAN ELECTRIC TRANSMISSION COMPANY FOR TRANSMISSION LINE, No. 150695; reported below: 309 Mich App 1. The parties shall include among the issues to be briefed whether the Electric

Transmission Line Certification Act, 1995 PA 30, effective May 17, 1995, is consistent with the first sentence of Const 1963, art 7, § 29.

SBC HEALTH MIDWEST, INC v CITY OF KENTWOOD, No. 151524; Court of Appeals No. 319428. The parties shall address whether the tax exemptions set forth under MCL 211.9(1)(a) are available to a for-profit educational institution.

In re JONES, No. 152595; Court of Appeals No. 326252. On order of the Court, the application for leave to appeal the October 27, 2015 judgment of the Court of Appeals is considered, and it is granted, limited to the issues: (1) whether this Court's opinion in *In re Hatcher*, 443 Mich 426 (1993), was correctly decided in applying the collateral attack rule to bar a challenge to the adjudication as part of an appeal from an order terminating parental rights, notwithstanding the entry of intervening dispositional orders that were appealable of right, see MCR 3.993(A)(1); if not, (2) what must a respondent do to preserve for appeal any alleged errors in the adjudication, and (3) what effect, if any, does a party's failure to utilize an appeal of right offered under the Court Rules have on that party's subsequent appeal of that issue, in light of the interests of reasonable finality in child protective proceedings, which intimately involve the interests and well-being of children, while promoting the goal of reconciliation between parents and children.

The Clerk of the Court is directed to place this case on the May 2016 session calendar for argument and submission. Appellant's brief and appendix must be filed no later than February 10, 2016, and appellee's brief and appendix, if appellee chooses to submit an appendix, must be filed no later than March 9, 2016.

The State Bar of Michigan, or an appropriate committee of the State Bar authorized in accordance with the State Bar's bylaws, is invited to file a brief amicus curiae, to be filed no later than March 30, 2016. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae, to be filed no later than March 30, 2016. Motions to extend the time for the filing of briefs will not be considered.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered December 23, 2015:

ARBUCKLE v GENERAL MOTORS, LLC, No. 151277; Court of Appeals No. 310611. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the plaintiff's action is preempted by federal law, and (2) whether the plaintiff's action is governed by state law or federal law. The parties should not submit mere restatements of their application papers.

The Eastern District of Michigan Chapter of the Federal Bar Association, the Labor and Employment Law Section of the Federal Bar Association, the Michigan Chamber of Commerce, and the Workers' Compensation Law and the Labor and Employment 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 issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied December 23, 2015:

PEOPLE v CYNTHIA JONES, No. 147663; reported below: 301 Mich App 566.

PEOPLE v DEDRICK THOMAS, No. 150741; Court of Appeals No. 323336.

PEOPLE v FLORES, No. 150876; Court of Appeals No. 324115.

PEOPLE v HANNING, No. 150879; Court of Appeals No. 324144.

PEOPLE v JOSEPH GILMORE, No. 151365; Court of Appeals No. 318592.

PEOPLE v HANAFORD, No. 151628; Court of Appeals No. 324634.

HARTLAND GLEN DEVELOPMENT, LLC v HARTLAND TWP, No. 151633; Court of Appeals No. 318843.

PEOPLE v KEVIN MOORE, No. 151748; Court of Appeals No. 318661.

PEOPLE v MCLAUGHLIN, No. 152034; Court of Appeals No. 327170.

PEOPLE v PACE, No. 152070; reported below: 311 Mich App 1.

PEOPLE v ROBERT FOSTER, No. 152139; Court of Appeals No. 320868.

ESPN, INC v MICHIGAN STATE UNIVERSITY, No. 152372; reported below: 311 Mich App 662. By order of October 16, 2015, this Court granted immediate consideration and ordered a stay of trial court proceedings. On order of the Court, the plaintiff's motion for immediate consideration is granted. The application for leave to appeal the August 18, 2015 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. The stay of trial court proceedings, ordered on October 16, 2015, is dissolved.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal and would instead grant leave to appeal to address the proper interpretation and application of the Freedom of Information Act (FOIA) privacy exemption found in MCL 15.243(1)(a), which provides that "[a] public body may exempt from disclosure as a public record under this act . . . [i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." I view this as a significant question, particularly in the distinctive context of a public university.

Plaintiff, ESPN, Inc., submitted a FOIA request to defendant, Michigan State University, seeking the campus incident reports, if they exist, in which the names of any of 301 specific students who are currently or were formerly enrolled at the university appear in any

context. Each of these students is apparently a current or former participant in intercollegiate athletics at the university. Defendant responded by disclosing dozens of reports but with all names and identifying information redacted, invoking the FOIA privacy exemption and explaining that its practice concerning incident reports is to disclose them "subject to redaction of the names and other identifying information . . . of victims, witnesses, and subjects when the request has been made by a requester who was not involved in the incident giving rise to the report." However, defendant discloses "the names and certain other information pertaining to suspects when [it has] reason to believe that the case is being prosecuted." Plaintiff responded by suing defendant for disclosure of the names, the trial court ordered disclosure, and the Court of Appeals affirmed. *ESPN, Inc v Mich State Univ*, 311 Mich App 662 (2015).

"Because our judicial role precludes imposing different policy choices than those selected by the Legislature, our obligation is, by examining the statutory language, to discern the legislative intent that may reasonably be inferred from the words expressed in the statute." *Herald Co v Bay City*, 463 Mich 111, 117 (2000). "[B]y expressly codifying exemptions to the FOIA, the Legislature has shielded some 'affairs of government' from public view. The FOIA exemptions signal particular instances where the policy of offering the public full and complete information about government operations is overcome by a more significant policy interest favoring nondisclosure." *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 472 (2006).

In particular, the privacy exemption of FOIA "has two prongs that the information sought to be *withheld* from disclosure must satisfy. First, the information must be 'of a personal nature.' Second, it must be the case that the public disclosure of that information 'would constitute a clearly unwarranted invasion of an individual's privacy . . . .' " *Mich Federation of Teachers v Univ of Mich*, 481 Mich 657, 675 (2008) (emphasis added). Concerning the second prong, " ' "a court must balance the public interest in disclosure against the interest [the Legislature] intended the exemption to protect." ' " *Herald Co*, 463 Mich at 126 (citations omitted) (alteration in original). "[T]he relevant 'public interest' to be weighed in this balance ' "is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government." ' " *Id*. (citations and emphasis omitted).

It is first necessary to clarify which records defendant is *not* seeking to withhold from disclosure or that are not at issue here. Defendant is *not* seeking to withhold campus incident reports concerning matters for which students have been prosecuted, or reports involving students who have not been prosecuted *except* to the extent that names and identifying information have been redacted, or any other requested information. Furthermore, the FOIA request pertains only to information within the university's possession and not to that held by prosecutors or any other public office. It appears that the reports being sought typically involve campus investigations of misconduct characteristic of a university community having large numbers of students between the ages of 17

and 25, but which misconduct, if confirmed by the investigation to have occurred, is for the most part unlikely to be made the subject of criminal prosecution. Because the public disclosure of an incident report would obviously tend to be embarrassing to an individual student, *Mich Federation of Teachers*, 481 Mich at 660, it seems clear that such reports implicate the first prong of the FOIA privacy exemption by pertaining to matters of a "personal nature." *US Dep't of Justice v Reporters Comm for Freedom of the Press*, 489 US 749, 780 (1989) ("[W]e hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy . . . ."). Accordingly, the critical issue in this case concerns the inquiry required by the second prong of the exemption: " ' "balanc[ing] the public interest in disclosure against the interest [the Legislature] intended the exemption to protect." ' " *Herald Co*, 463 Mich at 126 (second alteration in original). In that regard, I believe significant questions remain and should be addressed by this Court.

First, plaintiff argued in the trial court that disclosure was warranted so the public could determine whether defendant affords special treatment to student-athletes as compared with students who are not in athletic programs, and disclosure was ordered on that basis. However, given that *only* the records of student-athletes have been sought or ordered disclosed, it would seem to be difficult to actually *compare* the treatment of student-athletes and other students. Moreover, the need to disclose student-athletes' *names* has not yet been demonstrated given that these do not seem essential to making this comparison. Thus, does the sought-after disclosure principally reveal "information about *private citizens* that is accumulated" in defendant's files but "little or nothing" about *defendant's* own conduct, or does it advance the "core purpose of FOIA" by "contributing significantly to public understanding of the operations or activities" of defendant? *Mich Federation of Teachers*, 481 Mich at 673 (quotation marks and citations omitted) (emphasis added).

Second, in affirming the trial court, the Court of Appeals asserted on its own initiative at least two "public interests," neither of which was ever asserted by plaintiff itself: (a) determining whether defendant affords special treatment to students who participate in *certain* sports; and (b) determining whether defendant affords special treatment to particular student-athletes on the basis of their "renown." By articulating these "public interests" *sua sponte*, the Court relieved plaintiff of any legal obligation that it may have had to actually articulate, and thereby preserve, its own "public interest" arguments that assertedly warrant disclosure. Yet as several courts have indicated in the context of the federal FOIA privacy exemption, 5 USC 552(b)(6), see *Swickard v Wayne Co Med Examiner*, 438 Mich 536, 543-544 & n 6 (1991) (noting the similarity between these exemptions), the FOIA *requester* has the burden of articulating those "public interests." See, e.g., *Associated Press v US Dep't of Justice*, 549 F3d 62, 66 (CA 2, 2008) ("The requesting party bears the burden of establishing that disclosure of personal information would serve a public interest cognizable under FOIA."); *Lakin Law Firm, PC v Fed Trade Comm*, 352 F3d 1122, 1125 (CA 7, 2003) ("[The plaintiff] has failed to carry its burden of 'identify[ing] with

reasonable specificity the public interest that would be served by release of' the withheld identifying information.") (citations omitted) (alteration in original); *Salas v Office of the Inspector General*, 577 F Supp 2d 105, 112 (D DC, 2008) ("It is the requester's obligation to articulate a public interest sufficient to outweigh an individual's privacy interest, and the public interest must be significant."). When courts are allowed to speculate on their own as to possible "public interests," is the privacy-exemption balancing process distorted?

Third, assuming that whether defendant affords special treatment to students engaged in *certain* sports constitutes a "public interest" that may be asserted by the court, is this "public interest" diminished when the disclosure is limited to reports identifying the *sport* participated in by the student but not also his or her name? See, e.g., *Bradley v Saranac Community Sch Bd of Ed*, 455 Mich 285, 304 (1997) ("[A] public body is permitted to redact any information that falls within an exemption of the FOIA."). Would such a redaction enable the public to determine whether defendant affords special treatment to students in certain sports while also recognizing that "an individual's privacy" may sometimes constitute a basis for nondisclosure?

Fourth, while plaintiff's FOIA request was limited to students who participated in football and men's basketball, it is unclear whether either of the lower courts was, in fact, cognizant of this fact. Did the Court of Appeals, in fact, believe there was a significant "public interest" in comparing student-athletes in men's basketball with student-athletes in men's football, which was all that could have been compared by the reports sought here, or was the Court seeking, as appears more likely, to identify a "public interest" in comparing student-athletes engaged in these *two* sports with student-athletes in *lower-profile* sports? I cannot know for sure from what the lower courts have said, and I also cannot know what supposed limiting principles would govern future FOIA disclosures in cases involving student-athletes of "renown" in high-profile sports, student-athletes in high-profile sports, student-athletes in lower-profile sports, students not engaged in athletics but in other extracurricular pursuits that might become matters of interest for specialized media, or to university students in general. What limiting principles can be drawn from this case for future FOIA requests?

Fifth, assuming that whether defendant affords special treatment to student-athletes on the basis of their "renown" constitutes a "public interest" that may be asserted by the court, does the resultant balancing test require the disclosure of all reports pertaining to both "renowned" and "unrenowned" student-athletes even though there are far fewer of the former class? That is, by ordering the disclosure of *all* reports on the grounds that *plaintiff* be allowed to distinguish between "renowned" and "unrenowned" student-athletes, did the "public interest" in examining the reports of the few "renowned" student-athletes outweigh the privacy interests of the many "unrenowned" student-athletes?

Sixth, "[t]he Michigan Constitution confers a unique constitutional status on our public universities . . . ." *Federated Publications, Inc v Mich State Univ Bd of Trustees*, 460 Mich 75, 84 (1999). Accordingly, a public university such as defendant exercises "a fair amount of indepen-

dence and control over [its] day-to-day operations," which is presumably designed to secure its overall educational mission. *Western Mich Univ Bd of Control v Michigan*, 455 Mich 531, 540 (1997). Furthermore, a university owes certain responsibilities to its students that go beyond the purely academic, encompassing counseling, support, personal development, and nurturing. Parents who send their children to a university place some faith in that institution that it will provide a reasonably supportive environment for their still-teenage children, an environment once perhaps summarized by the phrase *in loco parentis*. These distinctive missions, educational and nurturing, may each be implicated by the effectiveness of university policies that protect, or fail to protect, the privacy interests of its students, as well as by the extent of deference shown to those policies under FOIA's privacy-exemption balancing test. Is it relevant under this test that the university may have, in its best judgment, decided it would ill serve its educational or nurturing mission to publicly shame a student who has either engaged in or been merely alleged to have engaged in minor misconduct? Is it relevant under this test that the university may have, in its best judgment, decided that it would ill serve its educational or nurturing mission to respond to misconduct or mere allegations of misconduct by automatically placing the relevant incident report in its FOIA disclosure file for whenever the media chooses to request that file? Is it relevant under this test that the university may have, in its best judgment, decided that it would breach faith with both its students and their parents if it were required to establish such an unforgiving disciplinary environment and required to disclose information involving no criminal conduct but possibly creating lifelong embarrassment?

Seventh, no apparent consideration was given in the lower courts' balancing processes to the fact that many students identified in incident reports are only *suspects* in campus misconduct, and not actual violators. Some number of defendant's students, for no reason other than that they have chosen to participate in intercollegiate sports, will now be permanently and publicly marked as *suspects* in minor episodes of campus misconduct that resulted in neither criminal charges nor convictions. Because this will result in some students who have committed no misconduct being treated identically with some students who have, should this factor have been given consideration in the exemption balancing process?

I have no doubt that plaintiff—as well as many among the public—may be genuinely interested concerning the nature of student-athlete behavior at the defendant university. However, the balancing test required by the second prong of the FOIA privacy exemption does not exclusively, or even largely, rest upon this consideration. Rather, "FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed." *Reporters Comm*, 489 US at 774. To be clear, while I am fully cognizant of the principles of government transparency reflected in FOIA, I am also cognizant of the *exceptions* to those principles also reflected in FOIA.

Put simply, it is this Court's duty to balance the public's unquestioned interest in "full and complete information about government operations" with the "significant policy interest[s]" reflected by the *exemptions* to that law, in this case the privacy exemption. *Herald Co*, 475 Mich at 472. Moreover, this balancing is of a particularly sensitive and nuanced kind when, as here, it pertains to an institution carrying out both an educational and a nurturing mission that might each be affected by the manner in which that institution upholds the privacy of its students. Cf. *Strout v US Parole Comm*, 40 F3d 136, 139 (CA 6, 1994) (interpreting the privacy exemption as protecting the *mission* of the institution in possession of the records as well as the privacy interests of those individuals who would be directly affected by disclosure).

For the reasons set forth herein, I am not yet persuaded that the balancing process in this case, requiring the disclosure of unredacted campus incident reports sought by plaintiff, will serve FOIA's core purpose without infringing the privacy interests of some affected students. Accordingly, I would grant leave to appeal to further consider this issue.

Leave to Appeal Denied December 30, 2015:

PEOPLE v ROBERTSON, No. 150132; Court of Appeals No. 315870.

PEOPLE v KEEFE, No. 151194; Court of Appeals No. 324910.

MARKMAN, J. (*concurring*). I concur with the order denying leave to appeal. However, I write separately to call to the attention of the Legislature what I believe may be the effective nullification of its mandatory minimum sentence for certain first-degree criminal sexual conduct (CSC-I) offenses set forth in MCL 750.520b(2)(b). This has arisen as a result of a misapprehension of MCL 750.520b(2)(b) in conjunction with new criminal sentencing rules articulated by the United States Supreme Court in *Alleyne v United States*, 570 US ___, ___; 133 S Ct 2151, 2162 (2013); it is also a result considerably different from that which might arise from a typical plea negotiation.

Defendant engaged in sexual penetrations with the victim between September 2006 and September 2009. At that time, defendant was between the ages of 17 and 20 and the victim was between the ages of 5 and 8. The prosecutor charged defendant with four counts of CSC-I, MCL 750.520b(1)(a) ("A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and . . . [t]hat other person is under 13 years of age."), and notified defendant that he was subject to a 25-year mandatory minimum sentence pursuant to MCL 750.520b(2)(b) (stating that CSC-I "committed by an individual 17 years of age or older against an individual less than 13 years of age [is punishable] by imprisonment for life or any term of years, but not less than 25 years"). At a pretrial hearing, defendant agreed to plead guilty to two counts of CSC-I in exchange for the prosecutor's agreement to drop the remaining two counts and to charge what she described as "basically a lesser of count one and two. . . . [T]he difference is it's not with the added element of the defendant being over

the age of 17." Put simply, the prosecutor orally amended the charges to reduce the severity of the CSC-I counts to which defendant was pleading guilty by dropping the "added element"— this being the threshold age of 17 set forth in MCL 750.520b(2)(b)—which would result in defendant's no longer being subject to the mandatory minimum sentence. The trial court then accepted defendant's guilty plea, and he was sentenced to concurrent prison terms of *23* to 50 years for the two CSC-I convictions. MCL 750.520b(2)(a) (stating that except as otherwise provided, "[c]riminal sexual conduct in the first degree is a felony punishable . . . by imprisonment for life or for any term of years").

There are four degrees of criminal sexual conduct: CSC-I, MCL 750.520b; second-degree criminal sexual conduct, MCL 750.520c; third-degree criminal sexual conduct, MCL 750.520d; and fourth-degree criminal sexual conduct, MCL 750.520e. See *People v Smith*, 425 Mich 98, 114 n 11 (1986) (explaining that 1974 PA 266 "redefined the offense [of rape] as criminal sexual conduct of four degrees of seriousness"). In this case, as defendant acknowledged at the hearing, he committed the most serious degree of criminal sexual conduct offense, CSC-I, because he engaged in sexual penetration with another person "under 13 years of age." MCL 750.520b(1)(a). And because those CSC-I offenses were "committed by an individual 17 years of age or older against an individual less than 13 years of age," they were punishable by "not less than 25 years." MCL 750.520b(2)(b). Furthermore, MCL 769.34(2)(a) provides that "[i]f a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections," such as here, "the court *shall* impose sentence in accordance with that statute." (Emphasis added.) Accordingly, in my view, MCL 750.520b(2)(b) was clearly designed by the Legislature to operate, as with any other mandatory minimum sentence, as a *limitation* on the trial court's sentencing discretion when CSC-I is "committed by an individual 17 years of age or older against an individual less than 13 years of age."

Indeed, that is the fundamental purpose of a mandatory minimum sentence—to statutorily communicate on behalf of the people the Legislature's intention that with regard to a particular criminal circumstance the Legislature is unwilling to defer to the discretion of the trial court but wishes instead to ensure that a sentence of a specific minimum length be imposed. It is thus not the difference between a 23-year sentence, as here, and a 25-year sentence that is principally at issue, but the difference between a sentence that is determined by the Legislature and one that is determined by the trial court, even when the latter sentence has met with the approval of both the prosecutor and the defendant. If a 23-year sentence may be imposed instead of the statutory minimum, then so too may a 13-year sentence or a 3-year sentence, and as a result the criminal punishments of the Legislature be disregarded.

These propositions are all fundamental and well established under our laws. "[T]he ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature." *People v Hegwood*, 465 Mich 432, 436 (2001). And regardless of whether a criminal punishment is viewed favorably in a particular case by the court, the

prosecutor, or the defendant, that policy may only be altered by the Legislature itself. *People v Morris*, 80 Mich 634, 637 (1890) ("[T]he policy of the law . . . belongs to the Legislature, which is composed of representatives direct from the people, and who alone have the right to voice the sentiments of the people in the public enactments."); *People v Coles*, 417 Mich 523, 538 (1983) ("[T]he people of this state, through their elected legislative representatives, are the appropriate ones to determine what specific punishment a defendant should receive for the conviction of a given crime."), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630 (1990).

Notwithstanding that MCL 750.520b(2)(b) was intended by the Legislature to limit the trial court's *sentencing discretion* when CSC-I is "committed by an individual 17 years of age or older against an individual less than 13 years of age," both the parties and the trial court here effectively treated MCL 750.520b(2)(b) as establishing a *separate degree* of criminal sexual conduct with an aggravated punishment, one that is nowhere found within the statutory scheme. That separate degree of criminal sexual conduct was ostensibly CSC-I committed by an individual "engag[ing] in sexual penetration with another person . . . under 13 years of age," with the *added element* that the defendant be "an individual 17 years of age or older." This separate degree was punishable not "by imprisonment for life or for any term of years," MCL 750.520b(2)(a), but instead "by imprisonment for life or any term of years, but not less than 25 years," MCL 750.520b(2)(b). Because counsel and the trial court (erroneously in my view) treated MCL 750.520b(2)(b) as establishing a separate degree of criminal sexual conduct with an aggravated punishment, defendant was able to plead guilty to a presumably "lesser offense" of CSC-I without the "added element" set forth in MCL 750.520b(2)(b) and therefore avoid the 25-year mandatory minimum sentence for his offense.

I am troubled by this application of MCL 750.520b(2)(b). There are only four degrees of criminal sexual conduct, and CSC-I is "defined as sexual penetration with another person accompanied by any one of some eight circumstances. MCL 750.520b(1)(a)-(h)." *Smith*, 425 Mich at 114 n 11 (citation omitted). MCL 750.520b(2)(b) cannot *itself* constitute a separate degree of criminal sexual conduct because there are only four degrees of that offense. Nor can MCL 750.520b(2)(b) constitute a ninth circumstance under which CSC-I may be committed because there are only eight such circumstances (some of which may be committed by alternate means), listed in MCL 750.520b(1)(a) to (h). Because MCL 750.520b(2)(b) can neither constitute a separate degree of criminal sexual conduct nor be a ninth circumstance under which CSC-I may be committed, the only proper effect of MCL 750.520b(2)(b) within the scheme set forth by MCL 750.520b is as a limitation on the trial court's sentencing discretion when CSC-I is "committed by an individual 17 years of age or older against an individual less than 13 years of age." And almost certainly, that is *exactly* what the Legislature intended MCL 750.520b(2)(b) to mean. This intention was undermined here because the prosecutor instead employed the mandatory minimum as mere leverage in a plea bargain.

To be clear, I recognize that "plea bargaining [is] 'an essential component of [our] administration of justice'." *People v Killebrew*, 416 Mich 189, 197 (1982), quoting *Santobello v New York*, 404 US 257, 260 (1971). I do not question the prosecutor's prerogative to negotiate lesser charges in the course of a plea bargain. In my view, however, the plea bargain cannot be allowed to supersede the Legislature's determination that a particular criminal offense is punishable by a mandatory minimum sentence. Because the commission of CSC-I here was sufficiently established by defendant's guilty plea, and because defendant was over the age of 17 while the victim was under the age of 13 when the offense was committed, the 25-year mandatory minimum *should* have applied to his sentence.

In the final analysis, I concur with the Court's order denying leave because the United States Supreme Court held in *Alleyne*, 570 US at ___; 133 S Ct at 2162, that "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." Consequently, because the fact that the CSC-I offenses here were committed by an individual 17 years of age or older aggravated the prescribed punishment, that fact formed a necessary constituent part of a "new offense." And "an information or indictment must contain an averment of every essential element of the crime with which a defendant is charged . . . ." *People v Nyx*, 479 Mich 112, 132 (2007) (opinion by TAYLOR, C.J.). Thus, the fact that defendant was "an individual 17 years of age or older" must have been *alleged* in the information to subject him to the 25-year mandatory minimum under MCL 750.520b(2)(b), and it was not alleged. Instead, the information was orally amended to omit that fact. Accordingly, defendant could not have been made subject to the mandatory minimum sentence. Put simply, as this case illustrates, *Alleyne* has altered the legal environment in which mandatory minimum sentences operate. Whereas they were previously understood as limitations on the *trial court's* sentencing discretion, they now effectively create a *separate degree* of an offense—here that of criminal sexual conduct—that may be employed as mere leverage by the prosecutor in the course of plea negotiations. See, e.g., *People v Moore*, 498 Mich 498 (denying leave to appeal in a case in which the defendant pleaded guilty of CSC-I involving a perpetrator 17 years of age or older and a victim under the age of 13 and received a 20-year minimum sentence following a plea agreement).

As a result of the practice adopted in this case, there is no longer any real mandatory minimum sentence for the class of criminal sexual conduct offenses at issue—those involving interactions between persons 17 years of age or older and those under the age of 13. Defendant thus has been convicted of CSC-I, he was over the age of 17, his victim was under the age of 13, and yet he has not been sentenced to the mandatory minimum sentence required by the law. I write separately only to call this situation to the attention of the Legislature so that, if it chooses to do so, it might review MCL 750.520b(2)(b) to ascertain whether the outcome of this case is in accordance with its intentions.

PEOPLE v CAIN, No. 152876; Court of Appeals No. 314342.

Leave to Appeal Denied January 8, 2016:

TAYLOR v CURTIS-BOTSFORD REAL ESTATE, LLC, No. 152260; Court of Appeals No. 325401.

KRAUS v GEROU, Nos. 152674 and 152675; Court of Appeals Nos. 326397 and 327149.

MCCORMACK and LARSEN, JJ., did not participate because of prior acquaintances with the parties involved in this matter.

In re PRICE, No. 152788; Court of Appeals No. 327001.

In re RINCONES, No. 152893; Court of Appeals No. 327495.

Summary Disposition January 15, 2016:

PEOPLE v HEMINGER, No. 150843; Court of Appeals No. 316959. By order of April 28, 2015, the application for leave to appeal as cross-appellant the November 20, 2014 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Hartwick* (Docket No. 148444) and *People v Tuttle* (Docket No. 148971). On order of the Court, the cases having been decided on July 27, 2015, 498 Mich 192 (2015), the application for leave to appeal as cross-appellant is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we direct the Alger Circuit Court, on retrial, with the input of the prosecutor and the defendant's counsel, to draft an appropriate instruction, to be given by the trial court to the jury orally and in writing, regarding the defendant's § 8 affirmative defense that is consistent with MCL 333.26428 and *People v Hartwick*, 498 Mich 192 (2015), including the applicable burden of proof. In all other respects, leave to appeal as cross-appellant is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. The stay of trial court proceedings, ordered on April 28, 2015, is dissolved.

Leave to Appeal Denied January 15, 2016:

In re CUSHMAN, No. 152727; Court of Appeals No. 327254.

Summary Disposition January 22, 2016:

PEOPLE v YUMAR BURKS, No. 150857; Court of Appeals No. 314579. On January 14, 2016, the Court heard oral argument on the application for leave to appeal the December 2, 2014 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 vacate that part of the Court of Appeals opinion holding that second-degree child abuse under MCL 750.136b(3)(b) is a necessarily included lesser offense of first-degree child abuse. The Court of Appeals did not need to reach this issue because that instruction was never requested in the trial court. 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.

Summary Disposition January 27, 2016:

LAFAVE V IONIA COUNTY ROAD COMMISSION CHAIRPERSON, No. 151417; Court of Appeals No. 315439. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals opinion applying the law of abandonment to the facts of this case. The Court of Appeals erred by finding that the facts on record are sufficient to demonstrate defendants Molly Kandle-Kost and James Kost intended to abandon their easement rights in Weberta Drive, particularly in light of the failure of the trial court to make any findings on abandonment or the precise nature of defendants' property right. We therefore remand this case to the Ionia Circuit Court for findings on the nature of any property right retained by defendants Molly Kandle-Kost and James Kost in Weberta Drive. Once that court has determined the nature of that right, it should determine whether an abandonment analysis is applicable and, if it is applicable, make any necessary findings regarding whether defendants intended to abandon their property rights in Weberta Drive. See *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 385 (2005). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE V COLUMBERT, No. 151710; Court of Appeals No. 325398. 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 to reconsider whether the requirements set forth in MCR 7.205(B) are satisfied in light of the prison account statements received on March 16, 2015 and May 28, 2015; five copies of a motion to waive filing fee for the defendant's delayed application for leave to appeal dated January 10, 2015 received some time before March 4, 2015; and the register of actions dated May 5, 2015 received on May 28, 2015. We do not retain jurisdiction.

In re APPLICATION OF CONSUMERS ENERGY TO INCREASE ELECTRIC RATES, No. 152263; Court of Appeals No. 317434. 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 addressed the claim of appeal filed by the Attorney General, Docket No. 317434, and we remand this case to the Court of Appeals for consideration of the merits of that claim of appeal. The fact that the Attorney General stipulated to a settlement agreement that recognized a rate increase is not inconsistent with the Attorney General's appeal from the June 28, 2013 decision of the Michigan Public Service Commission. That decision resolved issues preserved by the Attorney General in the settlement agreement. Those preserved issues can be addressed independent of the $89 million in rate relief approved pursuant to the settlement agreement. This order does not disturb the Court of Appeals disposition in the consolidated case, Docket No. 317456. We express no opinion regarding the merits of the

Attorney General's appeal. We do not retain jurisdiction.

LUTZ v TERRITO, No. 152983; Court of Appeals No. 328960. 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 of a portion of the trial court's order compelling discovery is granted. The trial court's July 9, 2015 order granting discovery of the stroke care data is 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 January 27, 2016:

PEOPLE v SIMPKINS, No. 150527; Court of Appeals No. 323485.

In re KEYES, No. 151657; reported below: 310 Mich App 266.

JRV HOLDINGS, LLC v CORVEN, No. 151698; Court of Appeals No. 323835.

VIVIANO, J., did not participate due to a familial relationship with the presiding district court judge in this case.

HAYES TWP v FOWLER, No. 151830; Court of Appeals No. 320530.

PEOPLE v EDDIE WRIGHT, No. 151938; Court of Appeals No. 320619.

PEOPLE v CALVIN AUSTIN, No. 152104; Court of Appeals No. 326999.

PEOPLE v GRIFFEN, No. 152292; Court of Appeals No. 321317.

PEOPLE v TRINH, No. 152363; Court of Appeals No. 326718.

Summary Disposition January 29, 2016:

LECH v HUNTMORE ESTATES CONDOMINIUM ASSOCIATION, No. 151943; reported below: 310 Mich App 258. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Section IV of the Court of Appeals judgment, and we remand this case to the Court of Appeals for reconsideration. On remand, the Court of Appeals shall consider whether its decision that the defendants are not entitled to post-judgment interest under MCL 600.6013 on their sanctions award is consistent with *Ayar v Foodland Distributors*, 472 Mich 713, 717 (2005). 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.

PEOPLE v HARPER, No. 152114; Court of Appeals No. 319942. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals opinion holding that it cannot be concluded that the two separate assaults constituted part of the "same transac-

tion" under MCL 750.520b(3). We agree, however, that the sentencing judge failed to identify specific evidence from which one could conclude that the imposition of consecutive sentences was warranted. We therefore remand this case to the Kent Circuit Court. On remand, the trial court shall either issue an order that provides a basis for its conclusion that the two criminal offenses arose from the same transaction, or impose concurrent sentences. We do not retain jurisdiction.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered January 29, 2016:

SPECTRUM HEALTH HOSPITALS v WESTFIELD INSURANCE COMPANY, No. 151419; Court of Appeals No. 323804. The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether *Miller v Auto-Owners Ins Co*, 411 Mich 633 (1981), remains a viable precedent in light of *Frazier v Allstate Ins Co*, 490 Mich 381 (2011), and *LeFevers v State Farm Mut Auto Ins Co*, 493 Mich 960 (2013); and (2) if so, whether *Miller* should be overruled. 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.

PEOPLE v FEELEY, No. 152534; reported below: 312 Mich App 320. The parties shall file supplemental briefs within 42 days of the date of this order addressing whether the term "police officer" in MCL 750.81d(7)(b)(*i*) encompasses reserve police officers. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied January 29, 2016:

PEOPLE v DUENAZ, No. 150286; reported below: 306 Mich App 85. On January 14, 2016, the Court heard oral argument on the application for leave to appeal the July 10, 2014 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court. We note, however, that the Court of Appeals has remanded this case to the St. Clair Circuit Court for resentencing, and that any such resentencing must comply with the procedure described in *People v Lockridge*, 498 Mich 358 (2015).

In addition, we encourage the Legislature to clarify whether evidence of prior sexual abuse constitutes "sexual conduct" within the meaning of the rape-shield statute, MCL 750.520j. The statute does not define "sexual conduct," and the proper construction of that term is a question that has divided Justices of this Court. See *People v Parks*, 483 Mich 1040 (2009) (YOUNG, J., concurring) (MARKMAN, J., dissenting); *People v Piscopo*, 480 Mich 966 (2007) (MARKMAN, J., dissenting).

In re MAES, No. 152973; Court of Appeals No. 325919.

Reconsideration denied January 29, 2016:

ABBO v WIRELESS TOYZ FRANCHISE, LLC, No. 149536; Court of Appeals No. 304185. Leave to appeal denied at 498 Mich 929.

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 July 6, 2015:

PROPOSED AMENDMENTS OF New MCR 2.403.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.403 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 Administrative Matters & Court Rules page.

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 2.403. CASE EVALUATION.

(A)-(N) [Unchanged.]

(O) Rejecting Party's Liability for Costs.

(1)-(5) [Unchanged.]

(6) For purposes of this rule, actual costs are

(a) those costs taxable in any civil action, and

(b) a reasonable ~~attorney~~ fee based on a reasonable hourly or daily rate as determined by the trial judge for legal services necessitated by the rejection of the case evaluation, which may include legal services provided by attorneys representing themselves or the entity for whom they work.

For the purpose of determining taxable costs under this subrule and under MCR 2.625, the party entitled to recover actual costs under this rule shall be considered the prevailing party.

(7)-(11) [Unchanged.]

Staff Comment: The proposed amendments of MCR 2.403(O) would allow a reasonable fee to be included in a request for costs by attorneys who represent themselves or who are employed by a party to the case for legal services provided after case evaluation is rejected.

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 September 1, 2015, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-09. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered September 16, 2015:

PROPOSED AMENDMENTS OF MCR 8.126, MCR 9.108, AND SBR 15.

On order of the Court, this is to advise that the Court is considering amendments of Rules 8.126 and 9.108 of the Michigan Court Rules, and 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 Administrative Matters & Court Rules page.

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 8.126. TEMPORARY ADMISSION TO THE BAR.

(A) Temporary Admission. Any person who is licensed to practice law in another state or territory, or in the District of Columbia, of the United States of America, or in any foreign country, and who is not disbarred or suspended in any jurisdiction, and who is eligible to practice in at least one jurisdiction, may be permitted to appear and practice in a specific case in a court, before an administrative tribunal or agency, or in a specific arbitration proceeding in this state when associated with and on motion of an active member of the State Bar of Michigan who appears of record in the case. An out-of-state attorney may ~~appear and~~ be temporarily admitted to practice under this rule in no more than five cases in a 365-day period. Permission to appear and practice is within the discretion of the court, administrative tribunal or agency, or arbitrator and may be revoked at any time for misconduct. For purposes of this

rule, an out-of-state attorney is one who is licensed to practice law in another state or territory, or in the District of Columbia, of the United States of America, or in a foreign country and who is not a member of the State Bar of Michigan.

(1) Procedure.

(a) Motion. An attorney seeking temporary admission must be associated with a Michigan attorney. The Michigan attorney with whom the out-of-state attorney is associated shall file with the court or administrative tribunal or agency an appearance and a motion that seeks permission for the temporary admission of the out-of-state attorney. The motion shall be supported by a current certificate of good standing issued by a jurisdiction where the out-of-state attorney is licensed and eligible to practice, the document supplied by the State Bar of Michigan showing that the required fee has been paid and an affidavit of the out-of-state attorney seeking temporary admission, which affidavit shall verify

(i)-(iv) [Unchanged.]

The out-of-state attorney must attach to the affidavit copies of any disciplinary dispositions~~, and a copy of the acknowledgment letter supplied by the State Bar of Michigan showing that the required fee has been paid~~. The motion shall include an attestation of the Michigan attorney that the attorney has read the out-of-state attorney's affidavit, has made a reasonable inquiry concerning the averments made therein, believes the out-of-state attorney's representations are true, and agrees to ensure that the procedures of this rule are followed. The motion shall also include the addresses and email addresses of both attorneys.

(b) Fee. In each case in which an out-of-state attorney seeks temporary admission in Michigan, the out-of-state attorney must pay a fee equal to the discipline and client-protection portions of a bar member's annual dues. The fee must be paid electronically to the State Bar of Michigan, in conjunction with submission of an electronic copy of the motion, the certificate of good standing and the affidavit to the State Bar of Michigan, pursuant to procedures established by the State Bar of Michigan. Upon receipt of the fee remitted electronically, confirmation of payment will issue electronically to the out-of-state attorney through the State Bar of Michigan's automated process.

~~The Michigan attorney shall send a copy of the motion and supporting affidavit to the Attorney Grievance Commission.~~ Within seven days after receipt of the copy of the motion and fee, the ~~Attorney Grievance Commission~~ State Bar of Michigan must notify the court, administrative tribunal or agency, or arbitrator and both attorneys whether the out-of-state attorney has been granted permission to appear temporarily in Michigan within the past 365 days, and, if so, the number of such appearances. The notification will be issued electronically, pursuant to the procedures established by the State Bar of Michigan. No order or other writing granting permission to appear in a case shall be entered by a court, administrative tribunal or agency, or arbitrator until the electronic notification is received from the ~~Attorney Grievance Commission~~ State Bar of Michigan.

The State Bar of Michigan shall retain the discipline portion of the fee for administration of the request for temporary admission and disciplinary oversight and allocate the client-protection portion to the Client Protection Fund. If a request for investigation is filed with the grievance administrator against an attorney while temporarily admitted to practice in Michigan, the entire amount of the administration fee paid by that attorney for the case in which the allegations of misconduct arose would be transferred to the disciplinary system.

(c) Order. Following notification by the ~~Attorney Grievance Commission~~State Bar of Michigan, if the out-of-state attorney has been granted permission to appear temporarily in fewer than 5 cases within the past 365 days, the court, administrative tribunal or agency, or arbitrator may enter an order granting permission to the out-of-state attorney to appear temporarily in a case. If an order or other writing granting permission is entered, ~~the court, administrative tribunal or agency, or arbitrator~~ the Michigan attorney shall submit an electronic ~~send a~~ copy of the order or writing to the ~~Michigan attorney, the out-of-state attorney, and the~~ State Bar of Michigan within seven days ~~Attorney Grievance Commission.~~

~~(d) Fee. In each case in which an out-of-state attorney seeks temporary admission in Michigan, a fee equal to the discipline and client-protection portions of a bar member's annual dues must be paid. The discipline portion of the fee shall be paid to the State Bar of Michigan for allocation to the attorney discipline system, and the client-protection portion shall be paid to the State Bar of Michigan for allocation to the Client Protection Fund. Upon receipt of payment of the fee, the State Bar of Michigan shall within three business days send to the out-of-state attorney an acknowledgment letter that the fee has been paid.~~

~~(e)~~(d) [Relettered former paragraph (e) as (d), but otherwise unchanged.]

RULE 9.108 ATTORNEY GRIEVANCE COMMISSION.

(A)-(D) [Unchanged.]

(E) Powers and Duties. The commission has the power and duty to:

(1)-(5) [Unchanged.]

(6) submit to the Supreme Court proposed changes in these rules; and

~~(7) compile and maintain a list of out-of-state attorneys who have been admitted to practice temporarily and the dates those attorneys were admitted, and otherwise comply with the requirements of MCR 8.126, and~~

(7)~~(8)~~[Renumbered former paragraph (8) as (7), but otherwise unchanged.]

RULE 15. ADMISSION TO THE BAR.

Section 1. Character and Fitness Committees. [Unchanged.]

Section 2 Foreign Attorney: Temporary Permission. Any person who is duly licensed to practice law in another state or territory, or in the District of Columbia, of the United States of America, or in any foreign

country, may be temporarily admitted under MCR 8.126. ~~The State Bar of Michigan shall inform the Attorney Grievance Commission when an applicant for temporary admission pays the required fee pursuant to MCR 8.126.~~

Section 3. Procedure for Admission; Oath of Office. [Unchanged.]

Staff Comment: These proposed amendments of MCR 8.126 and MCR 9.108, and SBR 15 were submitted jointly by the Attorney Grievance Commission and the State Bar of Michigan to improve effectiveness of the pro hac vice program by consolidating ministerial functions within the bar.

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, 2016, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2004-08. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered October 14, 2015:

PROPOSED AMENDMENT OF MCR 3.979.

On order of the Court, this is to advise that the Court is considering amendments of Rule 3.979 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 Administrative Matters & Court Rules page.

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 3.979. JUVENILE GUARDIANSHIPS.

(A)-(B) [Unchanged.]

(C) Court Jurisdiction; Review Hearings; Lawyer-Guardian ad Litem.

(1) Jurisdiction.

(a) Except as otherwise provided in this rule, the~~The~~ court's jurisdiction over a juvenile guardianship shall continue until terminated by court order. The court's jurisdiction over a juvenile under section 2(b) of the Juvenile Code, MCL 712A.2(b), and the jurisdiction of the MCI under section 3 of 1935 PA 220, MCL 400.203, shall be terminated after the court appoints a juvenile guardian under this section and conducts a review hearing pursuant to MCR 3.975 when parental rights to the child have not been terminated, or a review hearing pursuant to MCR 3.978 when parental rights to the child have been terminated. ~~Upon notice by the Department of Human Services that extended guardianship assistance beyond age 18 will be provided to a youth pursuant to MCL 400.665, the court shall retain jurisdiction over the guardianship until that youth no longer receives extended guardian assistance.~~

(b) Unless terminated by court order, the court's jurisdiction over a juvenile guardianship ordered under MCL 712A.19a or MCL 712A.19c for a youth 16 years of age or older shall continue until 120 days after the youth's eighteenth birthday. Upon notice by the Department of Health and Human Services that extended guardianship assistance beyond age 18 will be provided to a youth pursuant to MCL 400.665, the court shall retain jurisdiction over the guardianship until that youth no longer receives extended guardianship assistance.

(2) Review Hearings. The review hearing following appointment of the juvenile guardian must be conducted within 91 days of the most recent review hearing if it has been one year or less from the date the child was last removed from the home, or within 182 days of the most recent review hearing if it has been more than one year from the date the child was last removed from the home.

(3) Lawyer-Guardian ad Litem. The appointment of the lawyer-guardian ad litem in the child protective proceeding terminates upon entry of the order terminating the court's jurisdiction pursuant to MCL 712A.2(b). At any time after a juvenile guardian is appointed, the court may reappoint the lawyer-guardian ad litem or may appoint a new lawyer-guardian ad litem if the court is satisfied that such action is warranted. A lawyer-guardian ad litem appointed under this subrule is subject to the provisions of MCL 712A.17d.

(D) Court Responsibilities.

(1) Annual Reviews.

(a) Review on Condition of Child. The court shall conduct an annual review of a juvenile guardianship ~~annually~~ as to the condition of the child until the child's eighteenth birthday. The review shall be commenced within 63 days after the anniversary date of the appointment of the guardian. The court may conduct a review of a juvenile guardianship at any time it deems necessary. If the report ~~of~~ by the juvenile guardian has not been filed as required by subrule (E)(1), the court shall take appropriate action.

(b) Review on Extended Guardianship Assistance. If, under subrule (C)(1)(b), the Department of Health and Human Services has notified the court that extended guardianship assistance has been provided to a youth pursuant to MCL 400.665, the court shall conduct an annual

review hearing at least once every 12 months thereafter ~~the youth's eighteenth birthday~~ to determine that the guardianship meets the criteria under MCL 400.667. The duty to conduct an annual review hearing on extended guardianship assistance shall discontinue when the youth is no longer eligible for extended guardianship assistance. Notice of the hearing under this subrule shall be sent to the guardian and the youth as provided in MCR 3.920(D)(1).

(i) The hearing conducted under this subrule may be adjourned up to 28 days for good cause shown.

(ii) If requested by the court, the guardian must provide proof at the review hearing that the youth is in compliance with the criteria of MCL 400.667.

(iii) Following a review hearing under this subrule, ~~The~~the court shall issue an order to support its determination and serve the order on the Department of Health and Human Services, the guardian, and the youth.

(c) Termination of Juvenile Guardianship. Upon receipt of notice from the Department of Health and Human Services that it will not continue guardianship assistance, the court shall immediately terminate the juvenile guardianship.

(2)-(4) [Unchanged.]

(E)-(F) [Unchanged.]

Staff Comment: The proposed amendment of MCR 3.979 would require a court to maintain jurisdiction over a juvenile guardianship for 120 days after a juvenile's 18th birthday in cases where DHHS is making an eligibility determination for extended guardianship assistance. The proposed revisions of MCR 3.979 also would reflect recent amendments of the Young Adult Voluntary Foster Care Act (MCL 400.669) and the Juvenile Code (MCL 712A.2a).

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, 2016, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-05. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered November 25, 2015:

PROPOSED AMENDMENT OF ADMINISTRATIVE ORDER NO. 2013-12.

On order of the Court, this is to advise that the Court is considering amendments of Administrative Order No. 2013-12. 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 Administrative Matters & Court Rules page.

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.]

ADMINISTRATIVE ORDER NO. 2013-12.

(A)(1)-(3) [Unchanged.]

(B) (1)-(3) [Unchanged.]

Probate Court Guidelines.

[The following proposed probate court guidelines numbered 1.-4. would replace the former probate guidelines numbered 1.-3.:]

1. Estate Proceedings. 75% of all cases should be adjudicated within 35 days from the date of the initial filing, 90% within 182 days, and 98% within 364 days.

2. Guardianship, Conservatorship, and Protective Order Proceedings. 75% of all matters should be adjudicated within 90 days from the date of the initial filing and 95% within 364 days.

~~2.~~3. Mental Illness Proceedings; Judicial Admission Proceedings. 90% of all petitions should be adjudicated within 14 days from the date of filing and 98% within 28 days.

4. Civil Proceedings and Trust Proceedings. 70% of all cases should be adjudicated within 364 days from the date of case filing and 95% within 728 days.

District Court Guidelines.

(1)-(3) [Unchanged.]

Circuit Court Guidelines.

(1)-(11) [Unchanged.]

Staff Comment: These proposed revisions of Administrative Order No. 2013-12 would adjust the time guidelines in probate courts by applying disposition rates to all cases filed instead of applying rates to "contested matters;" also the proposed revisions would separate from estates, the guidelines for guardianship and conservatorship proceedings and group them with protective order proceedings, and would group trust proceedings with civil proceedings instead of the former grouping of trusts with proceedings for estates.

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, 2016, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-17. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered November 25, 2015:

PROPOSED AMENDMENT OF MCR 2.403.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.403 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 Administrative Matters & Court Rules page.

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 2.403. CASE EVALUATION.

(A)-(K) [Unchanged.]

(L) Acceptance or Rejection of Evaluation.

(1) Each party shall file a written acceptance or rejection of the panel's evaluation with the ADR clerk within ~~28~~14 days after service of the panel's evaluation. Even if there are separate awards on multiple claims, the party must either accept or reject the evaluation in its entirety as to a particular opposing party. The failure to file a written acceptance or rejection within ~~28~~14 days constitutes rejection.

(2) There may be no disclosure of a party's acceptance or rejection of the panel's evaluation until the expiration of the ~~28~~14-day period, at which time the ADR clerk shall send a notice indicating each party's acceptance or rejection of the panel's evaluation.

(3) [Unchanged.]

(M)-(O) [Unchanged.]

Staff Comment: This proposed amendment, submitted by the Michigan Judges Association, would reduce the time period from 28 days to 14 days in which a party would be required to accept or reject a case evaluation award.

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, 2016, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-13. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered November 25, 2015:

PROPOSED AMENDMENT OF MCR 7.306.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.306 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 Administrative Matters & Court Rules page.

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 7.306. ORIGINAL PROCEEDINGS.

(A) [Unchanged.]

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

(1)-(2) [Unchanged.]

(3) proof that a copy of the complaint and brief was 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) [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 MCR 7.212(B) and (D).

(E)-(I) [Former (D)-(H) relettered, but otherwise unchanged.]

Staff Comment: The proposed amendments of MCR 7.306 would expressly authorize a respondent attorney to file a brief in actions of superintending control when the complainant objects to a dismissal by the AGC or ADB; the proposed amendments would also require the party filing for superintending control to serve copies of the complaint and brief on the respondent and would allow 21 days for respondent attorney to submit a brief, with copies to be served on the plaintiff and defendant.

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, 2016, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-17. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered November 25, 2015:

PROPOSED AMENDMENTS OF MCR 3.605, MCR 3.606, MCR 3.928, MCR 3.944, MCR 3.956, MCR 6.001, MCR 6.425, MCR 6.445, MCR 6.610, AND MCR 6.933.

On order of the Court, this is to advise that the Court is considering amendments of Rules 3.605, 3.606, 3.928, 3.944, 3.956, 6.001, 6.425, 6.445, 6.610, and 6.933 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 Administrative Matters & Court Rules page.

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 strikeove.]

RULE 3.605. COLLECTION OF PENALTIES, FINES, FORFEITURES, AND FORFEITED RECOGNIZANCE.

(A)-(C) [Unchanged.]

(D) Remission of Penalty. An application for the remission of a penalty, including a bond forfeiture, may be made to the judge who imposed the penalty or ordered the forfeiture. The application may not be heard until reasonable notice has been given to the prosecuting attorney (or municipal attorney) and he or she has had an opportunity to examine the matter and prepare to resist the application. The application may not be granted without payment of the costs and expenses incurred in the proceedings for the collection of the penalty, unless waived by the court.

(E) [Unchanged.]

RULE 3.606. CONTEMPTS OUTSIDE IMMEDIATE PRESENCE OF COURT.

(A)-(E) [Unchanged.]

(F) The court shall not sentence a person to a term of incarceration for nonpayment unless the court has complied with the provisions of MCR 6.425(E)(3). Proceedings to which the Child Support and Parenting Time Enforcement Act, MCL 552.602 *et seq*., applies are subject to the requirements of that act.

RULE 3.928. CONTEMPT OF COURT.

(A)-(C) [Unchanged.]

(D) Determination of Ability to Pay. A juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court-ordered financial obligations as ordered by the court, unless the court determines that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so.

RULE 3.944. PROBATION VIOLATION.

(A)-(E) [Unchanged.]

(F) Determination of Ability to Pay. A juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court-ordered financial obligations as ordered by the court, unless the court determines that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so.

RULE 3.956. REVIEW HEARINGS; PROBATION VIOLATION.

(A)-(B) [Unchanged.]

(C) Determination of Ability to Pay. A juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court-ordered financial obligations as ordered by the court, unless the court determines that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so.

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, 6.102(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 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A)-(D) [Unchanged.]

(E) Sentencing Procedure.

(1)-(2) [Unchanged.]

(3) Incarceration for Nonpayment.

(a) The court shall not sentence a defendant to a term of incarceration, nor revoke probation, for failure to comply with an order to pay money unless the court finds, on the record, that the defendant is able to comply with the order without manifest hardship and that the defendant has not made a good-faith effort to comply with the order.

(b) Payment alternatives. If the court finds that the defendant is unable to comply with an order to pay money without manifest hardship, the court may impose a payment alternative, such as a payment plan, modification of any existing payment plan, or waiver of part or all of the amount of money owed to the extent permitted by law.

(c) Determining manifest hardship. The court shall consider the following criteria in determining manifest hardship:

(i) Defendant's employment status and history.

(ii) Defendant's employability and earning ability.

(iii) The willfulness of the defendant's failure to pay.

(iv) Defendant's financial resources.

(v) Defendant's basic living expenses including but not limited to food, shelter, clothing, necessary medical expenses, or child support.

(vi) Any other special circumstances that may have bearing on the defendant's ability to pay.

(F)-(G) [Unchanged.]

RULE 6.445. PROBATION REVOCATION.

(A)-(F) [Unchanged.]

(G) Sentencing. If the court finds that the probationer has violated a condition of probation, or if the probationer pleads guilty to a violation, the court may continue probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration. The court may not sentence the probationer to prison without having considered a current presentence report. The court may not sentence the probationer to prison or jail for failing to pay fines, costs, restitution, and other financial obligations imposed by the court without ~~and~~ having complied with the provisions set forth in MCR 6.425(B) and (E).

(H) [Unchanged.]

RULE 6.610. CRIMINAL PROCEDURE GENERALLY.

(A)-(E) [Unchanged.]

(F) Sentencing.

(1)[Unchanged.]

(2) The court shall not sentence a defendant to a term of incarceration for nonpayment unless the court has complied with the provisions of MCR 6.425(E)(3).

~~(2)~~ (3) [Renumbered, but otherwise unchanged.]

~~(3)~~ (4) [Renumbered, but otherwise unchanged.]

(G)-(H) [Unchanged.]

RULE 6.933. JUVENILE PROBATION REVOCATION.

(A)-(D) [Unchanged.]

(E) Determination of Ability to Pay. A juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court-ordered financial obligations as ordered by the court, unless the court determines that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so.

Staff Comment: The proposed amendments of MCR 3.605, 3.606, 3.928, 3.944, 3.956, 6.001, 6.425, 6.445, 6.610, and 6.933 were submitted by the Michigan State Planning Body for the Delivery of Legal Services to the Poor. The proposed rule revisions are intended to provide clarity and guidance to courts regarding what courts would be required to do before incarcerating a defendant for failure to pay.

With respect to the new language proposed as MCR 6.425(E)(3), the Michigan State Planning Body notes: The United States Supreme Court and the Michigan Supreme Court have recognized that it is unconstitutional to incarcerate someone for failure to pay fines, costs, fees, or restitution simply because the person is unable to pay. See, e.g., *Bearden v Georgia*, 461 US 660, 672-673 (1983); *People v Jackson,* 483 Mich 271 (2009). Any time the court is considering incarceration for failure to pay—whether at the time of sentencing or at a subsequent proceeding, such as a probation revocation or show-cause hearing—the court is required to take into account the defendant's financial resources. The Michigan Supreme Court has held that "once an ability-to-pay assessment is triggered, the court must consider whether the defendant remains indigent and whether repayment would cause manifest hardship." *Jackson,* 483 Mich at 275. The defendant should be considered to suffer manifest hardship if the defendant or his or her immediate family would be deprived of funds needed for basic living necessities such as food, shelter, clothing, necessary medical expenses, or child support. Specific statutes requiring ability-to-pay determinations can provide additional guidance. See, e.g., MCL 771.3(8) (in determining whether to revoke probation for failure to pay, courts "shall consider the probationer's employment status, earning ability, and financial resources, the willfulness of the probationer's failure to pay, and any other special circumstances that may have a bearing on the probationer's ability to pay"); MCL 769.1a(11) (substantially similar provision re restitution); MCL 771.3(6)(a) (in determining amount and method of paying costs, the court "shall take into account the probationer's financial

resources and the nature of the burden that payment of costs will impose, with due regard to his or her other obligations"); MCL 771.3(6)(b) (in considering petition for remission of costs, court should consider whether "payment of the amount due will impose a manifest hardship on the probationer or his or her immediate family"); MCL 780.766(12) (in considering modifying the method of restitution payment, court should consider whether payment "will impose a manifest hardship on the defendant or his or her immediate family").

The United States Supreme Court approved a simple framework for assessing ability to pay, albeit in the context of contempt proceedings: "(1) notice to the defendant that his 'ability to pay' is a critical issue . . . ; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status (*e.g.*, those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay." *Turner v Rogers*, 564 US 431, 447-448; 131 S Ct 2507, 2519 (2011). In implementing this rule, courts should ensure that the *Turner* standards are met.

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, 2016, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-12. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered December 23, 2015:

PROPOSED AMENDMENT OF MCR 2.305.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.305 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 Administrative Matters & Court Rules page.

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 2.305. SUBPOENA FOR TAKING DEPOSITION.

(A) General Provisions.

(1) Subpoenas shall not be issued except in compliance with MCR 2.306(A)(1). After serving the notice provided for in MCR 2.303(A)(2), 2.306(B), or 2.307(A)(2), a party may have a subpoena issued in the manner provided by MCR 2.506 for the person named or described in the notice. Service on a party or a party's attorney of notice of the taking of the deposition of a party, or of a director, trustee, officer, or employee of a corporate party, is sufficient to require the appearance of the deponent; a subpoena need not be issued.

(2)-(5) [Unchanged.]

(B)-(F) [Unchanged.]

Staff Comment: This proposal, submitted by the SBM Representative Assembly, would clarify that subpoenas issued for the production of documents may occur only after the defendant has had reasonable time after the complaint is filed and served to obtain an attorney, as described in MCR 2.306(A)(1).

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, 2016, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-27. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered December 23, 2015:

PROPOSED AMENDMENT OF MCR 2.306.

On order of the Court, this is to advise that the Court is considering amendments of Rule 2.306 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 Administrative Matters & Court Rules page.

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 2.306. DEPOSITIONS ON ORAL EXAMINATION.

(A)-(B) [Unchanged.]

(C) Conduct of Deposition; Examination and Cross-Examination; Manner of Recording; Objections; ~~Conferring~~ Communicating with Deponent.

(1)-(4) [Unchanged.]

(5) ~~Conferring~~ Communicating with Deponent.

(a) A person may instruct a deponent not to answer only when necessary to preserve a privilege or other legal protection, to enforce a limitation ordered by the court, or to present a motion under MCR 2.306(D)(1).

(b) A deponent may not ~~confer~~ communicate with another person while a question is pending, except to decide whether to assert a privilege or other legal protection.

(c) For purposes of this rule, "communicate" includes electronic communication conducted by text message, email or other transmission using an electronic device.

(D)-(G) [Unchanged.]

Staff Comment: The proposed amendments of MCR 2.306(C)(5) and (C)(5)(b) would replace references to the word "conferring" or "confer" with "communicating" or "communicate." The proposed amendment of MCR 2.306(C)(5)(c) would clarify that the term "communicate" would include electronic transmission by text message, email or other electronic manner.

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, 2016, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-04. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered December 23, 2015:

PROPOSED AMENDMENT OF MCR 2.403.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.403 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 Administrative Matters & Court Rules page.

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 2.403. CASE EVALUATION.

(A)-(F) [Unchanged.]

(G) Scheduling Case Evaluation Hearing.

(1) The ADR clerk shall set a time and place for the hearing and send notice to the case evaluators and the attorneys at least 42 days before the date set. The notice shall also contain the names of the case evaluators. If, for any reason, the ADR clerk appoints a replacement case evaluator after the date the notice is sent, then the ADR clerk shall send an amended notice to the case evaluators and the attorneys, including the name of the replacement evaluator, within a reasonable time but in any event at least two business days before the hearing, to allow the ADR clerk to reschedule or otherwise revise the scheduled case evaluation hearing to address any issue related to disqualification. If, prior to the hearing, the ADR clerk determines that the amended notice was not sent at least two business days before the hearing, the ADR clerk shall adjourn the hearing unless the parties stipulate to proceed with the scheduled case evaluation.

(2) [Unchanged.]

(H)-(O) [Unchanged.]

Staff Comment: The proposed amendments of MCR 2.403 would require the ADR clerk to notify counsel of the scheduled case evaluation panelists when sending the initial notice of case evaluation. Further, the proposal would require the ADR clerk to send notice of replacement evaluators no later than two business days before the hearing. If notice is not sent in that time, the hearing would be adjourned or the parties could stipulate to proceed.

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, 2016, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to

ADM File No. 2014-28. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered December 23, 2015:

PROPOSED AMENDMENT OF RULE 6 OF THE RULES FOR THE BOARD OF LAW EXAMINERS.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6 of the Rules for the Board of Law Examiners. 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 Administrative Matters & Court Rules page.

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. FEES.

The fees are: an application for examination, $400~~$340~~ and an additional fee for the late filing of an application or transfer of an application for examination, $100; an application for reexamination, $300~~$240~~; an application for recertification, $300~~$200~~; an application for admission without examination, $800~~$600~~ plus the requisite fee for the National Conference of Bar Examiners' character report. Certified checks or money orders must be payable to the State of Michigan. Online bar examination payments for first time exam takers must be paid by credit card.

Staff Comment: The proposed order increases the fees for application for the bar examination from $340 to $400, reexamination from $240 to $300, application for recertification from $200 to $300, and application for admission without examination from $600 to $800.

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, 2016, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-23. Your comments and the comments of others

will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

Order Entered January 11, 2016:

PROPOSED ADMINISTRATIVE ORDER ESTABLISHING MINIMUM STANDARDS FOR APPOINTED COUNSEL.

On order of the Court, this is to advise that the Court is considering adoption of an administrative order that would establish minimum standards for appointed counsel as proposed by the Michigan Indigent Defense Commission. 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 Administrative Matters & Court Rules page.

Note that each proposed standard includes a prefatory paragraph that describes the legal authority on which the standard is based, staff comments provided by the MIDC, and a list of sources and authority is appended at the end of the standards. These materials would not necessarily be included in a final order adopting the standards, but are included for purposes of publication to provide the legal context in which the proposed standards were drafted and submitted.

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. 2016-XX.

Minimum Standards for Appointed Counsel under the MIDC Act

Standard 1

Education and Training of Defense Counsel

The MIDC Act requires adherence to the principle that "[d]efense counsel is required to attend continuing legal education relevant to counsel's indigent defense clients." MCL 780.991(2)(e). The United States Supreme Court has held that the constitutional right to counsel guaranteed by the Sixth Amendment includes the right to the effective assistance of counsel. The mere presence of a lawyer at a trial "is not enough to satisfy the constitutional command." *Strickland v Washington*, 466 US 668, 685; 104 S Ct 2052, 2063; 80 L Ed 2d 674 (1984). Further, the Ninth Principle of The American Bar Association's *Ten Principles of a Public Defense Delivery System* provides that a public defense system, in order to provide effective assistance of counsel, must ensure that "Defense counsel is provided with and required to attend continuing legal education."

The MIDC proposes a minimum standard for the education and training of defense counsel:

A. Knowledge of the law. Counsel shall know substantive Michigan and federal law, constitutional law, criminal law, criminal procedure, rules of evidence, ethical rules and local practices. Counsel has a continuing obligation to know the changes and developments in the law.

B. Knowledge of scientific evidence and applicable defenses. Counsel shall know the forensic and scientific issues that can arise in a criminal case, know the legal issues concerning defenses to a crime, and be able to effectively litigate those issues.

C. Knowledge of technology. Counsel shall know how to utilize office technology commonly used in the legal community, and technology used within the applicable court system. Counsel shall be able to thoroughly review materials that are provided in an electronic format.

D. Continuing education. Counsel shall annually complete continuing legal education courses relevant to the representation of the criminally accused. Counsel shall participate in skills training and educational programs in order to maintain and enhance overall preparation, oral and written advocacy, and litigation and negotiation skills. Lawyers can discharge this obligation for annual continuing legal education by attending local trainings or statewide conferences. Attorneys with fewer than two years of experience practicing criminal defense in Michigan shall participate in one basic skills acquisition class. All attorneys shall annually complete at least twelve hours of continuing legal education.

Staff comments:

1. Training should be funded through compliance plans submitted by the local delivery system. This standard is not designed to place any financial burden on assigned counsel.

2. The minimum of twelve hours of training represents typical national and some local county requirements, and is accessible in existing programs offered statewide.

3. Data will be collected as to the amount of hours offered to and attended by assigned counsel. The quality of the training should be analyzed through evaluations, and the effectiveness of the training shall be measurable and validated.

Standard 2

Initial Interview

The MIDC Act requires adherence to the principle that "[d]efense counsel is provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with defense counsel's client." MCL 780.991(2)(a). United States Supreme Court precedent and American Bar Association Principles recognize that the "lack of time for adequate preparation and the lack of privacy for attorney-client consultation" can preclude "any lawyer from providing effective advice." *See United States v Morris*, 470 F3d 596, 602 (CA 6, 2006) (citing *United States v Cronic,* 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984)). Further, the Fourth Principle of The American Bar Association's *Ten Principles of a Public Defense Delivery System* provides that a public

defense system, in order to provide effective assistance of counsel, must ensure that "Defense counsel is provided sufficient time and a confidential space within which to meet with the client."

The MIDC proposes a minimum standard for the initial client interview:

A. Timing of the Interview: Counsel shall conduct a client interview as soon as practicable after appointment to represent the defendant in order to obtain information necessary to provide quality representation at the early stages of the case and to provide the client with information concerning counsel's representation and the case proceedings. Counsel shall conduct subsequent client interviews as needed. Following appointment, counsel shall conduct the initial interview with the client sufficiently before any subsequent court proceeding so as to be prepared for that proceeding. When a client is in local custody, counsel shall conduct an initial client intake interview within three business days of appointment. When a client is not in custody, counsel shall promptly deliver an introductory communication so that the client may follow-up and schedule a meeting.

B. Setting of the interview: All client interviews shall be conducted in a private and confidential setting. Counsel and the indigent criminal defense system shall ensure the necessary accommodations for private discussions between counsel and clients in courthouses, lock-ups, jails, prisons, detention centers, and other places where clients must confer with counsel.

C. Preparation: Counsel shall obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports concerning pretrial release, and discoverable material.

D. Client status:

1. Counsel shall evaluate whether the client is competent to participate in his/her representation, understands the charges, and has some basic comprehension of criminal procedure. Counsel has a continuing responsibility to evaluate the client's capacity to stand trial or to enter a plea pursuant to MCR 6.125 and MCL 330.2020. Counsel shall take appropriate action where there are any questions about a client's competency.

2. Where counsel is unable to communicate with the client because of language or communication differences, counsel shall take whatever steps are necessary to fully explain the proceedings in a language or form of communication the client can understand. Steps include seeking the appointment of an interpreter to assist with pre-trial preparation, interviews, investigation, and in-court proceedings, or other accommodations pursuant to MCR 1.111.

Staff comments:

1. The MIDC recognizes that counsel cannot ensure communication prior to court with an out of custody indigent client. For out of custody clients the standard instead requires the attorney to notify clients of the need for a prompt interview.

2. The requirement of a meeting within three business days is typical of national requirements (Florida Performance Guidelines suggest 72 hours; in Massachusetts, the Committee for Public Counsel Services Assigned Counsel Manual requires a visit within three business days for custody clients; the Supreme Court of Nevada issued a performance standard requiring an initial interview within 72 hours of appointment).

3. Certain indigent criminal defense systems only pay counsel for limited client visits in custody. In these jurisdictions, compliance plans with this standard will need to guarantee funding for multiple visits.

4. In certain systems, counsel is not immediately notified of appointments to represent indigent clients. In these jurisdictions, compliance plans must resolve any issues with the failure to provide timely notification.

5. Some jurisdictions do not have discovery prepared for trial counsel within three business days. The MIDC expects that this minimum standard can be used to push for local reforms to immediately provide electronic discovery upon appointment. Even without these reforms and timely provision of discovery, the MIDC still requires prompt in-custody client interviews to (1) establish the best possible relationship with the indigent client; (2) review charges; (3) determine whether a motion for pretrial release is appropriate; (4) determine the need to start-up any immediate investigations; (5) determine any immediate mental or physical health needs or need for foreign language interpreter assistance; (6) advise that clients should not discuss the circumstances of the arrest or allegations to cellmates, law enforcement, family or anybody else without counsel present.

6. The three business day requirement is specific to clients in "local" custody because some indigent defendants are in the custody of the Michigan Department of Corrections (MDOC) while other defendants might be in jail in a different county from the charging offense. In these situations, counsel should arrange for confidential client visits in advance of the first pre-trial hearing.

7. In jurisdictions with a large client population in MDOC custody or rural jurisdictions requiring distant client visits compliance plans might setup visits through confidential videoconferencing. Counsel for indigent criminal appellants have facilities for confidential videoconferencing. If similar facilities are made available for trial attorneys, visits should at least be scheduled within three business days.

8. Systems without adequate settings for confidential visits for either in custody or out of custody clients will need compliance plans to create this space.

9. This standard only involves the initial client interview. Other confidential client interviews are expected, as necessary.

Standard 3

Investigation and Experts

The United States Supreme Court has held: (1) "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v Washington*, 466 US 668, 691; 104 S Ct 2052, 2066; 80 L Ed 2d 674 (1984); and (2) "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." *Harrington v Richter*, 562 US 86, 106; 131 S Ct 770, 788; 178 L Ed 2d 624 (2011). The MIDC Act authorizes "minimum standards for the local delivery of indigent criminal defense services providing effective assistance of counsel . . ." MCL 780.985(3).

The MIDC proposes a minimum standard for investigations and experts:

A. Counsel shall conduct an independent investigation of the charges and offense as promptly as practicable.

B. When appropriate, counsel shall request funds to retain an investigator to assist with the client's defense. Reasonable requests must be funded.

C. Counsel shall request the assistance of experts where it is reasonably necessary to prepare the defense and rebut the prosecution's case. Reasonable requests must be funded as required by law.

D. Counsel has a continuing duty to evaluate a case for appropriate defense investigations or expert assistance.

Staff comments:

1. The MIDC recognizes that counsel can make "a reasonable decision that makes particular investigations unnecessary" after a review of discovery and an interview with the client. Decisions to limit investigation cannot be made merely on the basis of discovery or representations made by the government, and must take into consideration the client's wishes and the client's version of the facts.

2. The MIDC emphasizes that a client's professed desire to plead guilty does not automatically alleviate the need to investigate.

3. Counsel should inform clients of the progress of investigations pertaining to their case.

4. Expected increased costs from an increase in investigations and expert use will be tackled in compliance plans.

Standard 4

Counsel at First Appearance and other Critical Stages

The MIDC Act provides that standards shall be established to effectuate the following: (1) "All adults, except those appearing with retained counsel or those who have made an informed waiver of counsel, shall be screened for eligibility under this act, and counsel shall be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services." MCL 780.991(1)(c); (2) "A preliminary inquiry regarding, and the determination of, the indigency of any

defendant shall be made by the court not later than at the defendant's first appearance in court." MCL 780.991(3)(a); (3) ". . . counsel continuously represents and personally appears at *every court appearance* throughout the pendency of the case." MCL 780.991(2)(d)(emphasis added). The United States Supreme Court has held that assistance of counsel is required at critical stages of proceedings, and that the right to counsel attaches when a defendant's liberty is subject to restriction by the court. *Rothgery v Gillespie County,* 554 US 191; 128 S Ct 2578; 171 L Ed 2d 366 (2008).

The MIDC proposes a minimum standard on counsel at first appearance and other critical stages:

A. Counsel shall be assigned as soon as the defendant is determined to be eligible for indigent criminal defense services. The indigency determination shall be made and counsel appointed to provide assistance to the defendant as soon as the defendant's liberty is subject to restriction by a magistrate or judge. Representation includes but is not limited to the arraignment on the complaint and warrant. Nothing in this paragraph shall prevent the defendant from making an informed waiver of counsel.

B. All persons determined to be eligible for indigent criminal defense services shall also have appointed counsel at pre-trial proceedings, during plea negotiations and at other critical stages, whether in court or out of court.

Staff comments:

1. The proposed standard addresses an indigent defendant's right to counsel at every court appearance and is not addressing vertical representation (same defense counsel continuously represents) which will be the subject of a future minimum standard as described in MCL 780.991(2)(d).

2. One of several potential compliance plans for this standard may use an on-duty arraignment attorney to represent defendants. This appointment may be a limited appearance for arraignment only with subsequent appointment of different counsel for future proceedings. In this manner, actual indigency determinations may still be made during the arraignment.

3. Among other duties, lawyering at first appearance should consist of an explanation of the criminal justice process, advice on what topics to discuss with the judge, a focus on the potential for pre-trial release, or achieving dispositions outside of the criminal justice system via civil infraction or dismissal. In rare cases, if an attorney has reviewed discovery and has an opportunity for a confidential discussion with her client, there may be a criminal disposition at arraignment.

4. The MIDC anticipates creative and cost-effective compliance plans like representation and advocacy through videoconferencing or consolidated arraignment schedules between multiple district courts.

5. This standard does not preclude the setting of interim bonds to allow for the release of in-custody defendants. The intent is not to lengthen any jail stays. The MIDC believes that case-specific interim bond determinations should be discouraged. Formal arraignment and the formal setting of bond should be done as quickly as possible. Where there are case-specific interim bonds set, counsel at arraignment shall be prepared to make a de novo argument regarding an appropriate bond regardless of and, indeed, in the face of, an interim bond set prior to arraignment which has no precedential effect on bond-setting at arraignment.

6. Any waiver of the right to counsel must be both unequivocal and knowing, intelligent, and voluntary. People v Anderson, *398 Mich 361; 247 NW2d 857 (1976). The uncounseled defendant must have sufficient information to make an intelligent choice dependent on a range of case-specific factors, including his education or sophistication, the complexity or easily grasped nature of the charge, and the stage of the proceeding.*

Sources and Authority

Standard 1 - Education and Training of Defense Counsel

Sources:

ABA 10 Principles of a Public Defense Delivery System (Principles 6 and 9)

Florida Performance Guidelines for Criminal Defense Representation (Section 1.2)

Authority:

MCL 780.991(2)(c) and (2)(e)

Standard 2 - Initial Interview

Sources:

ABA 10 Principles of a Public Defense Delivery System (Principle 4)

Florida Performance Guidelines for Criminal Defense Representation (Section 2.1)

Committee for Public Counsel Services, Assigned Counsel Manual Policy and Procedures

(Part IIB)

Supreme Court of Nevada, *In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases* (Standard 4-4)

Authority:

Strickland v Washington, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984)

United States v Morris, 470 F3d 596 (CA6, 2006)

MCL 780.991(2)(a)

MCR 1.111

MCR 6.125

MRPC 1.6

Standard 3 - Investigation and Expert Witnesses

Sources:

Florida Performance Guidelines for Criminal Defense Representation (Section 4.2)

Committee for Public Counsel Services, Assigned Counsel Manual Policy and Procedures

(Parts IVA, VIA)

Supreme Court of Nevada, *In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases* (Standard 4-7)

Authority:

Strickland v Washington, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984)

Harrington v Richter, 562 US 86; 131 S Ct 770; 178 L Ed 2d 624 (2011)

Ake v Oklahoma, 470 US 68; 105 S Ct 1087; 84 L Ed 2d 53 (1985)

Hinton v Alabama, 571 US ___; 134 S Ct 1081; 188 L Ed 2d 1 (2014)

People v Ackley, 497 Mich 381; 870 NW2d 858 (2015)

People v Trakhtenberg, 493 Mich 38; 826 NW2d 136 (2012)

Wiggins v Smith, 539 US 510; 123 S Ct 2527; 156 L Ed 2d 471 (2003)

Avery v Prelesnik, 548 F3d 434 (CA 6, 2008)

MCL 780.985(3)

Standard 4 - Counsel at First Appearance

Sources:

ABA Ten Principles of a Public Defense Delivery System - Principle 3

Authority:

Rothgery v Gillespie County, 554 US 191; 128 S Ct 2578; 171 L Ed 2d 366 (2008)

United States v Cronic, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984)

Powell v Alabama, 287 US 45; 53 S Ct 55; 77 L Ed 158 (1932)

United States v Morris, 470 F3d 596 (CA6, 2006)

Lafler v Cooper, 566 US ___; 132 S Ct 1376; 182 L Ed 2d 398 (2012)

MCL 780.991(1)(c), (2)(d), (3)(a)

MCR 6.005(A)

Staff Comment: As noted in the introductory paragraphs of this order, the content of this proposal was submitted to the Michigan Supreme Court in its entirety by the Michigan Indigent Defense Commission. The staff comments following each proposed Standard were also supplied by the MIDC.

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, 2016, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-27. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.