MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

June 10, 2014, through August 5, 2014

CORBIN R. DAVIS
REPORTER OF DECISIONS

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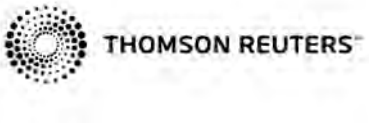

2015

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SUPREME COURT

	Term Expires January 1 of
Chief Justice	
ROBERT P. YOUNG, Jr.	2019
Justices	
MICHAEL F. CAVANAGH	2015
STEPHEN J. MARKMAN	2021
MARY BETH KELLY	2019
BRIAN K. ZAHRA	2015
BRIDGET M. McCORMACK	2021
DAVID F. VIVIANO	2015

Commissioners

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

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

ANNE E. ALBERS

State Court Administrator

JOHN A. HOHMAN, Jr.

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

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
WILLIAM B. MURPHY	2019
Chief Judge Pro Tem	
DAVID H. SAWYER	2017
Judges	
MARK J. CAVANAGH	2015
KATHLEEN JANSEN	2019
E. THOMAS FITZGERALD	2015
HENRY WILLIAM SAAD	2015
JOEL P. HOEKSTRA	2017
JANE E. MARKEY	2015
PETER D. O'CONNELL	2019
WILLIAM C. WHITBECK	2017
MICHAEL J. TALBOT	2015
KURTIS T. WILDER	2017
PATRICK M. METER	2015
DONALD S. OWENS	2017
KIRSTEN FRANK KELLY	2019
CHRISTOPHER M. MURRAY	2015
PAT M. DONOFRIO	2017
KAREN FORT HOOD	2015
STEPHEN L. BORRELLO	2019
DEBORAH A. SERVITTO	2019
JANE M. BECKERING	2019
ELIZABETH L. GLEICHER	2019
CYNTHIA DIANE STEPHENS	2017
MICHAEL J. KELLY	2015
DOUGLAS B. SHAPIRO	2019
AMY RONAYNE KRAUSE	2015
MARK T. BOONSTRA	2015
MICHAEL J. RIORDAN	2019

Chief Clerk:
JEROME W. ZIMMER, Jr.

Research Director:
JULIE ISOLA RUECKE

CIRCUIT JUDGES

		Term Expires January 1 of
1.	MICHAEL R. SMITH	2015
2.	JOHN E. DEWANE	2015
	JOHN M. DONAHUE	2017
	CHARLES T. LaSATA	2017
	ANGELA PASULA	2019
3.	DAVID J. ALLEN	2015
	ANNETTE J. BERRY	2019
	GREGORY D. BILL	2019
	SUSAN D. BORMAN	2015
	ULYSSES W. BOYKIN	2015
	KAREN Y. BRAXTON	2019
	MARGIE R. BRAXTON	2017
	MEGAN MAHER BRENNAN	2015
	JAMES A. CALLAHAN	2017
	MICHAEL J. CALLAHAN	2015
	THOMAS CAMERON	2015
	JEROME C. CAVANAGH	2019
	ERIC WILLIAM CHOLACK	2017
	JAMES R. CHYLINSKI	2017
	ROBERT J. COLOMBO, Jr.	2019
	KEVIN J. COX	2019
	DAPHNE MEANS CURTIS	2015
	CHRISTOPHER D. DINGELL	2015
	PRENTIS EDWARDS	2013
	CHARLENE M. ELDER	2015
	VONDA R. EVANS	2015
	EDWARD EWELL, Jr.	2019
	PATRICIA SUSAN FRESARD	2017
	SHEILA ANN GIBSON	2017
	JOHN H. GILLIS, Jr.	2015
	ALEXIS GLENDENING	2015
	DAVID ALAN GRONER	2017
	RICHARD B. HALLORAN, Jr.	2019
	CYNTHIA GRAY HATHAWAY	2017
	DANIEL ARTHUR HATHAWAY	2015

		Term Expires January 1 of
	MICHAEL M. HATHAWAY	2017
	CHARLES S. HEGARTY	2015
	CATHERINE HEISE	2015
	SUSAN L. HUBBARD	2017
	MURIEL D. HUGHES	2017
	VERA MASSEY JONES	2015
	EDWARD JOSEPH	2015
	CONNIE MARIE KELLEY	2015
	TIMOTHY MICHAEL KENNY	2017
	QIANA D. LILLARD	2015
	ARTHUR J. LOMBARD	2015
	KATHLEEN I. MACDONALD	2017
	KATHLEEN M. McCARTHY	2019
	WADE H. McCREE	2015[1]
	BRUCE U. MORROW	2017
	JOHN A. MURPHY	2017
	MARIA L. OXHOLM	2019
	LINDA V. PARKER	2019[2]
	LYNNE A. PIERCE	2015
	LITA MASINI POPKE	2017
	DANIEL P. RYAN	2019
	RICHARD M. SKUTT	2015
	MARK T. SLAVENS	2017
	LESLIE KIM SMITH	2019
	VIRGIL C. SMITH	2019
	MARTHA M. SNOW	2017
	JEANNE STEMPIEN	2017[3]
	CRAIG S. STRONG	2015
	BRIAN R. SULLIVAN	2017
	LAWRENCE S. TALON	2015
	DEBORAH A. THOMAS	2019
	MARGARET MARY VanHOUTEN	2015
	ROBERT L. ZIOLKOWSKI	2015
4.	SUSAN E. BEEBE	2017
	RICHARD N. LaFLAMME	2017
	JOHN G. McBAIN, Jr.	2015
	THOMAS D. WILSON	2019
5.	AMY McDOWELL	2015
6.	JAMES M. ALEXANDER	2015
	MARTHA ANDERSON	2015

[1] To March 26, 2014.

[2] To March 17, 2014.

[3] To October 1, 2013.

		Term Expires January 1 of
	LEO BOWMAN	2019
	MARY ELLEN BRENNAN	2017
	RAE LEE CHABOT	2017
	LISA ORTLIEB GORCYCA	2015
	NANCI J. GRANT	2015
	SHALINA D. KUMAR	2015
	DENISE LANGFORD-MORRIS	2019
	CHERYL A. MATTHEWS	2017
	KAREN D. McDONALD	2019
	PHYLLIS C. McMILLEN	2019
	RUDY J. NICHOLS	2015
	COLLEEN A. O'BRIEN	2017
	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	2015
	ARCHIE L. HAYMAN	2019
	GEOFFREY L. NEITHERCUT	2019
	DAVID J. NEWBLATT	2017
	MICHAEL J. THEILE	2015
	RICHARD B. YUILLE	2015
8.	DAVID A. HOORT	2017
	SUZANNE KREEGER	2015
9.	GARY C. GIGUERE, Jr.	2015
	STEPHEN D. GORSALITZ	2017
	J. RICHARDSON JOHNSON	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	2015
11.	WILLIAM W. CARMODY	2015
12.	CHARLES R. GOODMAN	2015
13.	THOMAS G. POWER	2017
	PHILIP E. RODGERS, Jr.	2015
14.	TIMOTHY G. HICKS	2017
	KATHY HOOGSTRA	2015
	WILLIAM C. MARIETTI	2017

		Term Expires January 1 of
	ANNETTE ROSE SMEDLEY	2019
15.	PATRICK W. O'GRADY	2015
16.	JAMES M. BIERNAT, Sr.	2019
	RICHARD L. CARETTI	2017
	MARY A. CHRZANOWSKI	2017
	DIANE M. DRUZINSKI	2015
	JENNIFER FAUNCE	2019
	JOHN C. FOSTER	2015
	PETER J. MACERONI	2015
	EDWARD A. SERVITTO, Jr.	2019
	MARK S. SWITALSKI	2019
	MATTHEW S. SWITALSKI	2015
	KATHRYN A. VIVIANO	2017
	TRACEY A. YOKICH	2019
17.	GEORGE S. BUTH	2017
	PAUL J. DENENFELD	2017
	KATHLEEN A. FEENEY	2015
	DONALD A. JOHNSTON, III	2019
	DENNIS B. LEIBER	2019
	JAMES ROBERT REDFORD	2017
	PAUL J. SULLIVAN	2015
	MARK A. TRUSOCK	2019
	CHRISTOPHER P. YATES	2019
	DANIEL V. ZEMAITIS	2015
18.	HARRY P. GILL	2017
	KENNETH W. SCHMIDT	2019
	JOSEPH K. SHEERAN	2015
19.	JAMES M. BATZER	2015
20.	KENT D. ENGLE	2017
	JON H. HULSING	2015
	EDWARD R. POST	2017
	JON VAN ALLSBURG	2019
21.	PAUL H. CHAMBERLAIN	2017
	MARK H. DUTHIE	2019
22.	ARCHIE CAMERON BROWN	2017
	TIMOTHY P. CONNORS	2019
	CAROL ANNE KUHNKE	2019
	DONALD E. SHELTON	2015
	DAVID S. SWARTZ	2015
23.	RONALD M. BERGERON	2015
	WILLIAM F. MYLES	2017
24.	DONALD A. TEEPLE	2015
25.	JENNIFER MAZZUCHI	2015
	THOMAS L. SOLKA	2017

		Term Expires January 1 of
26.	MICHAEL G. MACK	2015
27.	ANTHONY A. MONTON	2019
	TERRENCE R. THOMAS	2015
28.	WILLIAM M. FAGERMAN	2015
29.	MICHELLE M. RICK	2017
	RANDY L. TAHVONEN	2015
30.	ROSEMARIE ELIZABETH AQUILINA	2015
	LAURA BAIRD	2019
	CLINTON CANADY, III	2017
	WILLIAM E. COLLETTE	2015
	JOYCE DRAGANCHUK	2017
	JAMES S. JAMO	2019
	JANELLE A. LAWLESS	2015
31.	DANIEL J. KELLY	2015
	CYNTHIA A. LANE	2017
	MICHAEL L. WEST	2019
32.	ROY D. GOTHAM	2015
33.	RICHARD M. PAJTAS	2015
34.	MICHAEL J. BAUMGARTNER	2017
35.	GERALD D. LOSTRACCO	2015
36.	KATHLEEN BRICKLEY	2019
	JEFFREY J. DUFON	2015
37.	JAMES C. KINGSLEY	2015
	BRIAN KIRKHAM	2017
	STEPHEN B. MILLER	2017
	CONRAD J. SINDT	2019
38.	MARK S. BRAUNLICH	2017[4]
	JOSEPH A. COSTELLO, JR.	2015
	MICHAEL A. WEIPERT	2017
	DANIEL WHITE	2015
39.	ANNA MARIE ANZALONE	2015
	MARGARET MURRAY-SCHOLZE NOE	2015
40.	NICK O. HOLOWKA	2017
	BYRON KONSCHUH	2015
41.	MARY BROUILLETTE BARGLIND	2017
	RICHARD J. CELELLO	2015
42.	MICHAEL J. BEALE	2015
	STEPHEN CARRAS	2013
43.	MICHAEL E. DODGE	2017
44.	MICHAEL P. HATTY	2019
	DAVID READER	2017

[4] From July 3, 2014.

		Term Expires January 1 of
45.	PAUL E. STUTESMAN	2019
46.	JANET M. ALLEN	2011
	GEORGE J. MERTZ	2015
47.	STEPHEN T. DAVIS	2017
48.	MARGARET BAKKER	2017
	KEVIN W. CRONIN	2015
49.	SCOTT P. HILL-KENNEDY	2019
	RONALD C. NICHOLS	2015
50.	NICHOLAS J. LAMBROS	2013
51.	RICHARD I. COOPER	2015
52.	M. RICHARD KNOBLOCK	2015
53.	SCOTT LEE PAVLICH	2017
54.	AMY GIERHART	2019
55.	THOMAS R. EVANS	2015
	ROY G. MIENK	2019
56.	JANICE K. CUNNINGHAM	2019
	JEFFREY L. SAUTER	2015
57.	CHARLES W. JOHNSON	2019

DISTRICT JUDGES

		Term Expires January 1 of
1.	MARK S. BRAUNLICH	2015[1]
	TERRENCE P. BRONSON	2019
	JACK VITALE	2017
2A.	LAURA J. SCHAEDLER	2017
	JAMES E. SHERIDAN	2015
2B.	DONALD L. SANDERSON	2015
3A.	BRENT R. WEIGLE	2015
3B.	JEFFREY C. MIDDLETON	2015
	ROBERT PATTISON	2019
4.	STACEY A. RENTFROW	2015
5.	GARY J. BRUCE	2017
	ARTHUR J. COTTER	2015
	SCOTT SCHOFIELD	2015
	STERLING R. SCHROCK	2019
	DENNIS M. WILEY	2017
7.	ARTHUR H. CLARKE, III	2015
	ROBERT T. HENTCHEL	2017
8.	ANNE E. BLATCHFORD	2019
	PAUL J. BRIDENSTINE	2019
	ROBERT C. KROPF	2015
	JULIE K. PHILLIPS	2015
	RICHARD A. SANTONI	2015
	VINCENT C. WESTRA	2017
10.	SAMUEL I. DURHAM, Jr.	2017
	JOHN A. HALLACY	2015
	JOHN R. HOLMES	2019[2]
	FRANKLIN K. LINE, Jr.	2015
	JAMES D. NORLANDER	2017[3]
12.	JOSEPH S. FILIP	2017
	DANIEL GOOSTREY	2013
	MICHAEL J. KLAEREN	2015
	R. DARRYL MAZUR	2015

[1] To July 3, 2014.

[2] To June 7, 2014.

[3] From July 21, 2014.

		Term Expires January 1 of
14A.	RICHARD E. CONLIN	2015
	J. CEDRIC SIMPSON	2019
	KIRK W. TABBEY	2017
14B.	CHARLES POPE	2015
15.	JOSEPH F. BURKE	2019
	CHRISTOPHER S. EASTHOPE	2015
	ELIZABETH POLLARD HINES	2017
16.	SEAN P. KAVANAGH	2015
	KATHLEEN J. McCANN	2019
17.	KAREN KHALIL	2017
	CHARLOTTE L. WIRTH	2015
18.	SANDRA A. CICIRELLI	2019
	MARK A. McCONNELL	2015
19.	WILLIAM C. HULTGREN	2017
	SAM A. SALAMEY	2019
	MARK W. SOMERS	2015
20.	MARK J. PLAWECKI	2015
	DAVID TURFE	2019
21.	RICHARD L. HAMMER, Jr.	2015
22.	SABRINA JOHNSON	2013
23.	GENO SALOMONE	2019
	WILLIAM J. SUTHERLAND	2015
24.	JOHN T. COURTRIGHT	2015
	RICHARD A. PAGE	2017
25.	MICHAEL F. CUINGAN	2015
	DAVID J. ZELENAK	2017
27.	RANDY L. KALMBACH	2019
28.	JAMES A. KANDREVAS	2015
29.	LAURA REDMOND MACK	2019
30.	BRIGETTE R. OFFICER-HILL	2017
31.	PAUL J. PARUK	2015
32A.	ROGER J. La ROSE	2015
33.	JENNIFER COLEMAN HESSON	2017
	JAMES KURT KERSTEN	2015
	MICHAEL K. McNALLY	2019
34.	TINA BROOKS GREEN	2019
	BRIAN A. OAKLEY	2017
	DAVID M. PARROTT	2015
35.	MICHAEL J. GEROU	2017
	RONALD W. LOWE	2019
	JAMES A. PLAKAS	2015
36.	LYDIA NANCE ADAMS	2017
	ROBERTA C. ARCHER	2019
	JOSEPH N. BALTIMORE	2015
	NANCY McCAUGHAN BLOUNT	2015
	IZETTA F. BRIGHT	2017
	DEMETRIA BRUE	2015
	ESTHER LYNISE BRYANT-WEEKES	2015
	RUTH C. CARTER	2017

		Term Expires January 1 of
	DONALD COLEMAN	2019
	PRENTIS EDWARDS, Jr.	2019
	WANDA EVANS	2019
	DEBORAH GERALDINE FORD	2017
	RUTH ANN GARRETT	2019
	RONALD GILES	2015
	KATHERINE HANSEN	2017
	SHANNON A. HOLMES	2015
	PAULA G. HUMPHRIES	2017
	PATRICIA L. JEFFERSON	2015
	ALICIA A. JONES-COLEMAN	2019
	KENNETH J. KING	2015
	DEBORAH L. LANGSTON	2019
	LEONIA J. LLOYD	2017
	MIRIAM B. MARTIN-CLARK	2017
	WILLIAM McCONICO	2019
	DONNA R. MILHOUSE	2019
	B. PENNIE MILLENDER	2017
	CYLENTHIA L. MILLER	2017
	DAVID PERKINS	2015
	KEVIN F. ROBBINS	2019
	DAVID S. ROBINSON, Jr.	2019
	BRENDA KAREN SANDERS	2015
	MICHAEL E. WAGNER	2015
37.	DEAN AUSILIO	2017
	JOHN M. CHMURA	2019
	MICHAEL CHUPA	2015
	MATTHEW P. SABAUGH	2013
38.	CARL F. GERDS III	2015
39.	JOSEPH F. BOEDEKER	2015
	MARCO A. SANTIA	2019
	CATHERINE B. STEENLAND	2017
40.	MARK A. FRATARCANGELI	2019
	JOSEPH CRAIGEN OSTER	2015
41A.	MICHAEL S. MACERONI	2015
	DOUGLAS P. SHEPHERD	2019
	STEPHEN S. SIERAWSKI	2017
	KIMBERLEY ANNE WIEGAND	2019
41B.	LINDA DAVIS	2015
	CARRIE LYNN FUCA	2017
	SEBASTIAN LUCIDO	2019
42-1.	DENIS R. LeDUC	2015
42-2.	WILLIAM H. HACKELL III	2019
43.	CHARLES G. GOEDERT	2015
	KEITH P. HUNT	2019
	JOSEPH LONGO	2017
44.	TERRENCE H. BRENNAN	2015
	DEREK W. MEINECKE	2019
45A.	JAMES L. WITTENBERG	2015

		Term Expires January 1 of
45B.	MICHELLE FRIEDMAN APPEL	2015
	DAVID M. GUBOW	2015
46.	SHEILA R. JOHNSON	2015
	DEBRA NANCE	2019
	WILLIAM J. RICHARDS	2017
47.	JAMES BRADY	2015
	MARLA E. PARKER	2017
48.	MARC BARRON	2017
	DIANE D'AGOSTINI	2019
	KIMBERLY SMALL	2015
50.	RONDA FOWLKES GROSS	2019
	MICHAEL C. MARTINEZ	2015
	PRESTON G. THOMAS	2017
	CYNTHIA THOMAS WALKER	2015
51.	JODI R. DEBBRECHT SWITALSKI	2019
	RICHARD D. KUHN, Jr.	2015
52-1.	ROBERT BONDY	2019
	BRIAN W. MacKENZIE	2015
	DENNIS N. POWERS	2017
52-2.	JOSEPH G. FABRIZIO	2015
	KELLEY RENAE KOSTIN	2017
52-3.	LISA L. ASADOORIAN	2019
	NANCY TOLWIN CARNIAK	2017
	JULIE A. NICHOLSON	2015
52-4.	WILLIAM E. BOLLE	2015
	KIRSTEN NIELSEN HARTIG	2017
53.	THERESA M. BRENNAN	2015
	L. SUZANNE GEDDIS	2017
	CAROL SUE READER	2019
54A.	LOUISE ALDERSON	2017
	PATRICK F. CHERRY	2015
	HUGH B. CLARKE, Jr.	2017
	FRANK J. DeLUCA	2019
	CHARLES F. FILICE	2015
54B.	RICHARD D. BALL	2017
	ANDREA ANDREWS LARKIN	2019
55.	DONALD L. ALLEN	2017
	THOMAS P. BOYD	2015
56A.	HARVEY J. HOFFMAN	2017
	JULIE H. REINCKE	2015
56B.	MICHAEL LEE SCHIPPER	2019
57.	WILLIAM A. BAILLARGEON	2019
	JOSEPH S. SKOCELAS	2015
58.	CRAIG E. BUNCE	2019
	SUSAN A. JONAS	2015
	BRADLEY S. KNOLL	2015
	KENNETH D. POST	2017
59.	PETER P. VERSLUIS	2017
60.	HAROLD F. CLOSZ, III	2015

		Term Expires January 1 of
	MARIA LADAS HOOPES	2015
	MICHAEL JEFFREY NOLAN	2019
	ANDREW WIERENGO	2017
61.	DAVID J. BUTER	2015
	J. MICHAEL CHRISTENSEN	2017
	JEANINE NEMESI LaVILLE	2019
	BEN H. LOGAN, II	2019
	DONALD H. PASSENGER	2017
	KIMBERLY A. SCHAEFER	2015
62A.	PABLO CORTES	2015
	STEVEN M. TIMMERS	2019
62B.	WILLIAM G. KELLY	2015
63-1.	STEVEN R. SERVAAS	2015
63-2.	SARA J. SMOLENSKI	2015
64A.	RAYMOND P. VOET	2015
64B.	DONALD R. HEMINGSEN	2015
65A.	RICHARD D. WELLS	2015
65B.	STEWART D. McDONALD	2015
66.	WARD L. CLARKSON	2019
	TERRANCE P. DIGNAN	2015
67-1.	DAVID J. GOGGINS	2015
67-2.	JOHN L. CONOVER	2015
	MARK W. LATCHANA	2017
67-3.	LARRY STECCO	2015
67-4.	MARK C. McCABE	2015
	CHRISTOPHER ODETTE	2019
68.	TRACY L. COLLIER-NIX	2015
	WILLIAM H. CRAWFORD, II	2019
	MARY CATHERINE DOWD	2017
	HERMAN MARABLE, Jr.	2019
	NATHANIEL C. PERRY, III	2015
70-1.	TERRY L. CLARK	2019
	M. RANDALL JURRENS	2017
	M. T. THOMPSON, Jr.	2015
70-2.	CHRISTOPHER S. BOYD	2017
	ALFRED T. FRANK	2015
	KYLE HIGGS TARRANT	2019
71A.	LAURA CHEGER BARNARD	2015
71B.	KIM DAVID GLASPIE	2015
72.	MICHAEL L. HULEWICZ	2017
	JOHN D. MONAGHAN	2019
	CYNTHIA SIEMEN PLATZER	2015
74.	MARK E. JANER	2015
	TIMOTHY J. KELLY	2013
	DAWN A. KILDA	2015
75.	MICHAEL CARPENTER	2015
	JOHN HENRY HART	2015
76.	ERIC JANES	2015
	WILLIAM R. RUSH	2015

		Term Expires January 1 of
77.	SUSAN H. GRANT	2015
78.	H. KEVIN DRAKE	2015
79.	PETER J. WADEL	2015
80.	JOSHUA M. FARRELL	2015
81.	ALLEN C. YENIOR	2015
82.	RICHARD E. NOBLE	2015
83.	DANIEL L. SUTTON	2015
84.	AUDREY D. VAN ALST	2015
86.	MICHAEL J. HALEY	2015
	THOMAS J. PHILLIPS	2013
	MICHAEL STEPKA	2017
87.	PATRICIA A. MORSE	2015
88.	THEODORE O. JOHNSON	2015
89.	MARIA L. BARTON	2015
90.	JAMES N. ERHART	2015
92.	BETH GIBSON	2015
93.	MARK E. LUOMA	2009
94.	GLENN A. PEARSON	2015
95A.	JEFFREY G. BARSTOW	2015
95B.	CHRISTOPHER S. NINOMIYA	2015
96.	DENNIS H. GIRARD	2017
	ROGER W. KANGAS	2015
97.	MARK A. WISTI	2015
98.	ANDERS B. TINGSTAD, Jr.	2015

MUNICIPAL JUDGES

	Term Expires January 1 of
RUSSELL F. ETHRIDGE	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	2013
Bay	KAREN TIGHE	2013
Benzie	JOHN MEAD	2019
Berrien	MABEL JOHNSON MAYFIELD	2015
Berrien	THOMAS E. NELSON	2019
Branch	KIRK A. KASHIAN	2019
Calhoun	MICHAEL L. JACONETTE	2017
Cass	SUSAN L. DOBRICH	2019
Cheboygan	ROBERT JOHN BUTTS	2019
Chippewa	ELIZABETH BIOLETTE CHURCH	2015
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	2015
Genesee	F. KAY BEHM	2019
Gogebic	JOEL L. MASSIE	2019
Grand Traverse	MELANIE STANTON	2019
Gratiot	KRISTIN M. BAKKER	2019
Hillsdale	MICHELLE SNELL BIANCHI	2019
Houghton	FRASER T. STROME	2019
Huron	DAVID L. CLABUESCH	2019
Huron	DAVID B. HERRINGTON	2015

Ingham	R. GEORGE ECONOMY	2019
Ingham	RICHARD JOSEPH GARCIA	2015
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	CURTIS J. BELL, JR.	2019
Kalamazoo	PATRICIA N. CONLON	2017
Kalamazoo	G. SCOTT PIERANGELI	2017
Kalkaska	LYNNE MARIE BUDAY	2019
Kent	PATRICIA D. GARDNER	2019
Kent	G. PATRICK HILLARY	2019
Kent	DAVID M. MURKOWSKI	2015
Kent	GEORGE JAY QUIST	2017
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	2015
Macomb	CARL J. MARLINGA	2019
Manistee	THOMAS N. BRUNNER	2019
Marquette	CHERYL L. HILL	2019
Mason	JEFFREY C. NELLIS	2019
Mason	MARK D. RAVEN	2013
Mecosta/Osceola	MARCO S. MENEZES	2019
Menominee	WILLIAM A. HUPY	2019
Midland	DORENE S. ALLEN	2019
Missaukee	CHARLES R. PARSONS	2019
Monroe	FRANK L. ARNOLD	2015
Monroe	CHERYL E. LOHMEYER	2015
Montcalm	CHARLES W. SIMON, III	2019
Montmorency	BENJAMIN T. BOSLER	2019
Muskegon	NEIL G. MULLALLY	2017
Muskegon	GREGORY C. PITTMAN	2019
Newaygo	GRAYDON W. DIMKOFF	2019
Oakland	LINDA S. HALLMARK	2019
Oakland	DANIEL A. O'BRIEN	2015
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	FAYE M. HARRISON	2015
Saginaw	PATRICK J. McGRAW	2019
St. Clair	ELWOOD L. BROWN	2015
St. Clair	JOHN TOMLINSON	2019
St. Joseph	DAVID C. TOMLINSON	2019
Sanilac	GREGORY S. ROSS	2015
Shiawassee	THOMAS J. DIGNAN	2019
Tuscola	NANCY THANE	2019
Van Buren	FRANK D. WILLIS	2019
Washtenaw	NANCY CORNELIA WHEELER	2015[1]
Washtenaw	DARLENE A. O'BRIEN	2019
Washtenaw	JULIA OWDZIEJ	2015
Wayne	JUNE E. BLACKWELL-HATCHER	2019
Wayne	FREDDIE G. BURTON, JR.	2019
Wayne	JUDY A. HARTSFIELD	2015
Wayne	TERRANCE A. KEITH	2015
Wayne	MILTON L. MACK, JR.	2017
Wayne	MARTIN T. MAHER	2015
Wayne	LISA MARIE NEILSON	2017
Wayne	FRANK S. SZYMANSKI	2019
Wexford	KENNETH L. TACOMA	2019

[1] To May 1, 2014.

JUDICIAL CIRCUITS

County	Seat	Circuit
Alcona	Harrisville	26
Alger	Munising	11
Allegan	Allegan	48
Alpena	Alpena	26
Antrim	Bellaire	13
Arenac	Standish	34
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	5
Emmet	Petoskey	33
Genesee	Flint	7
Gladwin	Gladwin	55
Gogebic	Bessemer	32
Grand Traverse	Traverse City	13
Gratiot	Ithaca	29
Hillsdale	Hillsdale	1
Houghton	Houghton	12
Huron	Bad Axe	52
Ingham	Mason, Lansing.	30
Ionia	Ionia	8
Iosco	Tawas City	23
Iron	Crystal Falls	41
Isabella	Mount Pleasant.	21
Jackson	Jackson	4
Kalamazoo	Kalamazoo	9
Kalkaska	Kalkaska	46
Kent	Grand Rapids	17
Keweenaw	Eagle River	12
Lake	Baldwin	51
Lapeer	Lapeer	40
Leelanau	Leland	13
Lenawee	Adrian	39
Livingston	Howell	44
Luce	Newberry	11
Mackinac	St. Ignace	50
Macomb	Mount Clemens	16
Manistee	Manistee	19
Marquette	Marquette	25
Mason	Ludington	51
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	26
Roscommon	Roscommon	34
Saginaw	Saginaw	10
St. Clair	Port Huron	31
St. Joseph	Centreville	45
Sanilac	Sandusky	24
Schoolcraft	Manistique	11
Shiawassee	Corunna	35
Tuscola	Caro	54
Van Buren	Paw Paw	36
Washtenaw	Ann Arbor	22
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ADMINISTRATIVE ORDERS

ADMINISTRATIVE ORDER No. 2014-11

ADJUSTMENT OF DISCIPLINE PORTION OF STATE BAR OF MICHIGAN DUES

Entered June 20, 2014, effective immediately (File No. 2014-14)—REPORTER.

In 2011, the Court directed that the discipline portion of the dues members pay to the State Bar of Michigan be redcued by $10 (to $110) in light of the $5 million surplus of the discipline system. Today, there is an even greater surplus. Therefore, the Court directs that the amount of discipline dues be adjusted to $90. This change will be reflected in the dues notice for the 2014-15 fiscal year that is distributed to all bar members under Rule 4 of the Rules Concerning the State Bar.

ADMINISTRATIVE ORDER
No. 2014-12

ORDER CREATING THE MICHIGAN TRIBAL STATE FEDERAL JUDICIAL FORUM

Entered June 25, 2014, effective immediately (File No. 2014-33)—REPORTER.

Michigan is privileged to be the home of 12 federally recognized Indian tribes and tribal court systems. Michigan has also enjoyed a long history of collaboration between state and tribal courts. The first Tribal State Court Forum, which was created in 1992, resulted in the creation of the "Enforcement of Tribal Judgments" court rule, MCR 2.615, and, most recently, the passage of the Michigan Indian Family Preservation Act of 2012 (MIFPA). Fostering continuing good relations between our state and tribal courts is of great interest to this Court.

For purposes of building on the past spirit of cooperation and of creating a dialogue among the state, tribal, and federal judiciaries, the Court recognizes the importance of establishing an ongoing forum that will address working relationships among the court systems and the interaction of state, tribal, and federal court jurisdiction in Michigan.

The Michigan Tribal State Federal Judicial Forum is established. The membership of the forum shall consist of: the chief tribal judge of each of Michigan's 12

federally recognized tribes, or their designated alternate judges, with membership to be expanded to accommodate any new federally recognized tribes; and 12 state court judges (or the same number as there are tribal judges), who will be appointed by the Michigan Supreme Court from among a pool of currently serving or retired Michigan judges or justices. In making appointments, the Court will consider geographic proximity to the tribes, Indian Child Welfare Act and MIFPA case load dockets, and current involvement with tribal court relations. The forum shall then pursue participation from federal judges and officials.

The specific charge of the forum is contained in its Naakonigewin (or Charter), but by majority vote, the members of the forum may designate any other duties that are in the best interests of state, tribal, and federal courts and the citizens who are served by these three systems.

Forum members will serve three-year terms, and memberships are renewable at the discretion of the Chief Tribal Judges or Tribal Liaison Justice. To facilitate the staggering of terms, some initial appointments will be for abbreviated terms. The forum shall be led by co-chairs, who will be one tribal court judge and one state court judge and who shall be selected by the entire body of members for a three-year term. Work committees may be formed as needed, and decisions shall be made by consensus—defined as a majority of members present at each meeting. Meetings shall be held three times per year, including at least two in-person meetings.

Effective July 1, 2014, the following state court judges or justices are appointed to the new Michigan Tribal State Federal Judicial Forum:

For terms ending July 1, 2016:

1) Susan L. Dobrich, Chief Judge, Cass County Courts, 43rd Circuit Court Family Division

2) William A. Hupy, Chief Judge, Menominee County Probate Court, 41st Circuit Court Family Division

3) Jeffrey C. Nellis, Judge, Mason County Probate Court, 51st Circuit Court Family Division

4) Larry J. Nelson, Chief Judge, Leelanau County Probate Court, 13th Circuit Court Family Division

5) George J. Quist, Judge, Kent County Probate Court, 17th Circuit Court Family Division

6) Frank S. Szymanski, Judge, Wayne County Probate Court, 3rd Circuit Court Family Division

For terms ending July 1, 2017:

1) Robert J. Butts, Judge, Cheboygan County Probate Court, 53rd Circuit Court Family Division

2) William T. Ervin, Judge, Isabella County Probate Court, 21st Circuit Court Family Division

3) Cheryl L. Hill, Judge, Marquette County Probate Court, 25th Circuit Court Family Division

4) James P. Lambros, Chief Judge, Chippewa County Courts, 50th Circuit Court Family Division

5) Timothy P. Connors, Judge, 22nd Circuit Court Family Division

6) Michael F. Cavanagh, Justice, Michigan Supreme Court

Effective July 1, 2014, tribal judges will be appointed by their respective Chief Tribal Court Judges to represent the following federally recognized Indian tribes:

1) Bay Mills Indian Community

2) The Grand Traverse Band of Ottawa and Chippewa Indians

3) Hannahville Indian Community

4) Nottawaseppi Huron Band of Potawatomi

5) Keweenaw Bay Indian Community

6) Lac Vieux Desert Band of Lake Superior Chippewa Indians

7) Little River Band of Ottawa Indians

8) Little Traverse Bay Bands of Odawa Indians

9) Pokagon Band of Potawatomi Indians

10) Saginaw Chippewa Indian Tribe

11) Sault Ste. Marie Tribe of Chippewa Indians

12) Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (Gun Lake Tribe)

Court staff shall serve as reporter of the forum.

Justice Bridget M. McCormack shall serve as the Supreme Court Tribal Liaison Justice to the forum.

ADMINISTRATIVE ORDER
No. 2014-13

AUTOMATED INCOME TAX GARNISHMENT PILOT PROJECT IN 36TH DISTRICT COURT

Entered June 25, 2013 (File No. 2014-10)—REPORTER.

On order of the Court, the 36th District Court (court) and the State Court Administrative Office (SCAO) developed this pilot project to automate the business process for issuing writs for income tax garnishment.

Effective immediately, the 36th District Court is authorized to operate a pilot program to process requests for writs of state income tax garnishment through a web-based system referred to as GarnIT. This administrative order governs the procedures associated with the transmission of requests and writs through GarnIT. This order also includes rules designed to address issues unique to the implementation of this program. Participation in this pilot program is voluntary for 2014.

The 36th District Court and SCAO will track the effectiveness of this pilot program and report the results to the Supreme Court after January 1, 2015.

1. Purpose and Construction. The purpose of the pilot is to determine whether it is feasible to automate the processing of income tax garnishments in the 36th District Court as a way to reduce overhead costs, streamline data storage requirements, and improve

user satisfaction. Except for matters related to transmission of requests and writs for state income tax garnishments through GarnIT during the pilot, the Michigan Court Rules govern all other postjudgment proceedings concerning the cases involved in the pilot.

2. Definitions.

(a) "ACH" means Automated Clearing House, an electronic network for financial transactions in the United States.

(b) "Batch" means an electronic submission that contains one or more case records.

(c) "CEPAS" means Centralized Electronic Payment Authorization System.

(d) "Clerk" means the clerk of the court for the 36th District Court.

(e) "Court" means the 36th District Court.

(f) "Department" means the Department of Treasury.

(g) "Electronic submission" means the submission of one or more requests which results in the recording of data into the 36th District Court's case management system.

(h) "File format" means the format for submitting income tax garnishment transactions to the Department of Treasury for processing.

(i) "GarnIT" means the web-based system for processing requests and writs for income tax garnishments.

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

(k) "Pilot" means the court innovation initiative tested in the 36th District Court and the Michigan Department of Treasury in conjunction with IBM and under the supervision of the SCAO. This web-based

application facilitates the electronic processing of income tax garnishments in the 36th District Court. The pilot program is expected to launch October 1, 2014 and will continue through November 30, 2014. If it is successful, the pilot will be discontinued and the program will be evaluated for statewide use.

(l) "Transaction" means the request and writ for income tax garnishment electronically processed pursuant to the pilot.

3. Participation in GarnIT. Use of GarnIT for filers who submit requests to the court for 2014 income tax garnishments begins on October 1, 2014, and shall be voluntary during the pilot.

4. Electronic Submission and Acceptance of Submission with the Court; Signature; Statutory Service and Process Fees.

(a) Plaintiffs who choose to use GarnIT will submit requests under the rules in this administrative order and agree to comply with GarnIT's technical requirements. GarnIT will reject requests that do not meet GarnIT's validation requirements and that do not conform to the technical requirements of GarnIT.

(b) Except when maintenance of the case management system or GarnIT is being performed, requests may be submitted to the court and will be processed 24-hours per day, seven days a week through GarnIT.

(c) A request submitted under these rules shall be deemed to have been signed by the plaintiff and filed with the clerk of the court. Electronic signatures shall use the following form: /s/ *John L. Smith*.

(d) By using GarnIT, the plaintiff acknowledges compliance with the rules of this administrative order and acceptance of the business process specified in this administrative order.

(e) The statutory service fee for issuing a writ (hereinafter referred to as filing fee) shall be paid electronically at the same time the writ is issued and in the same amount as required by statute.

(f) The court shall pay the fees associated with the use of credit cards or the court shall pay the cost of establishing Automated Clearing House (ACH) for payment of the filing fees for issuing the writs.

(g) Each plaintiff shall provide one email address with the functionality required by the GarnIT pilot.

5. Format and Form of Electronic Submission.

(a) A plaintiff may file only one request per case per defendant.

(b) A plaintiff may submit multiple transactions within a single batch, subject to subrule 5(a).

(c) All submissions shall comply with the technical requirements of GarnIT and MCR 1.109.

(d) The court will maintain a digital image of each order issued, in accordance with subrule (11).

6. Validation of Requests; Notice of Writs and Rejected Requests; Payment and Receipt.

(a) GarnIT will compare data from submitted requests against data in the Court's case management system and will validate:

(1) party information,

(2) case number,

(3) existence of an unsatisfied judgment on file,

(4) that the judgment has not expired,

(5) that the 21-day time frame before enforcing judgment has passed, and

(6) there is no bankruptcy case pending.

(b) If a request does not meet the validation criteria, GarnIT will display an error message to the filer indicating writ field validation failure. Instructions to the plaintiff for handling validation failure will be available through GarnIT. The instructions will include what steps, if any, the plaintiff can take to correct discrepancies in data between the court's case management system and the official court documents upon which the plaintiff is basing the request.

(c) Filing fees under MCL 600.2529(h) will be collected through CEPAS on each validated request.

(d) GarnIT will notify the plaintiff regarding the submitted requests including payment receipt numbers and a link for printing the writs for purposes of service on the department and the defendant in accordance with Rule 8. 7.Format and Generation of Writs; Payment Processing.

(a) For each validated request, GarnIT will produce an electronic equivalent of SCAO-approved form MC 52, Request and Writ for Garnishment (Income Tax Refund/Credit), which constitutes issuance of a signed writ.

(b) All writs issued will be recorded in data files in the format the department requires for use by the plaintiff.

(c) GarnIT will update the Court's case management system as to each writ issued.

(d) GarnIT will update the Court's case management system as to fees collected.

8. Service on the Department and the Defendant. The plaintiff shall print all issued writs and serve them on the department and the defendant in accordance with existing court rules and department requirements.

9. Correcting Data in the Court's Case Management System. If the plaintiff receives an error message as

indicated in Rule 6b, the following procedure shall be followed by the plaintiff and the court:

(a) If the error is the result of incorrect data provided by the plaintiff, the plaintiff may correct the data and resubmit the request through GarnIT in accordance with the instructions and requirements of GarnIT.

(b) If the plaintiff believes the error is the result of incorrect data in the court's case management system, the plaintiff shall submit an email request to correct the data, along with supporting documentation, in accordance with the instructions and requirements of GarnIT. Within 24 hours after receipt of a request to correct data and supporting documentation, the court shall handle the request. If the court determines that the discrepancy is the result of clerical error by the court, the court will correct the data in the case management system and send an email response to the plaintiff indicating what action was taken and informing plaintiff that the request can be resubmitted in GarnIT. If the court determines that the discrepancy is not the result of clerical error by the court, the court will send an email response to the plaintiff indicating that fact.

(c) If the plaintiff wants to request a change in case data that is not the result of data entry error, plaintiff shall file a motion with the court under MCR 2.119.

10. Technical Malfunctions. The GarnIT website will provide instructions regarding what action to take if the plaintiff experiences a technical malfunction with use of GarnIT or has other technical difficulties using GarnIT that cannot be resolved by the plaintiff.

11. Official Court Record; Record Retention.

(a) For purposes of this pilot program, the electronic data and the electronic equivalent of SCAO-approved form MC 52, Request and Writ for Garnishment (In-

come Tax Refund/Credit), produced by and through the GarnIT transaction and subsequently maintained in the case management system, constitutes the official court record and meets the record retention and public access requirements of the court rules and General Records Retention and Disposal Schedule #16 — Michigan Trial Courts.

(b) A request and writ processed by GarnIT can be generated or printed on demand by the clerk. The request and writ maintained by the court will not contain the social security numbers or federal identification numbers of the parties.

(c) If a request is made for a certified copy of a request and writ processed by GarnIT, the clerk shall print the document and certify it in compliance with the Michigan Trial Court Case File Management Standards.

12. Privacy Considerations. The plaintiff shall provide in each submission to GarnIT, the social security numbers and federal identification numbers of the parties for use in the data file and writs issued for service on the department. The social security number or federal identification number will not be retained by GarnIT or the Court after requests are validated and writs are issued and printed in accordance with Rules 6 and 7.

13. Expiration. Unless otherwise directed by the Michigan Supreme Court, this pilot shall continue until November 30, 2014.

SUPREME COURT CASES

SHOLBERG v TRUMAN

Docket No. 146725. Argued on application for leave to appeal December 12, 2013. Decided June 10, 2014.

Terri A. Sholberg died when the car she was driving hit a horse standing in the road. Diane K. Sholberg, as personal representative of her estate, brought an action in the Emmet Circuit Court against Daniel Truman (the owner of the horse, which had escaped from its stall) and Robert and Marilyn Truman (the title owners of the farm that Daniel Truman operated). Other than being the title owners, Robert and Marilyn Truman (hereafter "defendants") had nothing to do with the farm or the animals on it. Plaintiff presented evidence of at least 30 instances of animal elopement near the farm between 2003 and 2010, each allegedly creating a hazard on surrounding public roads. The court, Charles W. Johnson, J., entered a default judgment against Daniel Truman, but granted summary disposition in defendants' favor, concluding that they could not be held liable for a public nuisance because they were not in possession of the property. The Court of Appeals, TALBOT, P.J., and BECKERING and M. J. KELLY, JJ., affirmed in part and reversed with regard to the public nuisance claim in an unpublished opinion per curiam, entered November 15, 2012 (Docket No. 307308), holding that defendants' ownership of the property from which the alleged nuisance arose was sufficient to allow a nuisance action against them. Plaintiff applied for leave to appeal with respect to an issue concerning violations of the Equine Activity Liability Act, MCL 691.1661 *et seq*., and defendants filed a separate application for leave to appeal on the nuisance claim. The Supreme Court denied plaintiff's application, 493 Mich 974 (2013), but ordered and heard oral argument on whether to grant defendants' application for leave to appeal or take other action, 494 Mich 867 (2013).

In an opinion by Justice MARKMAN, joined by Chief Justice YOUNG and Justices KELLY, ZAHRA, and MCCORMACK, the Supreme Court *held*:

The title owner of real property cannot be held liable for a public nuisance that arose from that property when someone other than the

title owner was in actual possession of the property, exercised control over the property, and created the alleged nuisance.

1. A public nuisance is a tort that involves the unreasonable interference with a right common to all members of the general public. To be held liable for the nuisance, a defendant must have possession or control of the land. Ownership alone is not dispositive. The person in possession is normally in a position of control and thus normally best able to prevent any harm to others.

2. In this case, defendants merely owned the property. They never possessed or exercised any control over the property and had not even visited it in more than a decade. They had no contact with Daniel Truman, the person who was in actual possession and exercised control over the property. Defendants also did not own, possess, or control the horse that caused the accident or any other horse on the property, and did not even know that Daniel Truman owned the horse. There was no evidence that defendants knew or had reason to know that Daniel Truman's animals had been escaping the property when the accident happened. Because defendants did not control or possess the property or the horse, there was no basis for imposing tort liability on them for a public nuisance. Daniel Truman was the person best able to prevent any harm to others, and given that defendants had resigned all charge and control over the property to him, he was the person exclusively responsible for the alleged public nuisance he created on the property.

Court of Appeals' judgment reversed in part with respect to public nuisance claim; trial court order granting defendants summary disposition reinstated.

Justice CAVANAGH, concurring, agreed with the majority's result for the reasons stated in the conclusion of its opinion. Defendants were entitled to summary disposition because they were not in possession of the property, did not have control over the property, and did not create the alleged nuisance.

Justice VIVIANO, concurring in part and dissenting in part, agreed that defendants were entitled to dismissal because they were not liable for the nuisance, but wrote separately because he disagreed that the case could be decided as a matter of law on the issue of defendants' control over the land from which the nuisance arose. Justice VIVIANO believed that both control and knowledge must be shown before imposing liability on absentee owners like defendants. Control over property may be established through ownership or otherwise. Because control can be established through proof of ownership, he disagreed with the proposition that defendants could not be liable as a matter of law merely because they owned the property. There was evi-

dence that someone other than defendants was in active control of the property. However, Justice VIVIANO concluded that there was a question of fact whether defendants, even though absentee owners, retained sufficient control over the land to be held liable for the alleged nuisance. He pointed to several facts that could support such a finding: defendants held sole title to the property; defendants supplied the financing to purchase the property; defendants maintained insurance on the property; and defendants took out a mortgage on the property, the terms of which required defendants to maintain the property and prohibited them from permitting a nuisance on the property, abandoning the property, or leaving it unattended. He nonetheless would have held that summary disposition in defendants' favor was proper because, as the majority recognized, defendants had no knowledge of the nuisance on the premises.

NUISANCE — LIABILITY — POSSESSION AND CONTROL OF PROPERTY — OWNERSHIP.

The title owner of real property cannot be held liable for a public nuisance that arose from that property when someone other than the title owner was in actual possession of the property, exercised control over the property, and created the alleged nuisance.

Abood Law Firm (by *Andrew P. Abood*) for Diane K. Sholberg.

Cardelli Lanfear PC (by *Anthony F. Caffrey III*, *R. Carl Lanfear*, and *Paul M. Kittinger*) for Robert and Marilyn Truman.

Amici Curiae:

Swistak & Levine, PC (by *I. Matthew Miller*), for the Property Management Association of Michigan, the Detroit Metropolitan Apartment Association, the Property Management Association of West Michigan, the Property Management Association of Mid-Michigan, and the Washtenaw Area Apartment Association.

MARKMAN, J. The issue in this case is whether title owners of real property may be held liable for a public

nuisance that arose from that property, where someone other than the title owners is in possession of the property, is exercising control over the property, and is the one who created the alleged nuisance. We hold that title owners of the real property cannot be held liable for a public nuisance under such circumstances. Therefore, we reverse that portion of the Court of Appeals' judgment that held to the contrary and reinstate the trial court's order granting defendants' motion for summary disposition.

I. FACTS AND HISTORY

In 2010, Terri Sholberg while driving her car hit a horse that was standing in the road and died as a result. Plaintiff, as personal representative of her estate, brought this action against Daniel Truman, the owner of the horse that had escaped from its stall on the farm,[1] and his brother and sister-in-law, Robert and Marilyn Truman ("defendants"), the title owners of the farm operated by Daniel Truman.[2] Other than being the title owners, defendants have nothing to do with the farm or with any of the animals on the farm, including the horse

[1] The horse had been stored in a three-walled enclosure with a heavy gate, but the gate had been secured with baling twine that had failed.

[2] Robert and Daniel Truman's mother sold the property to Daniel Truman and his now ex-wife, Linda Truman. When Daniel and Linda divorced in 1989, the divorce decree required Daniel to pay off his wife's interest in the property. In order to have the cash to do so, Daniel borrowed money from his brother, Robert. Presumably because of the financial assistance that defendants provided Daniel, Linda signed the deed to the property over to defendants. Daniel repaid about $6,000 of the $15,000 that he owes defendants, but has not made a payment to defendants in several years, although Daniel does pay the property taxes. Defendants had a land contract drawn up but never obtained Daniel's signature on it. Defendants and Daniel do not speak with one another and have not done so for the past 10 years. Defendants have also not been on the property in the past 10 years.

struck by plaintiff's decedent. Plaintiff has presented evidence of at least 30 instances of animal elopement[3] near the farm between 2003 and 2010, each of which allegedly created a hazard on the surrounding public roads.[4] Marilyn Truman testified that no later than 2000, she received two or three telephone calls from people looking for Daniel Truman because his animals were loose.

A default judgment was entered against Daniel Truman. However, the trial court granted defendants' motion for summary disposition, concluding that they could not be held liable for public nuisance because they were not in possession of the property. The Court of Appeals reversed with regards to the public nuisance claim,[5] holding that "the Trumans owned the Property from which the alleged nuisance arose, which is sufficient to bring a nuisance action against them." *Sholberg v Truman*, unpublished opinion per curiam of the Court of Appeals, issued November 15, 2012 (Docket No. 307308). This Court then directed that oral argument be heard on defendants' application for leave to appeal and directed the parties to address "whether, and under what circumstances, a property owner who is not in possession of the property and does not participate in the conduct creating an alleged nuisance may be liable for the alleged nuisance," *In re Sholberg Estate*, 494 Mich 867 (2013), and argument was heard on December 12, 2013.

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[3] "Elope" in this legal context means "to flee; escape." *Random House Webster's College Dictionary* (1992).

[4] It is unknown whether all of these elopements involved animals from the property at issue here.

[5] Plaintiff also claimed negligence and violations of the Equine Activity Liability Act, but the trial court subsequently dismissed those claims and the Court of Appeals affirmed. Plaintiff filed an application for leave to appeal which this Court denied, and thus those claims are not before this Court.

II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Malpass v Dep't of Treasury*, 494 Mich 237, 245; 833 NW2d 272 (2013). The interpretation and applicability of a common-law doctrine is also a question that is reviewed de novo. *People v Petty*, 469 Mich 108, 113; 665 NW2d 443 (2003).

III. ANALYSIS

As an initial matter, the lower courts and the parties all assumed that incidents of animal elopement can constitute a public nuisance, and thus we too will assume, without deciding, that incidents of animal elopement can constitute a public nuisance.[6] "A public nuisance involves the unreasonable interference with a right common to all members of the general public." *Adkins v Thomas Solvent Co*, 440 Mich 293, 304 n 8; 487 NW2d 715 (1992). "No better definition of a public nuisance has been suggested than that of an act or omission which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects." *Garfield Twp v Young*, 348 Mich 337, 341-342; 82 NW2d 876 (1957) (quotation marks and citation omitted). "There is no doubt that nuisance is a tort . . . ." *Pohutski v City of Allen Park*, 465 Mich 675, 685; 641 NW2d 219 (2002). "In general, even though a nuisance may exist, not all actors are liable for the damages stemming from the condition." *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 191;

[6] Because defendants failed to raise this issue at the trial court, this issue is not properly before this Court. See *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) ("[A] litigant must preserve an issue for appellate review by raising it in the trial court. . . . [G]enerally 'a failure to timely raise an issue waives review of that issue on appeal.' ") (citation omitted).

540 NW2d 297 (1995). "A defendant held liable for the nuisance must have possession or control of the land." *Wagner v Regency Inn Corp*, 186 Mich App 158, 163; 463 NW2d 450 (1990); see also *Stevens v Drekich*, 178 Mich App 273, 278; 443 NW2d 401 (1989) ("It requires that the defendant liable for the nuisance have possession or control of the land."); 19 Mich Civ Jur, Nuisances, § 1, p 63 ("Liability for nuisance . . . requires that the defendant liable for the nuisance have possession or control of the land on which the condition exists or the activity takes place.").

As the Court of Appeals explained in *Merritt v Nickelson*, 80 Mich App 663, 666-667; 264 NW2d 89 (1978):

> To argue, as plaintiff does, that a co-owner's right to possession of the premises is sufficient to hold that co-owner liable for all injuries on the premises is to be simplistic. The issue of control is preeminent.
>
> > [The] rights and liabilities arising out of the condition of land, and activities conducted upon it, have been concerned chiefly with the possession of the land * * * for the obvious reason that the man in possession is in a position of control, and normally best able to prevent any harm to others. Prosser, Law of Torts (3d ed), § 57, at 358. (Footnote omitted.)
>
> "Possession" differs from the "right to possession" and "ownership" because of the concept of control. Possession is the detention and control of anything which may be the subject of property, for one's use and enjoyment. Blacks Law Dictionary (4th ed), at 1325. The mere "right to possession" does not necessarily entail the control inherent in the nature of "possession."
>
> It has been recognized in this state that control and possession are the determinative factors in the imposition of liability.

> It is a general proposition that liability for an injury due to defective premises ordinarily depends upon power to prevent the injury and therefore rests primarily upon him who has control and possession. [Citations omitted.]

This Court subsequently affirmed that decision, holding that a co-owner of land cannot be held liable where he or she has not "exercise[d] her right to possession and control over the property" because "[w]hen one co-owner of land cedes possession and control of the premises to her co-owners, the law is satisfied to look to those co-owners actually in control for liability for injuries to third persons." *Merritt v Nickelson*, 407 Mich 544, 554; 287 NW2d 178 (1980).

> Ownership alone is not dispositive. Possession and control are certainly incidents of title ownership, but these possessory rights can be "loaned" to another, thereby conferring the duty to make the premises safe while simultaneously absolving oneself of responsibility. [*Id*. at 552-553.]

See also *Musser v Loon Lake Shores Ass'n*, 384 Mich 616, 622; 186 NW2d 563 (1971) ("It is a general principle of tort law that a person is liable only as he participates in an activity giving rise to a tort. Mere co-ownership of land standing alone will not subject a person to liability for torts committed in the land by the other co-owners.").[7]

In the landlord/tenant context (which bears considerable resemblance to the context we have here), this Court has made it clear that generally a landlord is not

[7] Although *Merritt* and *Musser* involved premises liability causes of action, the general principles of tort liability articulated in those opinions are just as relevant in the context of a nuisance cause of action. Tort law generally does not favor shifting liability from a party directly responsible for giving rise to the tort to a mere title holder who lacked actual possession and control of the land.

liable for a nuisance created by the tenant. As Justice COOLEY explained in *Samuelson v Cleveland Iron Mining Co*, 49 Mich 164, 171; 13 NW 499 (1882):

> It is not pretended that the mere ownership of real estate upon which there are dangers will render the owner liable to those who may receive injury in consequence. Some personal fault must be involved, or neglect of duty, before there can be a personal liability. As between landlord and tenant the party presumptively responsible for a nuisance upon the leased premises is the tenant. But this might be otherwise if the lease itself contemplated the continuance of the nuisance, for in that case the personal fault of the landlord would be plain[.] [Citations omitted.]

The question at issue in *Samuelson* was "whether a personal duty to guard against danger to the [iron] miners was still incumbent upon the defendant as owner of the mine, and was continuous while the mine was being worked by the contractors." *Id*. at 173. This Court held:

> Mere ownership of the mine can certainly impose no such duty. The owner may rent a mine, resigning all charge and control over it, and at the same time put off all responsibility for what may occur in it afterwards. If he transfers no nuisance with it, and provides for nothing by his lease which will expose others to danger, he will from that time have no more concern with the consequences to others than any third person. If instead of leasing he puts contractors in possession the result must be the same if there is nothing in the contract which is calculated to bring about danger. But if, on the other hand, he retains charge and control, and gives workmen a right to understand that he is caring for their safety and that they may rely upon him to guard against negligent conduct in the contractors and others, his moral accountability for their safety is as broad as it would be if he were working the mine in person; and his legal accountability ought to be commensurate with it.

> But we do not find that in this case there was any such retention of charge and control, or that the arrangement between the contractors and the mining company gave to workmen any assurance that the company would protect them against the negligence of the contractors and their servants. [*Id*. at 173-174.]

The general rule is that if "the acts of the tenant unauthorized by the landlord create a nuisance 'after he has entered into occupation as a tenant, the landlord is not liable.' " *Rosen v Mann*, 219 Mich 687, 690-691; 189 NW 916 (1922) (citation omitted). "[I]n the absence of a contract duty on the part of the owner or landlord, the tenant, as between himself and the landlord, is bound to keep the leased premises in repair [and] the owner is not liable for damages to third persons for injuries arising from the neglect of the tenant to repair." *Maclam v Hallam*, 165 Mich 686, 693; 131 NW 81 (1911); see also *Harris v Cohen*, 50 Mich 324, 325; 15 NW 493 (1883) ("The case was not allowed to go to the jury, on the ground that the defendant was not personally in possession, and that she was not liable, as the case stood, for the neglect of her tenant."); *Fisher v Thirkell*, 21 Mich 1, 12-13 (1870) ("[T]he owners, being out of possession and not bound to repair, are not liable in this action for injuries received in consequence of the neglect to repair."); *Merritt*, 80 Mich App at 667 ("[O]wners of land . . . do not share liability when injury or negligence is attributable to the independent act of a single tenant who has exclusive control of the premises.").

"The underlying reason for the general rule . . . is that after leasing and surrendering the premises to the tenant the landlord loses all control over them." *Rosen*, 219 Mich at 691. "It is a general proposition that liability for an injury due to defective premises ordinarily depends upon power to prevent the injury and

therefore rests primarily upon him who has control and possession." *Dombrowski v Gorecki*, 291 Mich 678, 681; 289 NW 293 (1939).

> A tenant or occupant of premises having the entire control thereof is, so far as third persons are concerned, the owner. He is, therefore, as already stated, usually deemed to be prima facie liable for all injuries to third persons occasioned by the condition of the demised premises. [*Rosen*, 219 Mich at 692 (quotation marks and citations omitted).]

Although this Court has consistently held that control is required in order to hold a defendant liable for a nuisance, in dicta the Court of Appeals has articulated this rule in such a way that suggests that ownership alone may be sufficient to impose liability even if someone other than the owner exercises control over the property. To wit, in *Cloverleaf*, 213 Mich App at 191, the Court of Appeals stated:

> A defendant is liable for a nuisance where (1) the defendant created the nuisance, (2) the defendant *owned or controlled* the land from which the nuisance arose, or (3) the defendant employed another person to do work from which the defendant knew a nuisance would likely arise. [Emphasis added.]

The Court held that because the defendant did not own or control the property, the defendant could not be held liable. *Cloverleaf* cited *Gelman Sciences, Inc v Dow Chemical Co*, 202 Mich App 250, 252; 508 NW2d 142 (1993), for its articulation of the rule. *Gelman* did articulate this same rule, but held that because the defendant did not own or control the property, the defendant could not be held liable.

Gelman in turn cited *Radloff v Michigan*, 116 Mich App 745, 758; 323 NW2d 541 (1982), for its articulation of the rule. While *Radloff* did articulate this same rule,

it also held that "[o]wnership alone is not dispositive." *Id*. at 755, quoting *Merritt*, 407 Mich at 552. *Radloff* concluded that because "the defendants both owned *and* controlled the property," they could be held liable. *Radloff*, 116 Mich App at 759 (emphasis added). *Radloff* also held that *Merritt* was distinguishable because the defendants in *Merritt* were "mere landowners." *Id*. at 756.

Radloff cited *Stemen v Coffman*, 92 Mich App 595, 597-598; 285 NW2d 305 (1979), for its articulation of the "owned or controlled" rule. *Stemen* did articulate this rule, but held that because the defendants did not own or control the property, they could not be held liable. In support of this proposition, *Stemen*, 92 Mich App at 598, cited 58 Am Jur 2d, Nuisances, § [95],[8] p 616, which provides:

> To be liable for nuisance, it is not necessary for an individual to own the property on which the objectionable condition is maintained, but rather, liability for damages turns on whether the defendant controls the property, either through ownership or otherwise.[9] A person is liable

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[8] *Stemen* actually cited § 49, but this language can only be found in § 95, pp 642-643.

[9] See also *Beard v Michigan*, 106 Mich App 121, 126; 308 NW2d 185 (1981), citing *Stemen*, 92 Mich App at 598 ("We have previously held that liability for damage caused by a nuisance turns upon when the defendant was in control, either through ownership or otherwise."); *Detroit Bd of Ed v Celotex Corp*, 196 Mich App 694, 709-710; 493 NW2d 513 (1992), citing *Radloff*, 116 Mich App at 758 ("[N]uisance liability may be imposed where . . . the defendant owned or controlled the property from which the nuisance arose . . . ."); *Mitchell v Dep't of Corrections*, 113 Mich App 739, 742; 318 NW2d 507 (1982), citing *Stemen*, 92 Mich App at 598 ("Unless the defendant has created the nuisance, owned or controlled the property from which it arose or employed another to do work knowing it would likely create a nuisance, liability may not be imposed under a nuisance theory."); *Coburn v Pub Serv Comm*, 104 Mich App 322, 327; 304 NW2d 570 (1981), quoting *Stemen*, 92 Mich App at 598 ("We have found no authority imposing liability for damage caused by a nuisance where the

> if he or she knowingly permits the creation or maintenance of a nuisance on premises of which he or she has control even though such person does not own the property or even though such person is not physically present, such as where he or she is an absentee owner. A party who has no control over the property at the time of the alleged nuisance cannot be held liable therefor.

While this language indicates that an absentee owner may be held liable, it does not state that mere land ownership may give rise to liability. That is, even the treatise cited above and referred to by *Stemen* indicates that something more than mere ownership is required—the absentee landowner must have "knowingly permit[ted] the creation or maintenance of a nuisance on [the] premises." *Id*.[10]

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defendant has not either created the nuisance, owned or controlled the property from which the nuisance arose, or employed another to do work which he knows is likely to create a nuisance.").

[10] As recognized by the partial dissent, "this Court has never explicitly held that knowledge is a required element of a nuisance claim," *post* at 23, and we do not hold so in the instant case. See note 11 of this opinion. Such a holding would require us to modify our existing common law, and "[w]hile this Court unquestionably has the authority to modify the common law, such modifications should be made with the utmost caution because it is difficult for the judiciary to assess the competing interests that may be at stake and the societal trade-offs relevant to one modification of the common law versus another in relation to the existing rule." *Woodman v Kera LLC*, 486 Mich 228, 231; 785 NW2d 1 (2010). Contrary to the partial dissent's contention, just because the parties and the Court assumed, without deciding, that knowledge is an element of a nuisance claim in *Wendt v Village of Richmond*, 164 Mich 173; 129 NW 38 (1910), does not mean that if this Court today expressly held that knowledge is an element of a nuisance claim this would not constitute a modification of our existing common law. Moreover, given that the parties themselves have not even asked that the common law be modified by adding the element of knowledge (indeed, defendants have actually argued that "knowledge of a nuisance is irrelevant for purposes of liability"), we are not prepared to "assess the competing interests that may be at stake and the societal trade-offs relevant" to such a modification of the common law. *Woodman*, 486 Mich at 231. We recognize that plaintiff and defen-

None of the Court of Appeals cases cited above involved a situation in which the Court of Appeals imposed liability on a defendant on the basis of his or her mere land ownership. Instead, each of these cases involved situations in which the Court of Appeals held that the defendants either could *not* be held liable because they did not own or control the property or *could* be held liable because they did both own *and* control the property. And even the treatise specifically relied on by the Court of Appeals for its "ownership or control" rule does not stand for the proposition that ownership alone can give rise to liability where someone other than the owner is exercising control over the property.

In the instant case, defendants merely own the property. It is undisputed that they have never possessed or exercised any control over the property. They have not even visited the property in more than a decade. They have no contact with the person who is in actual possession of the property and who is exercising control over that property. Defendants also had nothing to do with the horse that caused the accident in this case or with any other horse on the property. They did

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dants (at least until they filed their application for leave to appeal with this Court) assumed that knowledge is an element of a nuisance claim. However, this does not change the fact that neither party has argued that we should modify the common law to add a knowledge requirement or has "assess[ed] the competing interests that may be at stake and the societal trade-offs relevant to [such a] modification of the common law." *Woodman*, 486 Mich at 231. One would think that if it were so important for this Court to add knowledge as an element, defendants, who have the most to gain by the addition of this element, would have argued in support of this addition. But, instead, defendants argued that "knowledge of a nuisance is irrelevant for purposes of liability." In light of these circumstances, we exercise "the utmost caution" in recognition of the fact that we are in no position to "assess the competing interests that may be at stake and the societal trade-offs relevant to [the partial dissent's proposed] modification of the common law." *Id*.

not own, possess, or control the horse. Indeed, they did not even know that Daniel Truman owned the horse. Although Marilyn Truman testified that she received two or three telephone calls from people looking for Daniel Truman because his animals were loose, she testified that she received these calls no later than 2000—at least 10 years before the accident. Not only did none of the neighbors testify that they had *ever* called defendants about the escaped animals, but most of these neighbors, as well as the animal-control officer, actually testified that they *never* called defendants about such animals. Thus, there is no evidence of any kind that defendants knew or had reason to know that Daniel Truman's animals were escaping the property when the accident happened in 2010.[11] Because defendants did not control or possess the property or the horse, there is no basis on which to impose tort liability on defendants for a public nuisance.

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[11] We speak of knowledge not because it is an element of a nuisance action in this state, because it is not, see note 10 of this opinion, but only because defendants' *lack* of knowledge is relevant evidence in this case of defendants' lack of control or possession of the property, which *is* an element of a nuisance action. See *Wagner*, 186 Mich App at 163 ("A defendant held liable for the nuisance must have possession or control of the land."). That is, the fact that defendants did not even know that Daniel Truman owned a horse, or that animals were still getting loose from the farm operated by Daniel Truman, suggests strongly that they were also not in possession of, or exercising control, over the farm because had they been, they likely would have known about the horse and they likely would have known that animals were still escaping from the farm. See MRE 401 (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). It should not be viewed as remarkable that a lack of *knowledge* of some occurrence may be relevant evidence of a lack of *control* with regard to the conditions that underlie that occurrence. This, of course, is not to say that evidence of knowledge or the lack thereof is dispositive evidence of control or the lack thereof.

As explained by the trial court:

> The facts in this case are that the property in question was under the possession and control of Daniel Truman. That while Robert and Marilyn Truman held fee title to that property, it was something more in the nature of a security interest than active ownership. There's no evidence to show that they actively managed, supervised, maintained, possessed or controlled the subject property. To the contrary, all the evidence shows that possession and control of the premises was vested in Daniel Truman. The Plaintiff points to language in a mortgage on the subject premises that's clearly regulating the relations as between the bank and Robert and Marilyn Truman. It doesn't constitute any sort of admission by them that they were actually controlling the property as opposed to having the right to control it in relation to the bank, that right being something that they had passed along to Daniel Truman from the get go in this transaction it appears.
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> * * *
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> Robert and Marilyn were not in possession of the subject property. They didn't control the subject property. Therefore, there's no nuisance liability that can be attached to them with respect to this land, and the Court likewise must grant summary disposition . . . .[12]

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[12] Unlike the partial dissent, we do not believe that there is a genuine issue of material fact in this case concerning the issue of control. Although the facts cited by the partial dissent—that defendants are the title owners of the property, that they loaned money to Daniel Truman so that he could buy out his ex-wife's interest in the property, that they maintained insurance on the property, and that they took out a mortgage on the property that included a duty to maintain the property—suggest strongly that defendants may have had a right to exercise control of the property, they do not suggest that defendants actually exercised control over the property, which remains the dispositive issue. See *Merritt*, 407 Mich at 554 (stating that a co-owner of land cannot be held liable when he or she has not "exercise[d] her right to possession and control over the property" because "when one co-owner of land cedes possession and control of the premises to her co-owners, the law is satisfied to look to those co-owners actually in control for liability for injuries to third persons").

"[T]he party presumptively responsible for a nuisance upon the leased premises is the tenant," *Samuelson*, 49 Mich at 171, for the obvious reason that "the man in possession is in a position of control, and normally best able to prevent any harm to others," *Merritt*, 407 Mich at 552 (quotation marks and citation omitted). In this case, Daniel Truman was the "man in possession" of the property, and thus he was the one "best able to prevent any harm to others." Given that it appears that defendants "resign[ed] all charge and control over [the property]," *Samuelson*, 49 Mich at 173, to Daniel Truman, Daniel Truman, rather than defendants, is the one exclusively responsible for the alleged public nuisance he created on the property.[13]

IV. CONCLUSION

For these reasons, we hold that title owners of real property cannot be held liable for a public nuisance that arose from that property, when someone other than the title owners is in actual possession of the property, is exercising control over the property, and is the one who created the alleged nuisance. Therefore, we reverse that portion of the Court of Appeals' judgment that held to the contrary and reinstate the trial court's order granting defendants' motion for summary disposition.

YOUNG, C.J., and KELLY, ZAHRA, and MCCORMACK, JJ., concurred with MARKMAN, J.

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[13] Because in this case someone other than defendant title owners was in possession of and exercising control over the property, it is unnecessary to address whether an absentee landowner *could* be held liable for a nuisance where *no one* is in possession of or exercising control over property. We simply hold that when someone other than the landowner *is* in possession of property, is exercising control over the property, and is the one who created the nuisance, that person, rather than the landowner, is the one liable for the public nuisance.

CAVANAGH, J. (*concurring*). I agree with the majority's result for the reasons stated in the conclusion section of the opinion. Defendants are entitled to summary disposition because they were not in possession of the property, did not have control over the property, and did not create the alleged nuisance.

VIVIANO, J. (*concurring in part and dissenting in part*). I concur with the majority that defendants Robert and Marilyn Truman are entitled to dismissal because they are not liable for the nuisance at issue. I write separately because I disagree that this case can be decided as a matter of law on the issue of defendants' control over the land from which the nuisance arose. But I would reach the same result because I believe that defendants' lack of knowledge of the nuisance provides an alternative basis for dismissal.

In our order directing oral argument on defendants' application for leave to appeal, this Court directed the parties to address "whether, and under what circumstances, a property owner who is not in possession of the property and does not participate in the conduct creating an alleged nuisance may be liable for the alleged nuisance."[1] I believe that the answer to this question is best stated in 58 Am Jur 2d, Nuisances, § 95, which recognizes a requirement to show both control and knowledge before imposing liability for absentee owners, like defendants: "A person is liable if he or she knowingly permits the creation or maintenance of a nuisance on premises of which he or she has control . . . even though such person is not physically present, such as where he or she is an absentee owner." Applying that rule here, I believe that there is a question of fact whether defendants, even though ab-

[1] *In re Sholberg Estate*, 494 Mich 867 (2013).

sentee owners, retained sufficient control over the land to be held liable for the alleged nuisance. But I would hold that summary disposition in their favor was proper because they had no knowledge of the nuisance on the premises.

I. CONTROL

I agree with the majority that "control is required in order to hold a defendant liable for a nuisance . . . ."[2] As the majority also appears to recognize, control over the property may be established "either through ownership or otherwise."[3] However, because control may be established through proof of ownership, I disagree with the majority that defendants cannot be liable as a matter of law on the ground that they "merely own[ed] the property."[4] Instead, I believe that there is a question of fact regarding the extent to which defendants retained control and responsibility over the property.

There is evidence that someone other than defen-

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[2] *Ante* at 11. See 58 Am Jur 2d, Nuisances, § 91, p 640 (stating the general rule that "dominion and control over the property causing the harm is sufficient to establish nuisance liability"); see also 58 Am Jur 2d, Nuisances, § 95, p 643("A party who has no control over the property at the time of the alleged nuisance cannot be held liable therefor.").

[3] 58 Am Jur 2d, Nuisances, § 95. See *ante* at 12.

[4] *Ante* at 14. Although I agree that ownership may not be dispositive of control in some cases (for example, when control is ceded by means of a lease or land contract), I cannot agree with the more general assertion that proof of ownership will never be sufficient to establish control. Rather, I believe that in many cases proof of ownership will be sufficient to establish control because the title owner typically has the right to control and dispose of the property. See Taylor et al, Michigan Practice Guide: Torts, § 1:816 (2004) ("A landowner will usually have sufficient control to be liable for a nuisance[.]"); *Eastbrook Homes, Inc v Dep't of Treasury*, 296 Mich App 336, 348; 820 NW2d 242 (2012) (stating that " 'title,' is defined . . . as '[t]he union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property' ").

dants was in active control of the subject property. As the majority notes, Daniel Truman paid the property taxes, and defendants have not visited the property in more than a decade or maintained contact with Daniel Truman. Further, defendants have not profited from the farm and have not been involved in any aspect of Daniel Truman's management of the farm. On the other hand, contrary facts were adduced that could support a finding that defendants retained sufficient control over the premises to be liable for nuisance: (1) defendants hold sole title to the property by means of a warranty deed executed by Daniel Truman's ex-wife in 1989; (2) defendants supplied the financing for Daniel Truman to buy out his ex-wife's interest in the land;[5] (3) defendants maintained insurance on the property at the time the accident took place; (4) defendants took out a mortgage on the property in March 2010;[6] and (5) the terms of that mortgage required defendants to maintain the property and prohibited them from permitting a nuisance on the property, abandoning the property, or leaving it unattended.

Given the foregoing facts, I believe that the fact of title ownership—when coupled with defendants' financial leverage over Daniel Truman, their insurance interest, and the commitments they made in the 2010 mortgage—created a genuine issue of material fact

[5] Although Robert Truman allegedly had a land contract drafted, there is no evidence of that document in the record, and Robert Truman and Daniel Truman testified that the document was never executed.

[6] In his deposition, Robert Truman claimed that he actually intended to take a mortgage on a different parcel of land that he owned on Stutsmanville Road. He asserted that the fact the mortgage was taken on the 5151 Stutsmanville Road property was an error at the bank. While this alleged error could refute that defendants had control over the property by means of the mortgage agreement, I believe that the import of the written agreement and credibility of Robert Truman's statements should be resolved by the trier of fact.

regarding the degree of control that defendants retained over the property.[7] In my view, these facts evidence that defendants may have been more than

[7] It is the primary obligation of a landowner to keep his premises from becoming a public nuisance. See *Kern v Myll*, 80 Mich 525, 530-531; 45 NW 587 (1890); see also *Alabama ex rel Bailes v Guardian Realty Co*, 237 Ala 201, 205-206; 186 So 168 (1939). In this regard, "[a]n owner of property on which a nuisance is being conducted may be made a party defendant, along with the one conducting the nuisance." 58 Am Jur 2d, Nuisances, § 326, p 822; see 58 Am Jur 2d, Nuisances, § 94, p 642. Therefore, the current question in this case is not, as the majority suggests, whether Daniel Truman was responsible for the nuisance, but whether defendants may *also* be liable as landowners who retained a sufficient right to control the land to abate the nuisance.

The majority relies on *Musser v Loon Lake Shores Ass'n*, 384 Mich 616, 622; 186 NW2d 563 (1971), for the proposition that "a person is liable only as he participates in an activity giving rise to a tort." However, that case, like many of the cases the majority cites, is distinguishable because it involved a premises liability claim, which is legally distinct from a nuisance claim. Under nuisance law, a party may be liable when it owned and controlled the property, even if that party did not actually create the nuisance. See *Radloff v Michigan*, 116 Mich App 745, 756-759; 323 NW2d 541 (1982). Further, the majority relies on *Merritt v Nickelson*, 407 Mich 544, 554; 287 NW2d 178 (1980), another premises liability case, for the proposition that the actual exercise of control over the property is required to impose nuisance liability. In that case, unlike his co-owner, the invitor was liable because he alone exercised control over the land, and by doing so assumed a duty of care to those he invited to the land. See *Merritt*, 407 Mich at 551, 553-554. But under nuisance law, a plaintiff need only show that the landowner had the *right to control* the property. See *Randall v Delta Charter Twp*, 121 Mich App 26, 34-35; 328 NW2d 562 (1982) (holding that the plaintiff failed to state a nuisance claim because he "failed to allege that [the defendant] . . . had any interest in or *right of control* over the property") (emphasis added).

The majority opinion holds that absentee owners who, by virtue of their absence, have not *actually* exercised control over the property during the relevant time period are not liable for nuisance. I disagree with that holding because I do not believe that nuisance liability for absentee landowners turns on the actual *exercise* of control. Rather, even if an absent landowner does not actually exercise control over the property, the landowner may still be liable for nuisance when he or she retains a right to control the property sufficient to abate the nuisance. See e.g., *Maynard v Carey Constr Co*, 302 Mass 530, 533; 19 NE2d 304 (1939).

"mere landowners."[8] Thus, I do not believe that we can decide as a matter of law that plaintiff has provided sufficient evidence to survive summary disposition on the issue of control.

II. KNOWLEDGE

Despite the foregoing, I agree with the majority that defendants are entitled to summary disposition because even if defendants had control over the land, their lack of knowledge of the alleged nuisance provides an alternate basis for dismissal.

The general rule in nuisance law is that "[a] landowner is subject to liability for a nuisance created by the activity of a third party on the land if the owner *knows, or has reason to know*, that the activity is causing, or will cause, an unreasonable risk of nuisance, and the landowner consents to the activity or fails to exercise reasonable care to prevent the nuisance."[9] And, as noted above, this liability extends to absentee owners, like defendants, if they knowingly permit a nuisance: "A person is liable if he or she *knowingly permits* the creation or maintenance of a nuisance on premises of which he or she has control . . . even though such

[8] If defendants could show that, despite their status as title owners, they ceded control through a properly executed lease or land contract, then summary disposition may well have been in order. No party alleges that a landlord-tenant relationship existed in this case; however, defendants do assert that they sold the property to Daniel Truman on a land contract. Even so, absent a written agreement, and in light of the contrary evidence, I cannot conclude that a land contract existed as a matter of law. See *Cowles v Bank West*, 476 Mich 1, 5, 37; 719 NW2d 94 (2006) (stating that summary disposition under MCR 2.116(C)(10) is improper where material questions of fact exist).

[9] 58 Am Jur 2d, Nuisances, § 96, p 643 (emphasis added). See also 66 CJS, Nuisances, § 121, pp 702-703 ("[T]he bare fact of ownership of real property imposes no responsibility for the nuisance unless the owner . . . has knowledge of the nuisance on his or her property.")

person is not physically present, such as where he or she is an absentee owner."[10]

Unlike some other jurisdictions, this Court has never explicitly held that knowledge is a required element of a nuisance claim.[11] However, requiring knowledge is not a novel concept in our common law. More than a century ago in *Wendt v Village of Richmond*,[12] the plaintiff brought a nuisance claim against the defendant village, alleging that the defendant had knowingly permitted sewage to collect in water run off ditches in the vicinity of the plaintiff's home. On appeal, although denying any knowledge of the condition, the defendant conceded

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[10] 58 Am Jur 2d, Nuisances, § 95, p 643 (emphasis added). The knowledge requirement also applies to possessors and lessors. See *Wagner v Regency Inn Corp*, 186 Mich App 158, 163-164; 463 NW2d 450 (1990), citing 4 Restatement Torts, § 838, p 157 ("A possessor of land upon which a third person carries on an activity that causes a nuisance is subject to liability for the nuisance if . . . the possessor *knows or has reason to know* that the activity is being carried on . . . .") (emphasis added); 4 Restatement Torts, 2d § 837, p 152 ("A lessor of land is subject to liability for a nuisance caused by an activity carried on upon the land . . . if . . . at the time of the lease the lessor . . . *knows or has reason to know* that it will be carried on, and (b) he then *knows or should know* that it will necessarily involve or is already causing the nuisance.") (emphasis added). See also 58 Am Jur 2d, Nuisances, § 97, p 644.

[11] See, e.g., *Tennessee Coal, Iron & R Co v Hartline*, 244 Ala 116, 124; 11 So 2d 833 (1943) ("[Land]owner may be liable for the continuance of a nuisance *when he has knowledge thereof* although it was created by the act of an unauthorized person.") (emphasis in original); *Louisville & N R Co v Laswell*, 299 Ky 799, 805; 187 SW2d 732 (1945) ("A person is liable if he knowingly permits the creation or maintenance of a nuisance on his premises."); *Rockport v Rockport Granite Co*, 177 Mass 246, 255; 58 NE 1017 (1901) ("[A]n owner is bound to see to it that his land is so managed by persons brought on to it by him, as not to cause injury to others" and if "he suffers [a nuisance] to remain there, he is liable to any one injured thereby, at any rate when he knows of the existence of the thing which constitutes the nuisance."); *Grant v Louisville & N R Co*, 129 Tenn 398, 404; 165 SW 963 (1914) ("The owner cannot be liable in respect to . . . a nuisance [on his land] unless he has some knowledge of it . . . .").

[12] *Wendt v Village of Richmond*, 164 Mich 173; 129 NW 38 (1910).

that "[i]t is a rule of law that one who does not knowingly or wilfully create a nuisance, but passively permits one to exist after knowledge thereof," can be liable after notice and reasonable opportunity to abate the nuisance.[13] And this Court approved this rule when it confirmed the sufficiency of the trial court's instruction on knowledge, which provided, "[I]f the defendant caused, *or knowingly permitted*, these things to be collected by its ditches and conveyed to plaintiff's premises . . . it would be liable, after the lapse of a reasonable time within which to remedy the condition . . . ."[14] Thus, the unremarkable proposition that knowledge is required to impose nuisance liability does not appear to be inconsistent with, or a modification of, Michigan's common law, but merely the recognition of an established requirement.[15]

Indeed, knowledge is a crucial element in circumstances in which a third party creates a nuisance. When

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[13] *Id.* at 177. See also *Tennessee Coal*, 244 Ala at 121.

[14] *Wendt*, 164 Mich at 175, 182.

[15] Suffice it to say, I disagree with the majority's assertion that recognizing a knowledge requirement would require a modification of our common law. The rule that knowledge is required to impose liability on landowners for a nuisance created by a third party appears to be the unanimous position of the courts and commentators that have addressed the issue, including our Court in *Wendt* and the Court of Appeals in *Wagner*. The majority also asserts that "the parties themselves have not even asked that the common law be modified by adding the element of knowledge . . . ." *Ante* at 13 n 10. However, plaintiff has never explicitly asked that the common law be modified to add a knowledge element because her position since the inception of this case has been that knowledge is already a recognized element of nuisance liability. Defendants did not disagree with this position until their briefing before this Court. Before reaching this Court, defendants consistently accepted that knowledge was required. For example, in their Court of Appeals brief, defendants conceded that "a title holder can only be held liable for a nuisance if he knows about it and fails to exercise reasonable care," citing *Wagner*, 186 Mich App at 163-164.

it is demonstrated that a landowner retains the legal right to resume control over the subject property *and* has knowledge of a nuisance created by a third party, that owner is bound to use all reasonable means within his or her power to abate the nuisance.[16]

In this case, however, as even the majority acknowledges, there is no evidence that defendants knew or should have known about the elopements. Contrary to the Court of Appeals' assertion, there is no evidence that defendants were aware of the farm animals' tendency to escape in the 10 years before the accident. Therefore, even if they had the requisite control over the land, defendants cannot be liable because they had no knowledge of the nuisance.[17]

III. CONCLUSION

In sum, although I agree with the majority that control is the critical inquiry for nuisance liability, I disagree that dismissal is warranted on that ground when defendants' ownership of the property, taken together with other facts in the record, creates a question of fact on the issue of control. I would conclude that summary disposition was nevertheless appropriate on the alternative basis that there is no genuine issue of material fact on the issue of knowledge, which is a necessary element for nuisance liability.

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[16] See *Maynard*, 302 Mass at 533 (stating that when the defendant landowner allowed a third-party to use the land, "after . . . notice [of the nuisance] it became the duty of the defendant, as . . . [the] owner who could resume control at will, to use all reasonable means within its power to abate the nuisance").

[17] I disagree with the majority's assertion that knowledge is relevant evidence of control. A defendant who creates a nuisance will most likely have both knowledge and control of the nuisance. However, when, as in this case, a third party creates a nuisance, whether a defendant landowner has knowledge has no bearing on whether the landowner has sufficient control to abate the nuisance.

LAFONTAINE SALINE, INC v CHRYSLER GROUP, LLC

Docket Nos. 146722 and 146724. Argued March 6, 2014 (Calendar No. 7). Decided June 10, 2014.

LaFontaine Saline Inc., an authorized dealer of Chrysler motor vehicles, brought an action for declaratory relief in the Washtenaw Circuit Court against Chrysler Group LLC and IHS Automotive Group, LLC, under the motor vehicle dealers act (MVDA), MCL 445.1561 *et seq*., after receiving notice that Chrysler and IHS had signed a letter of intent (LOI) to enter into a dealer agreement that would allow IHS to establish a Dodge dealership within nine miles of plaintiff's dealership if IHS satisfied certain conditions. When LaFontaine and Chrysler entered into a dealership agreement in 2007, the MVDA limited manufacturers' right to establish a dealership within the relevant market area of existing dealers of the same line of vehicles, which was defined as being within six miles; however, in August 2010, the MVDA was amended by 2010 PA 139 to extend the six-mile radius to nine miles. Defendants moved for summary disposition, arguing that 2010 PA 139 did not apply to the proposed dealership because their LOI predated the act's effective date and that 2010 PA 139 should not be applied retroactively. The court, David S. Swartz, J., granted defendants' motion for summary disposition under MCR 2.116(C)(10), and denied plaintiff's motion for reconsideration. Plaintiff appealed. The Court of Appeals, BORRELLO, P.J., and FITZGERALD and OWENS, JJ., reversed, concluding that the issue of retroactivity was immaterial because the LOI was not a dealer agreement and holding that the MVDA allowed plaintiff to bring a declaratory judgment action upon receiving notice of Chrysler's intent to establish a like-line dealership. 298 Mich App 576 (2012). The Supreme Court granted defendants' application to appeal. 495 Mich 870 (2013).

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

The 2010 amendment of the MVDA that expanded the relevant market area within which a manufacturer must give an existing vehicle dealer notice of its intention to establish a dealership of like-line vehicles from a six-mile radius to a nine-mile radius did not apply retroactively. A manufacturer-dealer relationship, ab-

sent contrary language in the contract, incorporates the relevant market area in effect when the dealer agreement was entered. Accordingly, the six-mile relevant market area in effect in 2007 governed the manufacturer-dealer agreement at issue in this case, and summary disposition in defendants' favor was reinstated.

1. The version of the MVDA in effect at the time of both the 2007 Chrysler-LaFontaine dealer agreement and the 2010 Chrysler-IHS LOI defined "dealer agreement" as requiring a writing establishing the legal rights and obligations of the parties with regard to the purchase and sale or resale of new motor vehicles and accessories for motor vehicles. The 2007 Chrysler-LaFontaine dealer agreement complied with these requirements and established the parties' contractual rights. However, the 2010 LOI between Chrysler and IHS was not a dealer agreement under the MVDA because it did not establish these rights and obligations. Rather, the LOI set forth requirements IHS must have met and conditions IHS must have satisfied before Chrysler would accept its offer to enter into a dealer agreement. At most, the LOI was akin to an agreement to agree to a dealer agreement, which was not enforceable because the document or contract that the parties agreed to make was to contain material terms that were not already agreed on. Chrysler and IHS therefore had no contractual rights under the 2010 LOI with which retroactive application of the nine-mile relevant market area could have interfered.

2. The amendments of the MVDA contained in 2010 PA 139 did not apply retroactively. Nothing in the language of 2010 PA 139 suggested the Legislature's intent that the law apply retroactively; retroactive application of the 2010 amendment would have impinged on Chrysler's rights under its dealer agreement with LaFontaine by requiring Chrysler to show good cause for the establishment of a broader geographical range of dealerships; and retroactive application would have granted LaFontaine greater substantive rights than the dealer agreement by allowing LaFontaine to challenge the establishment of any such dealership when it previously could not.

Court of Appeals' judgment vacated; case remanded to the trial court for reinstatement of summary disposition in favor of defendants.

STATUTES — MOTOR VEHICLE DEALERS ACT — DEFINITIONS — RELEVANT MARKET AREA — AMENDMENTS — RETROACTIVITY.

The amendment of the motor vehicle dealers act that expanded the relevant market area in which a manufacturer must notify

an existing dealer that it intends to open another dealership of the same line of vehicles from six miles to nine miles does not apply retroactively (2010 PA 139; MCL 445.1566(1)).

Ward M. Powers for LaFontaine Saline, Inc.

Dykema Gossett PLLC (by *Jill M. Wheaton* and *Thomas S. Bishoff*) and *Wilmer Cutler Pickering Hale and Dorr LLP* (by *Robert D. Cultice*, *pro hac vice*) for Chrysler Group, LLC.

Plunkett Cooney (by *Mary Massaron Ross* and *Josephine A. DeLorenzo*) for IHS Automotive Group, LLC.

Amici Curiae:

Abbott Nicholson, P.C. (by *Robert Y. Weller II* and *Kristen L. Baiardi*) for the Detroit Auto Dealers Association and the Michigan Auto Dealers Association).

Hogan Lovells US LLP (by *Jacqueline S. Glassman*) for the Alliance of Automobile Manufacturers.

KELLY, J. This case concerns whether the 2010 amendment of the Motor Vehicle Dealer Act (MVDA),[1] expanding the relevant market area—the area within which automobile manufacturers are required to notify an existing dealership of the manufacturer's intent to establish a dealership selling the same line of vehicles as that existing dealership—from a six-mile radius to a nine-mile radius, applies retroactively. We conclude that it does not. The 2010 amendment of the MVDA contains no language suggesting retroactivity, and applying the amendment retroactively would alter the parties' existing contract rights. A manufacturer-dealer relationship, absent contrary language in the contract,

[1] MCL 445.1561 *et seq*.

incorporates the relevant market area in effect at the time when the dealer agreement was entered. The six-mile relevant market area in effect in 2007, then, governs the 2007 manufacturer-dealer agreement at issue in this case. We therefore vacate the judgment of the Court of Appeals and remand this case to the Washtenaw Circuit Court for reinstatement of summary disposition in favor of defendants Chrysler Group (Chrysler) and IHS Automotive Group (IHS).

I. FACTS AND PROCEDURAL HISTORY

Chrysler and plaintiff LaFontaine Saline Inc. (LaFontaine), an authorized Chrysler automobile dealer, entered into a Dealer Agreement on September 24, 2007. The agreement granted LaFontaine the non-exclusive right to sell Dodge vehicles from its location in Saline, Michigan, and defined LaFontaine's Sales Locality as "the area designated in writing to [LaFontaine] by [Chrysler] from time to time as the territory of [LaFontaine's] responsibility for the sale of [Chrysler, Jeep, and Dodge] vehicles, vehicle parts and accessories . . . ." The agreement further provided that LaFontaine's "Sales Locality may be shared with other [Chrysler] dealers of the same line-make as [Chrysler] determines to be appropriate."

The parties agree that the 2007 Dealer Agreement is subject to the MVDA, which regulates relationships among automobile manufacturers, distributors, and dealers. In particular, the MVDA's relevant market area provision limits Chrysler's right to establish dealerships of the same line of vehicles in the vicinity of LaFontaine's existing dealership. This section, MCL 445.1576(2), provides:

> Before a manufacturer or distributor enters into a dealer agreement establishing or relocating a new motor

> vehicle dealer within a relevant market area where the same line make is represented, the manufacturer or distributor shall give written notice to each new motor vehicle dealer of the same line make in the relevant market area of its intention to establish an additional dealer or to relocate an existing dealer within the relevant market area.[2]

This notice requirement further entitles a recipient dealer to file a declaratory judgment action requiring the manufacturer to show good cause for establishing a new dealership within the relevant market area.[3]

At the time Chrysler and LaFontaine entered into their 2007 Dealer Agreement, MCL 445.1566(a) defined "relevant market area" as "the area within a radius of 6 miles of the intended site of the proposed or relocated dealer."[4] Significantly, this same six-mile radius was in effect when, on February 2, 2010, Chrysler and IHS, another Dodge automobile dealer, entered into a "Letter of Intent to Add Vehicle Line" (LOI). The LOI provided that Chrysler "will accept [IHS's] offer to enter into an Agreement" to sell Dodge vehicles upon

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[2] Although the 2007 Dealer Agreement makes no reference to relevant market area, the parties do not dispute that some version of the MVDA applies to the 2007 Dealer Agreement.

[3] MCL 445.1576(3) provides:

> Within 30 days after receiving the notice provided for in subsection (2), or within 30 days after the end of any appeal procedure provided by the manufacturer or distributor, a new motor vehicle dealer may bring a declaratory judgment action in the circuit court for the county in which the new motor vehicle dealer is located to determine whether good cause exists for the establishing or relocating of a proposed new motor vehicle dealer. Once an action has been filed, the manufacturer or distributor shall not establish or relocate the proposed new motor vehicle dealer until the circuit court has rendered a decision on the matter. An action brought pursuant to this section shall be given precedence over all other civil matters on the court's docket.

[4] This former version of what is now MCL 445.1566(1)(a) applied to counties with populations above 25,000, including Washtenaw County.

IHS's satisfaction of certain conditions enumerated in the LOI.[5] The LOI further provided Chrysler the discretionary right to terminate the LOI should "anyone file a protest or lawsuit, demand arbitration or otherwise challenge . . . the proposed establishment" if the challenge is not withdrawn or dismissed within 90 days of filing.

After execution of the LOI, the Legislature expanded the statutory definition of relevant market area from the six-mile radius to "the area within a radius of 9 miles" of the intended site of the proposed or relocated dealership.[6] Although the proposed location for IHS's Dodge facility is outside the pre-amendment six-mile radius of LaFontaine's existing dealership, it is within the post-amendment nine-mile radius of that location. On September 3, 2010, LaFontaine contacted Chrysler, indicating its protest of the proposed IHS Dodge dealership location in light of the nine-mile radius established by the 2010 Amendment. Chrysler responded on October 8, 2010, communicating its continuing intent to establish a Dodge dealership at IHS's Ann Arbor location.

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[5] Specifically, as it related to the facility's requirements, the LOI provided:

> Completion of all of the requirements of this LOI to [Chrysler's] satisfaction within the time periods specified herein and by the Expiration Date are material terms of this LOI. Failure to complete these requirements within the time periods specified herein will be a material breach of this LOI and [Chrysler] will have the right to terminate this LOI. Furthermore, any obligation of [Chrysler] to enter into [a Dodge Sales and Service Agreement] with You will be void and [Chrysler] will have no further obligation to You nor any liability to You.

[6] MCL 445.1566(1)(a). The current nine-mile radius applies to counties with populations above 150,000, which includes Washtenaw County. This amendment, contained in 2010 PA 139, took immediate effect upon the Governor's signature on August 4, 2010.

LaFontaine then filed a complaint for declaratory relief, challenging the proposed dealership under the MVDA. Chrysler and IHS responded with a motion for summary disposition, alleging that the 2010 Amendment did not apply to the proposed dealership because their LOI predated the Amendment, and LaFontaine therefore had no statutory right to challenge it. They further argued that applying the 2010 Amendment to the LOI and to the 2007 Chrysler-LaFontaine Dealer Agreement would be an impermissible retroactive application of the law. LaFontaine argued that its 2007 Dealer Agreement with Chrysler did not address or refer to LaFontaine's relevant market area, and therefore application of the 2010 Amendment could not interfere with that agreement. Even if the 2010 Amendment applied only prospectively, LaFontaine asserted that the LOI did not constitute a dealer agreement, but merely an agreement for certain improvements to IHS's facilities in anticipation of a dealer agreement. Any formal dealer agreement, LaFontaine argued, must follow the August 4, 2010 effective date of the amendment and be subject to the nine-mile relevant market area.

The Washtenaw Circuit Court granted Chrysler's and IHS's motions for summary disposition, concluding that the 2010 Amendment did not overcome the presumption that statutory amendments generally operate prospectively only. The Legislature provided a specific effective date of August 4, 2010, and omitted any reference to retroactivity. The circuit court further found that the LOI between Chrysler and IHS constituted a dealer agreement under the MVDA, and thereby established the parties' rights upon execution. The court denied LaFontaine's motion for reconsideration, adding that LaFontaine's claim was not ripe because it "rests on contingent future events that may not occur," i.e., a formal Dealer Agreement.

The Court of Appeals reversed the circuit court in a published opinion, concluding that the issue of retroactivity was immaterial because the LOI was not a dealer agreement because it did not establish the "legal rights [or] obligations of [Chrysler or IHS] with regard to the purchase and sale or resale of new motor vehicles and accessories for motor vehicles."[7] The Court of Appeals held that any dealer agreement could necessarily occur only after the effective date of the 2010 Amendment, and application of that amendment could not have retroactive effect on any dealer agreement between Chrysler and IHS.[8] Moreover, because the 2010 Amendment applied and the MVDA allows a dealer to bring a declaratory judgment action upon *notice* of a manufacturer's *intent* to establish a like-line dealership, the Court of Appeals held that LaFontaine had standing to sue to determine whether good cause existed for IHS's proposed dealership.[9] The Court of Appeals denied Chrysler's and IHS's motions for reconsideration.

We granted Chrysler's and IHS's applications for leave to appeal, requesting that the parties address

> whether the Court of Appeals erred in holding that the 2010 PA 139 definition of "relevant market area," MCL 445.1566(1)(a), applied to enable the plaintiff to challenge the future dealer agreement between the defendants under MCL 445.1576(3). Compare *Kia Motors America, Inc v Glassman Oldsmobile Saab Hyundai, Inc*, 706 F3d 733, 735 (CA 6, 2013).[10]

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[7] *LaFontaine Saline Inc v Chrysler Group LLC*, 298 Mich App 576, 588-589; 828 NW2d 446 (2012), quoting MCL 445.1562(2), as amended by 1998 PA 456 (quotation marks omitted).

[8] *Id*. at 587-588.

[9] *Id*. at 590-591.

[10] *LaFontaine Saline, Inc v Chrysler Group LLC*, 495 Mich 870 (2013).

II. STANDARD OF REVIEW

Chrysler and IHS moved for summary disposition under MCR 2.116(C)(8) and (10). Summary disposition under MCR 2.116(C)(8) is appropriate where the complaint fails to state a claim on which relief may be granted.[11] A motion for summary disposition under MCR 2.116(C)(10) challenges the factual sufficiency of the complaint, with the trial court considering the entire record in a light most favorable to the nonmoving party.[12] We review de novo a trial court's ruling on a motion for summary disposition.[13] We also review questions of statutory interpretation de novo,[14] including questions regarding retroactivity of amendments.[15]

III. ANALYSIS AND APPLICATION

In establishing whether the 2010 Amendment applies on the facts of this case, we first examine the source, if any, of the parties' contractual rights that predates the 2010 Amendment. Only then can we determine whether retroactive application of the 2010 Amendment's expanded relevant market area would interfere with any such rights.

A. THE SOURCE OF CONTRACTUAL RIGHTS

The MVDA in effect at the time of both the 2007 Chrysler-LaFontaine Dealer Agreement and 2010 Chrysler-IHS LOI defined "Dealer agreement" as

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[11] *Spiek v Dep't of Transp*, 456 Mich 331, 333; 572 NW2d 201 (1998).

[12] *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013).

[13] *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).

[14] *Morales v Auto-Owners Insurance Co (After Remand)*, 469 Mich 487, 490; 672 NW2d 849 (2003).

[15] *Brewer v A D Transp Express, Inc*, 486 Mich 50, 53; 782 NW2d 475 (2010).

> an agreement or contract in writing between . . . a manufacturer and a . . . new motor vehicle dealer . . . which *purports to establish the legal rights and obligations of the parties* to the agreement or contract *with regard to the purchase and sale or resale of new and unaltered motor vehicles and accessories for motor vehicles*.[16]

This provision of the MVDA specifies three key elements to a Dealer Agreement: (1) a writing (2) establishing the legal rights and obligations of the parties (3) with regard to the purchase and sale or resale of new motor vehicles and accessories for motor vehicles.

Applying these elements to the 2007 Chrysler-LaFontaine Dealer Agreement compels the undisputed conclusion that that agreement constitutes a "dealer agreement" within the meaning of the MVDA. The agreement is in writing, purports to establish the parties' legal rights and obligations, and sets out specific "Products Covered" in a "Motor Vehicle Addendum." The agreement therefore complies with the requirements of then-effective MCL 445.1562(2), and establishes the parties' contractual rights.[17] And because MCL 445.1566(1) provided for a six-mile relevant market area at the time Chrysler and LaFontaine entered into their Dealer Agreement, the six-mile radius will govern that agreement *unless* the 2010 Amendment expanding the relevant market area is retroactively applicable to existing dealer agreements. Indeed, it is well settled that

> "the obligation of a contract consisted in its binding force on the party who makes it. *This depends upon the laws in existence when it is made.* They are necessarily referred to

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[16] MCL 445.1562(2), as amended by 1998 PA 456 (emphasis supplied).

[17] The 2010 amendment also amended the definition of "dealer agreement," renumbered as MCL 445.1562(3), but the scope of that amendment is immaterial here.

> in all contracts, and form a part of them, as the measure of obligation to perform them by the one party and right acquired by the other." The doctrine asserted in that case . . . applies to laws in reference to which the contract is made, and forming a part of the contract.[18]

Before reaching the issue of retroactivity, however, we must also consider the 2010 LOI between Chrysler and IHS and whether that agreement similarly meets the MVDA's definition of "dealer agreement." Like the 2007 Chrysler-LaFontaine Dealer Agreement, the LOI between Chrysler and IHS is a writing executed by both parties. However, while the language of this latter agreement speaks in terms of "requirements" and "breaches," and purports to constitute Chrysler and IHS's "entire agreement concerning the establishment of the Facility," the LOI is not a "dealer agreement" within the meaning of the MVDA because it does not establish their rights and obligations *with regard to the purchase and sale or resale of new motor vehicles and accessories for motor vehicles*, as the MVDA requires. Rather, the LOI speaks almost entirely to requirements IHS must meet *before* Chrysler will "accept [IHS's] offer to enter into an Agreement in its then-customary form" and likewise contemplates conditions IHS must satisfy "[b]efore [Chrysler] enters into an Agreement with [IHS] . . . ."[19] At most, then, the LOI is akin to an

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[18] *Crane v Hardy*, 1 Mich 56, 62-63 (1848), quoting *McCracken v Hayward*, 43 US 608, 612; 11 L Ed 397 (1844) (emphasis supplied). See also *State Hwy Comm'r v Detroit City Controller*, 331 Mich 337, 352; 49 NW2d 318 (1951), quoting *Von Hoffman v City of Quincy*, 71 US 535, 550; 18 L Ed 403 (1866) (stating that it is " 'settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to and incorporated in its terms.' ").

[19] Indeed, at no point does the LOI purport to establish the types or numbers of automobiles Chrysler would provide to IHS, wholesale purchase price for any such vehicles, or any other terms relevant to the

agreement to agree to a Dealer Agreement. While it is " 'well recognized that it is possible for parties to make an enforceable contract binding them to prepare and execute a subsequent agreement,' " an agreement to agree is not enforceable where " 'the document or contract that the parties agree to make is to contain any material term that is not already agreed on . . . .' "[20] Accordingly, the LOI was not a Dealer Agreement pursuant to MCL 445.1562(2) as was in effect at the time Chrysler and IHS executed their LOI. Chrysler and IHS therefore had no contractual rights by way of the 2010 LOI with which retroactive application of the nine-mile relevant market area could interfere.

B. RETROACTIVITY

Because the 2007 Dealer Agreement between Chrysler and LaFontaine established rights between the parties, we consider whether retroactive application of the 2010 Amendment's nine-mile relevant market area would impermissibly deprive Chrysler of any such rights.

To begin, we note that the 2007 Dealer Agreement between Chrysler and LaFontaine contains no language purporting to grant LaFontaine rights against encroachment by like-line dealers. Rather, the agreement explicitly

purchase and sale or resale of new motor vehicles and motor vehicle accessories. The only semblance of any such terms occurs in Paragraph 8 of the LOI, which provides that the precise terms "will change based on several factors, including changes that occur in the total industry new vehicle sales, changes in sales of new like-line vehicles in the sales locality, and changes in the number of like-line dealers in the sales locality." Chrysler explicitly states that it "does not predict the number of new vehicles that [Chrysler] will sell to [IHS] or that [IHS] may sell." Nor does the LOI establish either party's rights or obligations regarding the purchase and sale or resale of new motor vehicles and accessories. Rather, it left these terms—terms essential to a Dealer Agreement—for later determination.

[20] *Professional Facilities Corp v Marks*, 373 Mich 673, 679; 131 NW2d 60 (1964), quoting 1 Corbin, Contracts, § 29, p 68.

contemplates that LaFontaine's "Sales Locality may be shared with other [Chrysler] dealers of the same line-make as [Chrysler] determines to be appropriate." This language makes clear that, aside from any limits set out in the MVDA (i.e., the relevant market area provision), nothing in the 2007 Dealer Agreement prevents Chrysler from reaching like-line dealer agreements with other dealerships within LaFontaine's "Sales Locality."[21] Accordingly, any right LaFontaine has against encroachment by like-line dealers is a creature of statute. We consequently must determine whether the creation of a statutory right against encroachment by the 2010 MVDA amendment, applied against Chrysler's preexisting 2007 Dealer Agreement with LaFontaine, would result in impermissible retroactive application.

Retroactive application of legislation " 'presents problems of unfairness . . . because it can deprive citizens of legitimate expectations and upset settled transactions.' "[22] We have therefore required that the Legislature make its intentions clear when it seeks to pass a law with retroactive effect.[23] In determining whether a law has retroactive effect, we keep four principles in mind. First, we consider whether there is specific language providing for retroactive application.[24] Second, in some situations,[25] a statute

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[21] This is so even though the 2007 Dealer Agreement at no point refers to the MVDA's relevant market area provision. Clearly, contracting parties need not explicitly mention an applicable statute in order for that statute to govern the transaction at hand.

[22] *Downriver Plaza Group v Southgate*, 444 Mich 656, 666; 513 NW2d 807 (1994), quoting *Gen Motors Corp v Romein*, 503 US 181, 191; 112 S Ct 1105; 117 L Ed 2d 328 (1992).

[23] *Frank W Lynch & Co v Flex Technologies*, 463 Mich 578, 583; 624 NW2d 180 (2001).

[24] *In re Certified Questions*, 416 Mich 558, 570; 331 NW2d 456 (1982).

[25] *Id*. at 571 (noting that "[s]econd rule cases relate to measuring the amount of entitlement provided by a subsequent statute in part by services rendered pursuant to a prior statute").

is not regarded as operating retroactively merely because it relates to an antecedent event.[26] Third, in determining retroactivity, we must keep in mind that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past.[27] Finally, a remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute.[28]

MCL 445.1566(1)(a), as amended by 2010 PA 139, provides:

> (1) "Relevant market area" means . . . :
>
> (a) In a county that has a population of more than 150,000, the area within a radius of 9 miles of the site of the intended place of business of a proposed new vehicle dealer or the intended place of business of a new vehicle dealer that plans to relocate its place of business. For purposes of this section, the 9-mile distance is determined by measuring the distance between the nearest surveyed boundary of an existing new motor vehicle dealer's principal place of business and the nearest surveyed boundary line of the proposed or relocated new motor vehicle dealer's principal place of business.

Nothing in the language of MCL 445.1566(1)(a) suggests the Legislature's intent that the law apply retroactively. The Legislature " 'knows how to make clear its intention that a statute apply retroactively.' "[29] In fact, it has done so with other provisions of the MVDA, which explicitly provide that they apply to pre-existing con-

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[26] *Id*. at 570-571.

[27] *Id*. at 571.

[28] *Id*.

[29] *Brewer*, 486 Mich at 56, quoting *Frank W Lynch & Co*, 463 Mich at 583.

tracts.[30] The Legislature has even used specific retroactivity language when amending the MVDA.[31] The Legislature's silence regarding retroactivity in its amendment of the definition of "relevant market area" undermines any argument that MCL 445.1566 was intended to apply retroactively. That the Legislature provided for the law to take immediate effect *upon its filing date*—August 4, 2010—only confirms its textual prospectivity.[32]

The remaining factors in our retroactivity analysis require that we examine the amendment's effect on existing contract rights. A statute's relation to a prior event alone will not render the statute retroactive. Rather, we consider whether the statute "takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past."[33] LaFontaine asserts that retroactivity is not at issue in this case merely because it invoked the anti-encroachment protection of the 2010 amendment after that amendment went into effect. However, this argument begs the retroactivity question, failing to recognize that retroactive application of the

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[30] MCL 445.1567(1)-(2), MCL 445.1568, and MCL 445.1570 each begin with the preface "Notwithstanding any agreement . . . ."

[31] See 1998 PA 456, codified at MCL 445.1582a, which provides:

> The 1998 amendments to this act that added this section apply to agreements in existence on the effective date of this section and to agreements entered into or renewed after the effective date of this section.

[32] *Brewer*, 486 Mich at 56 ("[P]roviding a specific, future effective date and omitting any reference to retroactivity supports a conclusion that a statute should be applied prospectively only.") (quotation marks and citation omitted).

[33] *Hughes v Judges' Retirement Bd*, 407 Mich 75, 85; 282 NW2d 160 (1979).

2010 Amendment would "create a new liability in connection with a past transaction"[34]—namely, Chrysler's 2007 Dealer Agreement with LaFontaine. Applying the 2010 Amendment's nine-mile relevant market area to the parties' 2007 agreement would impose on Chrysler the new obligation of meeting the rigorous "good cause" standard in an action for declaratory relief under MCL 445.1576(3). Chrysler did not bargain for or contemplate this obligation at the time of its 2007 Dealer Agreement with LaFontaine, when the MVDA imposed only a relevant market area of six miles. Rather, Chrysler had the settled expectation at the time of its 2007 agreement that it could establish a like-line dealership anywhere outside a six-mile radius of LaFontaine's place of business.

Because Chrysler explicitly reserved its right to establish such dealerships within LaFontaine's "Sales Locality" as refered to in the 2007 Dealer Agreement, Chrysler's right is contractual in nature, limited only by LaFontaine's statutory anti-encroachment rights in the MVDA's relevant market area provision.[35] Accordingly, retroactive application of the 2010 Amendment would not merely "operate in furtherance of a remedy or mode of procedure," and therefore cannot be characterized as remedial or procedural.[36] Rather, the expansion of the relevant market area creates substantive rights for dealers that had no prior existence in law or contract, and diminishes a manufacturer's existing rights under

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[34] *Hansen-Snyder Co v Gen Motors Corp*, 371 Mich 480, 484; 124 NW2d 286 (1963).

[35] See *Dale Baker Oldsmobile, Inc v Fiat Motors of North America, Inc*, 794 F2d 213, 220 (CA 6, 1986) (rejecting dealer's argument that manufacturer's rights under dealer agreement were statutory rather than contractual).

[36] *Frank W Lynch & Co*, 463 Mich at 584 (quotation marks and citation omitted).

contracts executed before the 2010 Amendment. Application of the 2010 Amendment would give LaFontaine the substantive right to object where it previously could not—that is, the right to object to a proposed like-line dealership more than six, but less than nine miles away.[37] Because retroactive application of the 2010 Amendment would interfere with Chrysler's contractual right to establish dealerships outside of a six-mile radius of LaFontaine, such retroactive application is impermissible on these facts.[38] Accordingly, the relevant market area in effect when Chrysler reached its 2007 Dealer Agreement with LaFontaine governs that agreement.

Our conclusion is consistent with the recent interpretation of this exact amendment of the MVDA by the United States Court of Appeals for the Sixth Circuit. In *Kia Motors*,[39] the Sixth Circuit upheld a manufacturer's right, after the effective date of the 2010 Amendment, to establish a new like-line dealership approximately seven miles from an existing dealership.[40] In doing so, the Sixth Circuit relied on the Kia-Glassman Dealer Agreement, which, like the 2007 Chrysler-LaFontaine Dealer Agreement here, predated the 2010 Amendment.[41]

Applying Michigan retroactivity law, the Sixth Circuit concluded that the 2010 Amendment did not apply

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[37] See *Hansen-Snyder Co*, 371 Mich at 484 (presumption against retroactivity is "especially true when giving a statute retroactive operation will . . . create a new liability in connection with a past transaction, or invalidate a defense which was good when the statute was passed").

[38] See *Byjelich v John Hancock Mut Life Ins Co*, 324 Mich 54, 61; 36 NW2d 212 (1949) ("A statute cannot be retroactive so as to change the substance of a contract previously entered into.").

[39] *Kia Motors America, Inc v Glassman Oldsmobile Saab Hyundai, Inc*, 706 F3d 733 (CA 6, 2013).

[40] *Id*. at 736-737.

[41] *Id*. at 740-741.

retroactively.[42] The 2010 Amendment was silent as to retroactivity, and hence bore "no clear legislative intent that the Amendment should be applied retroactively."[43] Moreover, Kia's rights under its preexisting Dealer Agreement with Glassman were vested rights, as they were contractual rather than statutory.[44] Finally, the Sixth Circuit held that the amendment "[c]learly . . . imposes a new substantive duty and provides a new substantive right that did not previously exist," and therefore was not procedural or remedial.[45]

The Sixth Circuit recognized the retroactivity issue presented by these circumstances, contrary to the Court of Appeals below, which undertook no retroactivity analysis whatsoever. We find the Sixth Circuit's analysis and application of Michigan law persuasive. Accordingly, we hold that the pre-amendment six-mile radius that was in effect at the time Chrysler and LaFontaine entered into their 2007 Dealer Agreement governs that agreement such that Chrysler need not show good cause for the establishment of IHS's proposed dealership location.

IV. CONCLUSION

The Court of Appeals erred by limiting its analysis to whether the 2010 Chrysler-IHS Letter of Intent constituted a Dealer Agreement within the meaning of the MVDA. While we agree with the Court of Appeals that the 2010 LOI created no substantive rights with which application of the 2010 Amendment could interfere, Chrysler's 2007 Dealer Agreement with LaFontaine did

[42] *Id*. at 740.

[43] *Id*.

[44] *Id*.

[45] *Id*. at 740-741.

create such rights. Retroactive application of the 2010 Amendment would subject Chrysler to greater burdens than those in place when the 2007 Dealer Agreement went into effect because it would require Chrysler to show good cause for the establishment of a broader geographical range of dealerships. Likewise, retroactive application would grant LaFontaine greater substantive rights than the 2007 agreement, allowing LaFontaine to challenge the establishment of dealerships that it previously could not. Accordingly, retroactive application of the 2010 Amendment's nine-mile relevant market area would impinge upon Chrysler's rights under its 2007 agreement with LaFontaine. Because nothing in the language of the 2010 Amendment evinces the Legislature's intent that the amendment apply retroactively, we decline to give it retroactive effect. We therefore vacate the judgment of the Court of Appeals and remand this case to the Washtenaw Circuit Court for reinstatement of summary disposition in favor of Chrysler and IHS.

YOUNG, C.J., and CAVANAGH, MARKMAN, ZAHRA, MCCORMACK, and VIVIANO, JJ., concurred with KELLY, J.

STATE OF MICHIGAN *ex rel* GURGANUS v CVS CAREMARK CORPORATION

CITY OF LANSING v RITE AID OF MICHIGAN, INC

CITY OF LANSING v CVS CAREMARK CORPORATION

Docket Nos. 146791, 146792, and 146793. Argued January 16, 2014 (Calendar No. 4). Decided June 11, 2014. Rehearing denied, 496 Mich 869.

Marcia Gurganus, as relator, brought a qui tam action on behalf of the state of Michigan in the Kent Circuit Court against CVS Caremark Corporation, CVS Pharmacy, Inc., Caremark, L.L.C., and other Michigan pharmacies, alleging that they had failed to comply with MCL 333.17755(2) when they submitted prescription drug claims to the state for generic drugs dispensed to Medicaid beneficiaries. Under MCL 333.17755(2), when a pharmacist receives a prescription for a brand-name drug and instead dispenses the generic equivalent, he or she must pass on the savings in cost to the purchaser. Gurganus alleged that defendants had failed to pass on the savings in cost and therefore submitted false claims to the state in violation of the Medicaid False Claim Act (MFCA), MCL 400.601 *et seq*. The city of Lansing and Dickinson Press Inc. (both third-party payors for prescription medication) brought a class action in the Kent Circuit Court against all but two of the defendants in the qui tam action, and the city, Dickinson, and Scott Murphy (who is a consumer of prescription medication) brought a second class action against those remaining defendants. The class actions alleged violations of MCL 333.17755(2) and the Health Care False Claim Act (HCFCA), MCL 752.1001 *et seq*., specifically, that the pharmacies systematically violated MCL 333.17755(2) by charging prices for generic drugs that produced a higher profit margin than they achieved by selling the equivalent brand-name drugs and made false statements in contravention of the HCFCA when they submitted claims for private insurance reimbursement that were not in compliance with MCL 333.17755(2). The court, James Robert Redford, J., granted defendants summary disposition, dismissing all three cases without prejudice and holding that the complaints had alleged no acts undertaken in Michigan by any defendant and had therefore failed to plead sufficient facts, relying instead on unsupported inferences. Rather than providing pricing data specific to defendants, the plaintiffs based the allegations in

their second amended complaints on specific proprietary information acquired by Gurganus that revealed the wholesale costs and sales prices of brand-name and generic drugs sold in 2008 at a West Virginia Kroger pharmacy where Gurganus had been employed. Plaintiffs alleged that because Kroger Co. (a defendant in this case) operated retail pharmacies nationwide, acquired prescription drugs through central purchasing functions serving all its pharmacy locations, and acquired the majority of its prescription drugs from wholesalers, the wholesale costs of the other defendants were likely not materially different and one could extrapolate from the West Virginia data the wholesale costs of each defendant in Michigan. The court granted summary disposition with prejudice for plaintiffs' failure to state a claim on which relief could be granted, noting that there was a complete lack of any specificity concerning transactions. The court also ruled that there is no private right of action to enforce MCL 333.17755(2) or the HCFCA. The Court of Appeals, M. J. KELLY, P.J., and HOEKSTRA and STEPHENS, JJ., affirmed in part and reversed in part in an unpublished opinion per curiam, issued January 22, 2013 (Docket Nos. 299997, 299998, and 299999). The panel affirmed the trial court's holding that there is no implied right of action under MCL 333.17755(2) but held that the HCFCA does allow a private right of action. The panel also held that MCL 333.17755(2) applies to all transactions in which a generic drug is dispensed and not just to transactions in which a generic drug is substituted for its brand-name equivalent. Because the trial court was required to accept as true plaintiffs' allegations that the wholesale costs for generic and brand-name drugs did not materially differ from those of the West Virginia pharmacy, the Court of Appeals concluded that plaintiffs' claims under the MFCA and the HCFCA could proceed, reasoning that the facts that plaintiffs' complaints did not allege transactions based on information specific to defendants and relied on some inferences were not fatal to the complaints because plaintiffs were not required to prove their cases in their pleadings. Defendants sought leave to appeal, and the city, Dickinson, and Murphy sought leave to cross-appeal. The Supreme Court granted the applications for leave to appeal, but limited its grant of leave to cross-appeal to the issue of whether a private cause of action existed under MCL 333.17755(2). 495 Mich 857 (2013).

In an opinion by Chief Justice YOUNG, joined by Justices MARKMAN, KELLY, ZAHRA, MCCORMACK, and VIVIANO, the Supreme Court *held*:

MCL 333.17755(2) requires that when a generic drug is substituted for a brand-name drug (and only then), the pharmacist

must pass on the difference between the wholesale cost of the brand-name drug and the wholesale cost of the generic drug.

1. MCL 333.17755(1) states that when a pharmacist receives a prescription for a brand-name drug product, the pharmacist may, or upon request must, dispense a lower cost generic drug. MCL 333.17755(2) specifies that if a pharmacist dispenses a generically equivalent drug product, he or she must pass on the savings in cost to the purchaser or to the third-party payment source if the prescription purchase is covered by a third-party pay contract, with the savings in cost defined as the difference between the wholesale cost to the pharmacist of the two drug products. The introductory phrase of Subsection (2), immediately following as it does Subsection (1) governing transactions in which generic drugs are dispensed in lieu of brand-name drugs, indicates that Subsection (2) only applies when the pharmacist is engaged in a substitution transaction described in Subsection (1), and the Court of Appeals erred by holding otherwise.

2. Defendants argued that MCL 333.17755(2) only requires pharmacists to sell the substituted generic drug at the same price that a purchaser would pay had the generic been prescribed in the first instance. Under the statute, however, the amount a pharmacist must pass on to a purchaser or third-party payer is the difference between the wholesale cost of the two drugs. In other words, the savings in cost equals the brand-name wholesale cost minus the generic wholesale cost. Nonetheless, as a practical matter Subsection (2) provides a maximum allowable profit in a substitution transaction regardless of whether the pharmacist dispenses a generic drug or a brand-name drug; the pharmacist cannot make more dispensing a generic drug than he or she could dispensing a brand-name drug.

3. A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. MCR 2.112(B)(1) provides a heightened pleading standard for fraud claims, requiring that for allegations of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity. Plaintiffs' complaints relied on wholesale drug cost data from a single Kroger pharmacy in West Virginia, extrapolating from that proprietary data thousands of allegedly fraudulent transactions by defendants in violation of MCL 333.17755(2). In doing so, plaintiffs relied on the assumptions that (1) each defendant acquired its prescription drugs from just a few wholesalers, (2) the prescription drug purchasing power of each defendant was substantially the same, (3) the wholesale prices each defendant paid were materially the same, and (4) the wholesale prices did not change over time. In

light of the heightened pleading standard for fraud claims, plaintiffs' claims of MCL 333.17755(2) violations could not survive because they provided no information regarding defendants' actual wholesale costs. The connection drawn between the West Virginia data and pharmaceutical sales in Michigan was too tenuous and conclusory to state a claim for relief, and the Court of Appeals erred by holding that plaintiffs' allegations were sufficient to survive summary disposition.

4. Plaintiffs' complaints were also deficient because they failed to allege with particularity a single improper substitution transaction of the type to which MCL 333.17755(2) applies. Instead, plaintiffs only alleged the occurrence of generic drug transactions, regardless of whether they were transactions involving the substitution of generic drugs for brand-name drugs.

5. In addition to violations of MCL 333.17755(2), the class action plaintiffs alleged violations of the HCFCA, and Gurganus alleged violations of the MFCA, both premised on defendants' alleged violations of MCL 333.17755(2). The failure of plaintiffs' complaints to adequately establish violations of MCL 333.17755(2) disposed of the appeals in their entirety, and it was not necessary to evaluate the remainder of plaintiffs' arguments.

Court of Appeals' construction of MCL 333.17755(2) and its holding that plaintiffs' pleadings were sufficient to survive summary disposition reversed, remainder of Court of Appeals' judgment vacated, and trial court's grant of summary disposition to defendants reinstated.

Justice CAVANAGH, concurring in the result only, agreed that a pharmacy's obligation under MCL 333.17755(2) to pass on the savings in cost applies only to a transaction in which the pharmacy substitutes, i.e., replaces, a prescribed brand-name drug with a generic drug and that plaintiffs did not meet the heightened pleading standard under MCR 2.112(B)(1). In so holding, however, Justice CAVANAGH would have limited his consideration to the fact that plaintiffs did not specifically allege a single occurrence in which defendants dispensed a generic drug to replace a prescribed brand-name drug. Accordingly, he concurred only in the majority's result of reinstating the trial court's grant of summary disposition to defendants.

PHARMACISTS — PRESCRIPTION DRUGS — GENERIC DRUGS SUBSTITUTED FOR BRAND-NAME DRUGS — SAVINGS PASSED ON TO PURCHASERS OR THIRD-PARTY PAYORS.

MCL 333.17755(2) requires that when a pharmacist substitutes a generic drug for a brand-name drug (and only then), he or she

> must pass on to the purchaser, or to the third-party payment source if the prescription purchase is covered by a third-party pay contract, the difference between the wholesale cost of the brand-name drug and the wholesale cost of the generic drug.

Varnum LLP (by *Perrin Rynders* and *Bryan R. Walters*) for Marcia Gurganus, the city of Lansing, Dickinson Press Inc, and Scott Murphy.

Foley & Lardner LLP (by *Jeffrey S. Kopp*, *Robert H. Griffith*, and *David B. Goroff*) for CVS Caremark Corporation, CVS Pharmacy, Inc, Caremark, LLC, Revco Discount Drug Centers, Inc, and others.

Dykema Gossett PLLC (by *Jill M. Wheaton*, *Todd Grant Gattoni*, and *Lisa M. Brown*) for Kmart Holding Corporation, Sears Holdings Corporation, Sears Holdings Management Corporation, and Sears, Roebuck and Co.

Miller Canfield Paddock and Stone PLC (by *Todd A. Holleman*, *Clifford W. Taylor*, *Robert L. DeJong*, and *Joseph M. Infante*) for Perry Drug Stores, Inc, and Rite Aid of Michigan, Inc.

Dickinson Wright PLLC (by *Edward P. Perdue*) and *Faegre & Benson LLP* (by *Wendy J. Wildung* and *Craig S. Coleman*) for Target Corporation.

Honigman Miller Schwartz and Cohn LLP (by *Norman C. Ankers*, *Arthur T. O'Reilly*, and *Eric J. Eggan*) for The Kroger Co. of Michigan, The Kroger Co., and Walgreen Co.

Miller Johnson (by *Matthew L. Vicari* and *Joseph J. Gavin*) and *Jones Day* (by *Tina M. Tabacchi*, *Brian J. Murray*, and *Dennis Murashko*) for Wal-Mart Stores, Inc.

Amici Curiae:

Warner Norcross & Judd LLP (by *Matthew T. Nelson* and *Gaëtan Gerville-Réache*) for the Michigan Chamber Litigation Center.

Barris, Sott, Denn & Driker, PLLC (by *Morley Witus*), and *Jesse C. Vivian* for the Michigan Pharmacists Association.

Bodman PLC (by *Janes J. Walsh* and *Rebecca D'Arcy O'Reilly*) for the National Association of Chain Drug Stores, the National Community Pharmacists Association, the Retail Litigation Center, and the Michigan Retailers Association.

Bodman PLC (by *James J. Walsh* and *Rebecca D'Arcy O'Reilly*) for the Small Business Association of Michigan.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Susan Hellerman*, Assistant Attorney General, for the Attorney General.

Mosby Law and Mediation (by *Lori Mosby*) for the Michigan Association of Health Plans.

YOUNG, C.J. This case concerns three actions—two class actions and a qui tam action brought in the name of the state of Michigan—involving allegations that multiple pharmacies in Michigan systematically violated MCL 333.17755(2) by improperly retaining savings that should have been passed on to customers when dispensing generic drugs in the place of their brand-name equivalents. Under MCL 333.17755(2), when a pharmacist receives a prescription for a brand-name drug and instead dispenses the generic equiva-

lent, the pharmacist must "pass on the savings in cost to the purchaser . . . ." The statute is clear: when a generic drug is substituted for a brand-name drug (and only then), the pharmacist must pass on the monetary difference between the wholesale cost of the brand-name drug and the wholesale cost of the generic drug.

Plaintiffs further contend that violations of § 17755(2) necessarily result in violations of the Health Care False Claim Act[1] (HCFCA) and the Medicaid False Claim Act[2] (MFCA) when pharmacists submit reimbursement claims to the state for Medicaid payments that they are not entitled to receive. Plaintiffs argue that, when submitting reimbursement claims, defendant pharmacies are impliedly and fraudulently representing that they are passing on the savings in cost when generic drugs are dispensed.

Plaintiffs' complaints, however, fail to plead facts with sufficient particularity to survive summary disposition. In their complaints, plaintiffs attempt to derive the wholesale costs of drugs dispensed by all the Michigan defendants by extrapolating from the wholesale costs in a single set of proprietary data from a single Kroger pharmacy in West Virginia. The inferences and assumptions required to implicate defendants are simply too tenuous for plaintiffs' claims to survive summary disposition. Moreover, plaintiffs' overbroad approach of identifying all transactions in which a generic drug was dispensed fails to hone in on the only relevant transactions—those in which a generic drug was dispensed *in place of* a brand-name drug. This overbroad method of pleading is deficient, especially given plaintiffs' burden to plead instances of fraud with particularity.[3]

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[1] MCL 752.1001 *et seq*.

[2] MCL 400.601 *et seq*.

[3] MCR 2.112(B)(1).

Because plaintiffs have failed to adequately plead violations of § 17755(2), their HCFCA and MFCA claims stemming from violations of that section necessarily fail as well. As a result, their complaints fail to state a ground on which relief can be granted.[4] We reverse the Court of Appeals' construction of MCL 333.17755(2) and its holding that plaintiffs' pleadings were sufficient to survive summary disposition, vacate the remainder of the Court of Appeals' judgment, and reinstate the trial court's grant of summary disposition to defendants.

I. FACTS AND PROCEDURAL HISTORY

Two of the consolidated cases are class actions brought by three named plaintiffs: the city of Lansing and Dickinson Press Inc. (who are third-party payors for prescription medication) and Scott Murphy (who is a consumer of prescription medication).[5] The claims before the Court arising from the class actions are alleged violations of § 17755(2) and the HCFCA. The class action plaintiffs argue that defendants systematically violated § 17755(2) by charging prices for generic drugs that produced a higher profit margin than had been achieved by selling the equivalent brand-name drugs. The class action plaintiffs also plead that defendant pharmacies made false statements in contravention of the HCFCA when they submitted claims for private insurance reimbursement that are not in compliance with § 17755(2).[6]

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[4] MCR 2.116(C)(8).

[5] The only relevant difference between the two cases are the named defendants. In Docket No. 146793, the class action plaintiffs named every defendant in these actions with the exception of Rite Aid of Michigan, Inc., and Perry Drugs Stores, Inc. The class actions plaintiffs sued these two corporations in Docket No. 146792.

[6] Under the HCFCA, "false" means "wholly or partially untrue or deceptive," MCL 752.1002(c), and "deceptive" is defined as including the

The other consolidated case is a qui tam action alleging a single claim under the MFCA.[7] The relator, Marcia Gurganus, alleges that defendants failed to comply with § 17755(2) when they submitted prescription drug claims to the state for generic drugs dispensed to Medicaid beneficiaries and failed to pass on the "savings in cost" when dispensing the generic drugs. By doing so, Gurganus contends, defendants submitted false claims to the state in violation of the MFCA.[8]

In their first amended complaints, plaintiffs relied on annual reports from some of the defendants and a newspaper article to allege that defendant pharmacies profited more from dispensing generic drugs than from brand-name drugs. The Kent Circuit Court granted defendants summary disposition pursuant to MCR 2.116(C)(8).[9] The court dismissed all three cases without prejudice, holding that the complaints failed to plead sufficient facts and relied on unsupported inferences, alleging no acts undertaken by any of the defendants in Michigan.

Instead of providing pricing data specific to defendants in their second amended complaints, both the class action plaintiffs and Gurganus derived the allegations for their claims from specific proprietary information acquired by Gurganus revealing the wholesale

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failure to reveal a material fact, leading to the belief that the state of affairs is something other than it actually is, MCL 752.1002(b).

[7] The MFCA specifically allows a qui tam action. See MCL 400.610a(1).

[8] Using language nearly identical to the HCFCA, the MFCA defines "false" as "wholly or partially untrue or deceptive." MCL 400.602(d). In turn, "deceptive" means making a claim "that contains a statement of fact or that fails to reveal a fact, which statement or failure leads the [Department of Community Health] to believe the represented or suggested state of affair to be other than it actually is." MCL 400.602(c).

[9] Summary disposition is appropriate when "[t]he opposing party has failed to state a claim on which relief can be granted." MCR 2.116(C)(8).

costs and sales prices of brand-name and generic drugs that had been sold in 2008 at a single West Virginia Kroger pharmacy where Gurganus was employed.[10] The key data for plaintiffs are the wholesale costs of drugs, which defendants keep confidential from the public.

Plaintiffs allege that because Kroger operates retail pharmacies nationwide, acquires prescription drugs through central purchasing functions serving all its pharmacy locations, and acquires the majority of its prescription drugs from wholesalers, the wholesale costs of all the other defendants likely were not materially different. Because Kroger and the other defendants operate in substantially the same manner, and because the purchasing power for each defendant is essentially the same, said plaintiffs, one can extrapolate from the West Virginia pharmacy data the wholesale costs of each of the defendants in Michigan. Plaintiffs go on to identify more than 2,000 transactions by various defendants allegedly made in violation of § 17755(2) using this West Virginia data.

Defendants again moved for summary disposition pursuant to MCR 2.116(C)(8), and the trial court again granted summary disposition for failure to state a claim on which relief could be granted, this time with prejudice.[11] Unpersuaded that the class action plaintiffs' allegations stated a claim, the court noted that

> [d]espite the literally hundreds of claims referenced, there is not a single transaction alleged which identifies the drug definitively prescribed; the actual generic drug dispensed;

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[10] This proprietary information was a cost sheet with information regarding a number of brand-name drugs sold at the West Virginia pharmacy during 2008, including the brand sales price, brand wholesale cost, brand profit, generic wholesale cost, maximum generic price, and actual generic sales price for each of the drugs.

[11] The trial court entered three separate orders in the three cases.

> the cost of the prescribed drug on the date in question minus its actual acquisition cost; the cost of the substituted drug on the date of substitution minus its actual acquisition cost; the subtraction and/or addition for any other applicable costs and/or payments such as those related to other third-party payers; and finally the amount actually paid by plaintiffs. There is a complete void of any of the critical specificity as to each transaction.

The order entered in Gurganus's action contained similar language. The trial court also dismissed Gurganus's suit on the separate but related ground that she is not an appropriate qui tam relator under the MFCA because she failed to allege facts sufficient to survive summary disposition.[12] Moreover, the trial court ruled that there is no private right of action to enforce § 17755(2) or the HCFCA. Finally, the court ruled that the HCFCA imposes only criminal, not civil, liability for its violations.

The Court of Appeals reversed in substantial part, holding that plaintiffs' claims under the MFCA and the HCFCA could proceed. The panel affirmed the trial court's holding that there is no implied right of action under § 17755(2) because the Legislature provided administrative remedies for violations of the statute. However, the panel reversed the trial court's holding that the HCFCA did not allow for a private right of action. Rather, a private cause of action arises out of the "broad and mandatory statement of civil liability in MCL 752.1009 . . . ."[13]

Moreover, the Court of Appeals interpreted § 17755(2) as applicable to all transactions in which a generic drug is dispensed, and therefore the statute is

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[12] See generally MCL 400.610a.

[13] *Michigan ex rel Gurganus v CVS Caremark Corp*, unpublished opinion per curiam of the Court of Appeals, issued January 22, 2013 (Docket Nos. 299997, 299998, and 299999), p 12.

not limited only to transactions in which a generic drug is substituted in place of its brand-name equivalent. The Court reasoned that there is no express language in § 17755(2) requiring such a limited interpretation.[14]

The panel also reversed the trial court's holding that plaintiffs had failed to state a claim on which relief could be granted based on the insufficiency of plaintiffs' pleadings. Because a court must accept as true plaintiffs' allegations that the wholesale costs for generic and brand-name drugs do not materially differ from those of the West Virginia Kroger, the Court of Appeals concluded that plaintiffs' claims under the false claim acts could proceed. The Court of Appeals reasoned:

> [T]he fact that plaintiffs' complaints do not allege transactions based on information specific to defendants, and the fact that the complaints rely on some inferences, is not fatal to plaintiffs' complaints. Plaintiffs are not required to prove their case in their pleadings, and summary disposition is appropriate only if the claim cannot succeed because of some deficiency that cannot be overcome at trial.[15]

The panel rejected defendants' argument that even assuming violations of § 17755(2) had occurred, a violation of that section does not amount to knowingly submitting a false claim under either the HCFCA or the MFCA. According to the panel, implicit in a pharmacist's submission for payment is the representation that he has complied with the requirement of § 17755(2) to pass along cost savings to the purchaser. If defendants did not, in fact, pass on the required savings to the purchaser, then they concealed material facts and made the purchasers believe the state of affairs was something different than it actually was.[16]

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[14] *Id*. at 20-21.

[15] *Id*. at p 18.

[16] *Id*. at 19-20.

Finally, the Court of Appeals reversed the trial court's ruling that Gurganus was not a proper relator in the qui tam action. Under the MFCA, any person may bring a qui tam action on behalf of the state for a violation of the MFCA, subject to certain restrictions.[17] Qui tam actions are not permitted, however, if the action is based on "the public disclosure of allegations or transactions" in a legal hearing, governmental hearing, report, or investigation or from the news media unless the relator is the original source of the information.[18] According to the panel, Gurganus's use of a news article did not contain "allegations or transactions" on which the complaint relied, and therefore Gurganus was not barred from bringing the qui tam action.[19]

II. STANDARD OF REVIEW

Issues of statutory construction are reviewed de novo,[20] as is a trial court's grant of summary disposition.[21]

III. DISCUSSION

A. INTERPRETATION OF MCL 333.17755(2)

Whether relief is sought for violation of § 17755(2) itself, or through violations of the HCFCA and the MFCA, § 17755(2) is the basis from which all of plaintiffs' claims derive. In order to properly evaluate whether plaintiffs' allegations pass muster to survive

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[17] MCL 400.610a(1).

[18] MCL 400.610a(13).

[19] *Gurganus*, unpub op at 6-7.

[20] *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 488; 697 NW2d 871 (2005).

[21] *Id*.

summary disposition, we must first construe § 17755(2) to determine what a plaintiff must allege to sufficiently state a violation.

Section 17755 is a provision in Part 177 of the Public Health Code.[22] Before the enactment of § 17755, a pharmacist was required to dispense a prescription as written and was prohibited from substituting a less expensive generically equivalent drug.[23] After enactment, pharmacies are generally permitted to substitute generic drugs for their brand-name equivalents. Section 17755 states in pertinent part:

> (1) When a pharmacist receives a prescription for a brand name drug product, the pharmacist may, or when a purchaser requests a lower cost generically equivalent drug product, the pharmacist shall dispense a lower cost but not higher cost generically equivalent drug product if available in the pharmacy, except as provided in subsection (3). If a drug is dispensed which is not the prescribed brand, the purchaser shall be notified and the prescription label shall indicate both the name of the brand prescribed and the name of the brand dispensed and designate each respectively. If the dispensed drug does not have a brand name, the prescription label shall indicate the generic name of the drug dispensed, except as otherwise provided in [MCL 333.17756].
>
> (2) If a pharmacist dispenses a generically equivalent drug product, the pharmacist shall pass on the savings in cost to the purchaser or to the third party payment source if the prescription purchase is covered by a third party pay contract. The savings in cost is the difference between the wholesale cost to the pharmacist of the 2 drug products.[24]

The proper interpretation of Subsection (2) is disputed in the instant case. First, the parties disagree

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[22] MCL 333.17701 *et seq*.

[23] Legislative Notes, *Improving Michigan's Generic Drug Law*, 9 Mich J L Reform 394, 394 (1976).

[24] MCL 333.17755(1) and (2).

whether Subsection (2) applies to all transactions in which a generic drug is dispensed or only in situations in which a generic drug is substituted for its brand-name equivalent. Second, the parties disagree about what it means to "pass on the savings in cost."

The goal of statutory interpretation "is to give effect to the Legislature's intent, focusing first on the statute's plain language."[25] Individual words and phrases are not read in a vacuum; "we examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme."[26]

Subsection (1) states, "When a pharmacist receives a prescription for a brand name drug product, the pharmacist may [or, upon request, shall] dispense a lower cost [generic drug] . . . ."[27] This introductory provision provides the context in which to read the rest of § 17755, i.e., transactions in which a pharmacist substitutes a generic drug for a brand-name drug. Subsection (2) then begins, "If a pharmacist dispenses a generically equivalent drug product, the pharmacist shall pass on the savings in cost . . . ."[28] This introductory phrase, which immediately follows Subsection (1) governing transactions in which generic drugs are dispensed in lieu of brand-name drugs, indicates that the text that follows is only triggered if the pharmacist is operating under Subsection (1). In other words, Subsection (2) only applies when the pharmacist is engaged in a substitution transaction described in Subsection (1). Surely, it would be counterintuitive for the Legislature to have inserted this provision governing *all* generic

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[25] *Malpass v Dep't of Treasury*, 494 Mich 237, 247-248; 833 NW2d 272 (2013) (quotation marks and citation omitted).

[26] *Id*. at 248.

[27] MCL 333.17755(1).

[28] MCL 333.17755(2).

drug transactions immediately after a specific provision referring only to substitution transactions. The first subsection gives meaning to the one that follows.

Other textual support only strengthens this interpretation. Subsection (2) itself refers to a "generically *equivalent* drug product."[29] The use of the term "equivalent" evidences a Legislative intent to compare two different drug products. If, as the Court of Appeals concluded, Subsection (2) applies to all transactions in which generic drugs are dispensed, including transactions in which no brand-name drug was prescribed, then the term "equivalent" is effectively written out of the statute because there is no referent to which the generic drug product is equivalent.[30] Similarly, the definition of "savings in cost" in Subsection (2) refers to the difference between "the 2 drug products."[31] Without a prescribed brand-name drug that is equivalent to the generic, there is only a single drug product. These textual clues belie the Court of Appeals' conclusion that nothing in the language of the statute limits the scope of Subsection (2) to only substitution transactions.

Plaintiffs improperly read the first clause of Subsection (2)—which reads, "[i]f a pharmacist dispenses a generically equivalent drug product"—as detached from the remainder of the subsection in order to come to their preferred interpretation that Subsection (2) applies to all transactions in which a generic drug is dispensed. In doing so, they ignore the remainder of Subsection (2). Viewing an excerpt of a subsection with a magnifying glass to the exclusion of its relevant

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[29] *Id*. (emphasis added).

[30] *In re MCI Telecom Complaint*, 460 Mich 396, 414; 596 NW2d 164 (1999) ("[A] court should avoid a construction that would render any part of the statute surplusage or nugatory.").

[31] MCL 333.17755(2).

context eschews this Court's dictate that "we must consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme."[32] When read properly, it is clear that the Legislature intended that Subsection (2) apply only to transactions in which a generic drug is dispensed in place of its brand-name equivalent. Plaintiffs' construction also ignores the fact that, before enactment of this statute, a pharmacist had to fill the prescription as the physician wrote it.

We now turn to the proper interpretation of the phrase "savings in cost." Subsection (2) states that a "pharmacist shall pass on the savings in cost to the purchaser" in a substitution transaction.[33] As provided in MCL 333.17755(2), "savings in cost" means "the difference between the wholesale cost to the pharmacist of the 2 drug products."

Defendants argue that the statute only requires pharmacists to sell the substituted generic drug at the same price that a purchaser would pay had the generic been prescribed in the first instance. In other words, pharmacists are prohibited from increasing the customer's cost of the substituted generic drug. However, this reading ignores the definition in the statute: The amount that a pharmacist must pass on to a purchaser or third-party payer is the difference between the wholesale cost of the two drugs. In other words, "savings in cost" equals the brand-name wholesale cost minus the generic wholesale cost.[34] As a practical mat-

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[32] *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008) (quotation marks and citations omitted).

[33] MCL 333.17755(2).

[34] Defendants seem to suggest that interpreting the statute by its plain terms recognizes an outmoded method of how pharmacies actually set their drug prices and that interpreting the statute by its terms would be

ter, Subsection (2) provides a maximum allowable profit regardless of whether the pharmacist dispenses a generic drug or a brand-name drug—he cannot make more from dispensing a generic drug than he could from a brand-name drug.

Furthermore, a 2013 article in Pharmacy & Therapeutics explained that "patients have taken the same drug prescribed or dispensed under more than one trademark" and provided examples of generic drugs that have multiple brand-name drugs associated with them.[35] This confirms the requirement in § 17755(2) that an actual substitution transaction must occur; otherwise, there is no basis for determining which brand-name wholesale cost to use when calculating the savings in cost.

B. ADEQUACY OF PLAINTIFFS' PLEADINGS

Having construed § 17755(2), we turn to whether plaintiffs' pleadings adequately state a claim for relief for violation of this statute. A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. A motion for summary disposition is properly granted if "[t]he opposing party has

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impractical in light of these realities. If this is the case, it is a concern more properly addressed to the Legislature, whose purview is the enactment of legislation, as compared to the interpretation of that legislation, which is the province of the courts. See *People v Kirby*, 440 Mich 485, 493-494; 487 NW2d 404 (1992) ("[A]rguments that a statute is unwise or results in bad policy should be addressed to the Legislature.").

[35] Grissinger, *Multiple Brand Names for the Same Generic Drug Can Cause Confusion*, 38 Pharm & Therapeutics 305 (2013), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3737992/pdf/ptj3806305.pdf> (accessed June 2, 2014) [http://perma.cc/V5MG-DHLF]. For instance, fluoxetine is marketed as both Sarafem and Prozac; finasteride is marketed as both Propecia and Proscar.

failed to state a claim on which relief can be granted."[36] When reviewing a motion brought under MCR 2.116(C)(8), the court considers only the pleadings.[37] Moreover, the court must accept all factual allegations in the complaint as true, along with all reasonable inferences or conclusions that can be drawn from them.[38] However, conclusory statements that are unsupported by allegations of fact on which they may be based will not suffice to state a cause of action.[39]

Because plaintiffs' claims are based on alleged fraudulent activity, the heightened pleading standard for fraud claims applies. MCR 2.112(B)(1) provides, in full, "In allegations of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity."[40]

Plaintiffs' complaints rely on wholesale drug cost data from a single Kroger pharmacy in West Virginia. From that proprietary data, plaintiffs extrapolate thousands of allegedly fraudulent transactions by defendants in violation of § 17755(2). In doing so, plaintiffs rely on various assumptions. These assumptions include (1) each defendant acquires its prescription drugs from just a few wholesalers, (2) the prescription drug

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[36] MCR 2.116(C)(8).

[37] MCR 2.116(G)(5).

[38] See *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992).

[39] *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003).

[40] Generally, fraud " 'is not to be presumed lightly, but must be clearly proved,' " *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008), quoting *Palmer v Palmer*, 194 Mich 79, 81; 160 NW 404 (1916), and must be proved by " 'clear, satisfactory and convincing evidence,' " *Cooper*, 481 Mich at 414, quoting *Youngs v Tuttle Hill Corp*, 373 Mich 145, 147; 128 NW2d 472 (1964). It is for these reasons that our court rules create an enhanced burden to plead fraud with particularity.

purchasing power is substantially the same for all defendants, (3) the wholesale prices each defendant pays are materially the same, and (4) the wholesale prices do not change over time.

When faced with the heightened pleading standard for fraud claims, plaintiffs' claims of § 17755(2) violations cannot survive. Plaintiffs rely on a small set of cost data from a single out-of-state pharmacy during a brief time period to charge numerous Michigan defendants with systematic fraudulent activity across a multiyear period. The connection drawn between the West Virginia data and pharmaceutical sales in Michigan is simply too tenuous and conclusory to state a claim for relief.[41] As the Court of Appeals correctly recognized: "The critical number in plaintiffs' formula is the acquisition cost of the generic and brand name drugs. This is true because the sale prices of generic and brand name drugs are publicly known and easily identifiable; however, the acquisition cost is proprietary to each defendant."[42] But the Court of Appeals erred by holding that plaintiffs' allegations were sufficient to survive summary disposition. Without precise allegations of fraud committed by defendants, plaintiffs' allegations valuing quantity over quality do not meet the heightened pleading standard applicable here.[43]

Plaintiffs' complaints are also deficient because they fail to particularly allege a single improper

[41] Construing the federal analogue to our pleading rules, the United States Supreme Court has held that when the pleaded facts "do not permit the court to infer more than the *mere possibility* of misconduct," the complaint fails to state a claim for relief. See *Ashcroft v Iqbal*, 556 US 662, 679; 129 S Ct 1937; 173 L Ed 2d 868 (2009) (emphasis added); FR Civ P 8(a).

[42] *Gurganus*, unpub op at 17.

[43] MCR 2.112(B)(1).

substitution transaction. As discussed earlier, § 17755(2) applies only to transactions in which a generic drug is substituted for a brand-name drug. Defendants claim that plaintiffs have not satisfied the heightened pleading requirement because plaintiffs do not identify substitution transactions in their complaints. Instead, plaintiffs only allege generic drug transactions, regardless of whether they are substitution transactions.[44]

Without distinguishing substitution transactions from transactions in which a generic was simply dispensed, plaintiffs' overbroad approach is deficient—especially under the heightened pleading standard. Plaintiffs essentially allege that defendants had a statutory duty to pass on the savings in cost from every sale of a generic drug. Yet as previously discussed, the statute simply does not impose such a duty on pharmacists. By alleging that thousands of generic drug transactions were improper, regardless of whether any of the transactions involved a substitution, plaintiffs failed to plead any transaction proscribed under § 17755(2) because the transactions are not of the type covered by § 17755(2), i.e., substitution transactions.[45] In other

[44] Plaintiffs alleged at oral argument that this absence of specific substitution transactions stems from plaintiffs' alleged lack of access to specific instances in which defendant pharmacies engaged in substitution transactions. However, plaintiff Scott Murphy, as a firsthand uninsured purchaser, would have evidence from the receipt at the point of sale whether a pharmacist dispensed a brand-name drug as prescribed by his doctor or whether the pharmacist instead dispensed a generic equivalent. Thus, at least one of the plaintiffs has, or could have, the knowledge of whether, in a specific transaction by a named defendant, a substitution transaction occurred.

[45] See *White v Beasley*, 453 Mich 308, 325; 552 NW2d 1 (1996) (holding that the plaintiff's tort complaint failed to state a claim because she failed to allege facts showing that the defendant owed her a duty).

words, plaintiffs' allegations assert concern about transactions not prohibited by law.[46]

C. PLAINTIFFS' REMAINING CLAIMS

In addition to violations of § 17755(2), the class action plaintiffs allege violations of the HCFCA and Gurganus alleges violations of the MFCA. Both claims are premised on defendants' alleged violations of § 17755(2). As already outlined briefly, plaintiffs contend that defendants make false statements in contravention of the HCFCA and MFCA when they submit claims for Medicaid or private health insurance reimbursement that are not in compliance with § 17755(2).[47] In other words, plaintiffs argue that certifying for reimbursement a claim founded on a transaction that was allegedly in violation of § 17755(2) constitutes a false claim under the respective false claim acts.

Because plaintiffs' complaints do not adequately establish violations of § 17755(2), this Court need not evaluate the propriety of the remainder of plaintiffs' arguments. Assuming for the sake of argument that claims under the HCFCA and MFCA *may* be derived from violations of § 17755(2), plaintiffs' failure to sufficiently allege violations of § 17755(2) necessarily means that they fail to allege derivative violations of the false claim acts.

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[46] Because plaintiffs have failed to plead any transaction proscribed under § 17755(2), we need not—and do not—determine whether § 17755(2) contains an implied right of action.

[47] The HCFCA provides that a "person shall not make or present or cause to be made or presented to a health care corporation or health care insurer a claim for payment of health care benefits knowing the claim to be false." MCL 752.1003(1). The MFCA provides that a "person shall not make or present or cause to be made or presented . . . a claim . . . knowing the claim to be false." MCL 400.607(1).

The failure of the pleadings thus disposes of the appeal in its entirety. Any discussion of these remaining derivative claims would constitute dicta because it is not necessary to resolve the case before us.[48] We decline to opine on matters unnecessary to the resolution of this case.

IV. CONCLUSION

MCL 333.17755(2) requires that when a generic drug is substituted for a brand-name drug (and only then), the pharmacist must pass on the difference between the wholesale cost of the brand-name drug and the wholesale cost of the generic drug.

Plaintiffs' allegations, which entirely rely on deriving wholesale costs of drugs for all the Michigan defendants by extrapolating from the wholesale costs in a single data set from a single West Virginia pharmacy, are simply too tenuous to survive summary disposition. Additionally, plaintiffs' approach of identifying all transactions in which a generic drug was dispensed fails to highlight the only relevant transactions—those in which a generic drug was substituted in place of a brand-name drug. This overbroad method of pleading is deficient, especially in light of the requirement that instances of fraud be pleaded with particularity.

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[48] See *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 597-598; 374 NW2d 905 (1985) ("Since we conclude that plaintiff failed even to meet the threshold requirements of proof to make out a prima facie claim of intentional infliction of emotional distress, we are constrained from reaching the issue as to whether this modern tort should be formally adopted into our jurisprudence by the well-settled rule that *statements concerning a principle of law not essential to determination of the case are obiter dictum and lack the force of an adjudication*.") (emphasis added); *People v Borchard-Ruhland*, 460 Mich 278, 287-288; 597 NW2d 1 (1999) (questioning why, in a prior case, the Court had addressed arguments after analyzing a dispositive evidentiary issue).

Because plaintiffs have failed to allege sufficient facts to state a violation of § 17755(2), plaintiffs' remaining derivative claims under the HCFCA and the MFCA are unsustainable. We reverse the Court of Appeals' construction of MCL 333.17755(2) and its holding that plaintiffs' pleadings were sufficient to survive summary disposition, vacate the remainder of the Court of Appeals' judgment, and reinstate the trial court's grant of summary disposition to defendants.

MARKMAN, KELLY, ZAHRA, MCCORMACK, and VIVIANO, JJ., concurred with YOUNG, C.J.

CAVANAGH, J. (*concurring only in the result*). Underlying all of plaintiffs' claims in this consolidated appeal is the allegation that defendants violated MCL 333.17755(2) by failing to "pass on the savings in cost" when dispensing generic drugs. I agree with the majority that § 17755(2) could not be clearer that the phrase "savings in cost" means "the difference between the wholesale cost to the pharmacist of the 2 drug products." Further, as the majority explains, a pharmacy's obligation under § 17755(2) to pass on the savings in cost only applies to a transaction in which the pharmacy substitutes, i.e., replaces, a prescribed brand-name drug with a generic drug. However, unlike the majority, I would look no further than the fact that plaintiffs did not specifically allege a single occurrence in which defendants dispensed a generic drug as a replacement for a prescribed brand-name drug to hold that plaintiffs did not meet the heightened pleading standard of MCR 2.112(B)(1). Accordingly, I concur only in the majority's result reinstating the trial court's grant of summary disposition to defendants.

I. HEIGHTENED PLEADING STANDARD UNDER MCR 2.112(B)(1)

It is well established that "fraud is not to be lightly presumed, but must be clearly proved." *Palmer v Palmer*, 194 Mich 79, 81; 160 NW 404 (1916). Memorializing this standard, MCR 2.112(B)(1) states that "[i]n allegations of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity." See *Lawrence M Clarke, Inc v Richco Constr, Inc*, 489 Mich 265, 283-284; 803 NW2d 151 (2011) (applying MCR 2.112(B)(1) to a common-law-fraud claim). In this case, plaintiffs argue that defendants' alleged failures to pass on the savings in cost under § 17755(2) constitute false claims for healthcare or Medicaid benefits under the Medicaid False Claim Act (MFCA), MCL 400.601 *et seq.*, and the Health Care False Claim Act (HCFCA), MCL 752.1001 *et seq*.[1] Specifically, plaintiffs assert that defendants have received overpayments to which they

[1] The HCFCA states:

> A person who receives a health care benefit or payment from a health care corporation or health care insurer which the person knows that he or she is not entitled to receive or be paid; or a person who knowingly presents or causes to be presented a claim which contains a false statement, shall be liable to the health care corporation or health care insurer for the full amount of the benefit or payment made. [MCL 752.1009.]

Similarly, the MFCA states:

> A person who receives a benefit that the person is not entitled to receive by reason of fraud or making a fraudulent statement or knowingly concealing a material fact, or who engages in any conduct prohibited by this statute, shall forfeit and pay to the state the full amount received, and for each claim a civil penalty of not less than $5,000.00 or more than $10,000.00 plus triple the amount of damages suffered by the state as a result of the conduct by the person. [MCL 400.612(1).]

The HCFA and the MFCA also define "knowingly." See MCL 752.1002(h); MCL 400.602(f).

are not entitled from purchasers, third-party payment sources, and the state by knowingly violating § 17755(2) and that plaintiffs must be reimbursed in full for every dispensation of a generic drug within the limitations period applicable to their lawsuits. Accordingly, the heightened pleading standard applies because plaintiffs' claims sound in fraud.[2]

Generally, when applying the federal heightened pleading standard to claims brought under the federal False Claims Act, 31 USC 3729 *et seq.*, federal courts have developed the guideline that plaintiffs must allege "with particularity the who, what, when, where, and how of the alleged fraud." *United States ex rel Ge v Takeda Pharm Co Ltd*, 737 F3d 116, 123 (CA 1, 2013) (citations and quotation marks omitted).[3] Importantly, plaintiffs' qui tam and class action lawsuits allege fraudulent schemes that involve numerous potential violations of the HCFCA and the MFCA over a long period of time. In light of these circumstances, the

[2] This conclusion is consistent with the approach taken by other states and federal courts that have addressed state and federal false claims acts. See *California ex rel McCann v Bank of America, NA*, 191 Cal App 4th 897, 906; 120 Cal Rptr 3d 204 (2011) (" 'As in any action sounding in fraud, the allegations of a [California False Claims Act] complaint must be pleaded with particularity.' ") (citations omitted); *Utah v Apotex Corp*, 2012 Utah 36, ¶ 23 & n 4; 282 P3d 66 (2012) (stating that "[e]very federal circuit court to consider the issue has concluded that claims brought under the federal False Claims Act (FCA) must be pled with particularity under rule 9(b) of the Federal Rules of Civil Procedure").

[3] See, also, *Chesbrough v VPA, PC*, 655 F3d 461, 467 (CA 6, 2011) (stating that claims must assert " '(1) the time, place, and content of the alleged misrepresentation,' (2) 'the fraudulent scheme,' (3) the defendant's fraudulent intent, and (4) the resulting injury") (citations omitted). Although "Michigan courts are not bound by" federal courts' interpretations of the federal court rules, when the Michigan Court Rules "are nearly identical to the federal requirements, we find it reasonable to conclude that similar purposes, goals, and cautions are applicable to both." *Henry v Dow Chem Co*, 484 Mich 483, 499; 772 NW2d 301 (2009); compare MCR 2.112(B)(1) with FR Civ P 9(b).

application of MCR 2.112(B)(1) must remain flexible so that it is measured within the context of the specific claims alleged. See *Utah v Apotex Corp*, 2012 Utah 36, ¶ 27; 282 P3d 66 (2012). See, also, *id*. (explaining that the particularity requirement is " 'not a straitjacket' " for pleading fraud claims), quoting *United States ex rel Grubbs v Kanneganti*, 565 F3d 180, 190 (CA 5, 2009).

For example, the "heightened pleading standard may be applied less stringently when the specific factual information is peculiarly within the defendant's knowledge or control." *Apotex*, 2012 Utah at ¶ 27 (citation and quotation marks omitted). Also, "where the alleged fraudulent scheme involved numerous transactions that occurred over a long period of time, courts have found it impractical to require the plaintiff to plead the specifics with respect to each and every instance of fraudulent conduct." *Id*. (citation and quotation marks omitted). See, also, *United States ex rel Joshi v St Luke's Hosp, Inc*, 441 F3d 552, 557 (CA 8, 2006) (explaining that the plaintiff was not required "to allege specific details of *every* alleged fraudulent claim," but the complaint "must provide *some* representative examples of [the defendants'] alleged fraudulent conduct, specifying the time, place, and content of their acts and the identity of the actors").[4]

Finally, in determining whether a plaintiff's claim under the HCFCA or the MFCA has been pleaded with sufficient particularity, a court should not lose sight of the fact that although one aim of the court rule "is to discourage nuisance suits and frivolous accusations,"

[4] Furthermore, "a plaintiff does not necessarily need the exact dollar amounts, billing numbers, or dates to prove to a preponderance that fraudulent bills were actually submitted" because "requir[ing] these details at pleading is one small step shy of requiring production of actual documentation with the complaint . . . ." *Grubbs*, 565 F3d at 190.

United States ex rel Pogue v Diabetes Treatment Ctrs of America, Inc, 238 F Supp 2d 258, 269 (D DC, 2002), the purpose of the heightened pleading standard is "to alert defendants 'as to the particulars of their alleged misconduct' so that they may respond," *Chesbrough v VPA, PC*, 655 F3d 461, 466 (CA 6, 2011), quoting *United States ex rel Bledsoe v Community Health Sys, Inc*, 501 F3d 493, 503 (CA 6, 2007).

II. ANALYSIS OF PLAINTIFFS' COMPLAINTS

As previously mentioned, a pharmacy's obligation under § 17755(2) is not implicated whenever a generic drug is dispensed, even though a pharmacy may, generally speaking, incur greater profit when generic drugs are dispensed than when brand-name drugs are dispensed. Instead, a pharmacy is obligated to "pass on the savings in cost" only if, in a given transaction, the pharmacy dispenses a generic drug in *substitution* for a brand-name drug that had been prescribed. Thus, a substitution transaction is a necessary component of a violation of § 17755(2), which becomes an essential element to plaintiffs' claims under the HCFCA and the MFCA because they are predicated on alleged violations of § 17755(2). Applying the aforementioned heightened pleading standard under MCR 2.112(B)(1), plaintiffs have not met the particularity requirement because their complaints do not allege a single, let alone "representative examples," *Joshi*, 441 F3d at 557, of instances in which defendants failed to pass on the savings in cost for a substitution transaction.

Instead of pleading substitution transactions in their complaints, plaintiffs simply list series of transactions in 2008 that represent alleged occasions when defendants merely dispensed generic drugs, with no indication of whether the dispensed generics resulted from

the pharmacies' replacement of a brand-name drug with a generic drug.[5] Requiring plaintiffs to identify the alleged transactions that specifically violate § 17755(2) is necessary to give sufficient notice to defendants of the particular transactions they are to defend against. See *Chesbrough*, 655 F3d at 466. Furthermore, under the circumstances of this case, this requirement does not create an insurmountable burden. As the majority notes, whether some plaintiffs received a generic drug in replacement for a previously prescribed brand-name drug is information that at least the plaintiffs who are uninsured buyers would have access to.[6] See *Spelman v Addison*, 300 Mich 690, 702; 2 NW2d 883 (1942) ("In determining the sufficiency of a bill of complaint, consideration should be given to the character of the

[5] The following excerpt from the second amended complaint in Docket No. 146791, the qui tam action, illustrates the nature of plaintiffs' allegations as they relate to the specific transactions pleaded:

> Rather than alleging out of the millions of prescriptions drug transactions with Defendants each of the transactions that violated the Michigan generic drug pricing laws and the Medicaid False Claims Act, Plaintiff alleges . . . specific information about Medicaid claims submitted by Defendants for . . . five generic drugs during the fourth quarter of 2008 as examples of Medicaid claims by Defendants that violated Michigan law. These examples are not exhaustive of those purchases for which Defendants failed to pass on to the State of Michigan the difference between the acquisition cost of the generic drug and brand-name drug as required by Michigan law. [Emphasis omitted.]

The class-action plaintiffs' complaints include nearly identical language demonstrating the gravamen of all plaintiffs' allegations.

[6] According to the trial court, plaintiff Marcia Gurganus "concede[d] that she has no way of knowing whether the prescription was written using the brand-name or generic . . . ." However, for the purposes of her qui tam action, that fact does not relieve Gurganus of her pleading burden; rather, her lack of knowledge regarding the nature of the transactions between defendant pharmacies and the state serves to question her ability to bring a qui tam action under MCL 400.610a(13) as "the original source of the information."

plaintiff's alleged cause of action and to such circumstances as whether the records and knowledge of the facts on which the plaintiff relies are in his possession or largely, if not exclusively, in the possession of defendant."); *Apotex*, 2012 Utah at ¶ 27.

Given that plaintiffs did not specifically identify in their complaints a single transaction that, if assumed true, would constitute a violation of § 17755(2), they have failed to meet the heightened particularity standard for pleading fraud claims, and, thus, summary disposition in favor of defendants under MCR 2.116(C)(8) is proper. See *Spiek v Dep't of Transp*, 456 Mich 331, 339; 572 NW2d 201 (1998) (holding that summary disposition under MCR 2.116(C)(8) was appropriate when "[t]aking all plaintiffs' factual allegations as true, the complaint fails to allege an essential element of their cause of action").[7] Accordingly, I concur only in the majority's result reinstating the trial court's grant of summary disposition to defendants.

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[7] Like the majority, I do not find it necessary to opine on the merits of the class-action plaintiffs' claim that § 17755(2) was intended as an implied cause of action. However, assuming arguendo that such a cause of action exists, the claims would be based on a statutory violation that is not necessarily fraudulent in nature, and, thus, the heightened pleading standard under MCR 2.112(B)(1) might not apply. Nevertheless, summary disposition in favor of defendants would be appropriate because plaintiffs' complaints are void of a bare allegation pertaining to the critical requirement for their possible claim under § 17755(2), i.e., the complaints failed to include *a mere statement* that defendants failed to pass on the savings in cost with respect to a substitution transaction. Instead, plaintiffs' theory of liability would essentially impose on defendants the obligation to pass on the "**full** cost savings realized by the pharmacies' lower acquisition cost of the generic drug" "obtained by the pharmacies in dispensing a generically equivalent drug product . . . ." Therefore, "the legal sufficiency of the claim on the pleadings alone . . . determine[s]" that plaintiffs have not "stated a claim on which relief may be granted." *Spiek*, 456 Mich at 337.

BADEEN v PAR, INC

Docket No. 147150. Argued on application for leave to appeal April 2, 2014. Decided June 13, 2014.

George Badeen (a licensed collection agency manager) and Midwest Recovery and Adjustment, Inc. (a licensed collection agency that Badeen owned and operated) brought a class action in the Wayne Circuit Court against PAR, Inc.; Remarketing Solutions; Center-One Financial Services, LLC; and numerous other lenders and forwarding companies doing business in Michigan. Forwarding companies act as middlemen between lenders and local collection agents, operating nationwide. When a creditor needs a collection done, it contracts with a forwarding company, which, in turn, allocates the collection to a collection agent in the appropriate location. Forwarding companies maintain networks of collection agents and negotiate favorable rates that save creditors money and allow the forwarding companies to make a profit. Forwarding companies do not, however, contact the debtors themselves. Plaintiffs alleged that defendant forwarding companies acted as collection agencies under Michigan law but did so without a license, in violation of MCL 339.904(1), and that defendant lenders, who hired the forwarding companies, violated Michigan law by hiring unlicensed collection agencies, in violation of MCL 445.252(s). Plaintiffs further alleged that the violations injured them by impeding their business while not complying with Michigan law. Defendants moved for summary disposition, arguing that the forwarding companies did not satisfy the definition of "collection agency" in MCL 339.901(b) because the phrase "soliciting a claim for collection" in that statute referred to asking the debtor to pay the debt, which the forwarding companies did not do. The court, Michael F. Sapala, J., granted defendants' motion. The Court of Appeals, METER, P.J., and FITZGERALD and WILDER, JJ. , affirmed, holding that soliciting a claim for collection means requesting the debtor to fulfill his or her obligation on the debt. 300 Mich App 430 (2013). Badeen applied for leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 495 Mich 921 (2014).

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

A forwarding company comes within the definition of "collection agency" in MCL 339.901(b) when it contacts a creditor asking for debts to allocate to local collection agents.

1. MCL 339.904(1), part of Article 9 of the Occupational Code, MCL 339.901 *et seq*., requires a person to apply for and obtain a license before operating a collection agency or commencing in the business of a collection agency. Under MCL 339.901(b), a "collection agency" is a person directly or indirectly engaged in soliciting a claim for collection or collecting or attempting to collect a claim owed or due another or repossessing or attempting to repossess a thing of value owed or due another arising out of an expressed or implied agreement. Under MCL 339.901(a), "claim" or "debt" means an obligation for the payment of money or a thing of value arising out of an expressed or implied agreement or contract for a purchase made primarily for personal, family, or household purposes.

2. Forwarding companies satisfy the definition of "collection agency" in MCL 339.901(b). Under the plain meaning of the statute, the phrase "soliciting a claim for collection" means asking a creditor for any unpaid debts that the collection agency may pursue by allocating them to local collection agents.

3. Because the circuit court concluded that its interpretation of the definition of "collection agency" was dispositive, it made no decision regarding defendants' other arguments for summary disposition, including an argument pertaining to the applicability of MCL 339.904(2), which provides that a collection agency need not obtain a license if the person's collection activities in this state are limited to interstate communications. Accordingly, a remand for further proceedings was necessary.

Part III(B) of the Court of Appeals' judgment vacated, and case remanded to the circuit court for further proceedings.

DEBTORS AND CREDITORS — COLLECTION AGENCIES — DEFINITION — LICENSING REQUIREMENTS — FORWARDING COMPANIES.

A forwarding company, which acts as a middlemen between lenders and local collection agents by contracting with creditors that need a collection done and allocating the collection to a local collection agent within the forwarding company's network, meets the definition of "collection agency" in MCL 339.901(b), part of Article 9 of the Occupational Code, when it contacts a creditor asking for debts to allocate even though the forwarding company has no contact with the debtor.

Xuereb Law Group PC (by *Joseph M. Xuereb*) for George Badeen and Midwest Recovery and Adjustment, Inc.

Miller, Canfield, Paddock and Stone, PLC (by *Clifford W. Taylor*, *Larry J. Saylor*, and *Lawrence M. Dudek*), for PAR, Inc.

Wienner & Gould, PC (by *S. Thomas Wienner* and *Seth D. Gould*), for PNC Bank, N.A., CenterOne Financial Services, LLC, and The M. Davis Co., Inc.

Law Office of John J. O'Shea, PLC (by *John J. O'Shea*), for Bank of America, N.A.

Pepper Hamilton LLP (by *Matthew J. Lund* and *Adam A. Wolfe*) for TD Auto Finance LLC.

Debrincat, Padgett, Kobliska & Zick (by *S. Thomas Padgett*) for Santander Consumer USA Inc.

Boyle Burdett (by *Howard William Burdett, Jr.*) for ASR Nationwide, LLC.

McShane & Bowie, PLC (by *James R. Bruinsma*), for Nissan Motor Acceptance Corporation.

Warner Norcross & Judd LLP (by *Molly E. McManus* and *Gaëtan Gerville-Réache*) for Fifth Third Bank.

Plunkett Cooney (by *Jeffrey C. Gerish* and *Matthew J. Boettcher*) for The Huntington National Bank.

Law Weathers (by *Leslie C. Morant*) for Toyota Motor Credit Corporation, Remarketing Solutions, LLC, Renovo Services, LLC, and Diversified Vehicle Services, Inc.

Collins Einhorn Farrell PC (by *Deborah Hebert* and *Kevin Moloughney*) for Millennium Capital and Recovery Corporation.

Blanco Wilczynski, PLLC (by *Derek S. Wilczynski*), for National Asset Recovery Corp.

Amicus Curiae:

Bill Schuette, Attorney General, *B. Eric Restuccia*, Deputy Solicitor General, and *Heidi L. Johnson* and *Bridget K. Smith*, Assistant Attorneys General, for the Department of Licensing and Regulatory Affairs.

ZAHRA, J. As long as there have been debts, there have been people tasked with collecting them.[1] To regulate the collection industry in Michigan, the Legislature passed a licensing requirement in 1980. This statutory package required collection agencies to obtain licenses and included statutes governing licensees' permissible actions throughout the collection process.[2]

For many years, the collection industry involved two players: the creditors and the collection agents that they hired to collect debts. But in the late 1990s, as the collection industry evolved, a middleman emerged. These middlemen—known as forwarders or forwarding companies—operate as intermediaries between creditors and local collection agents. The forwarding companies' business model involves obtaining assignments of unpaid accounts from creditors and then allocating the collection of those accounts to local collection agents. The forwarding companies do not, however, contact debtors themselves.

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[1] See Cicero, *The Verrine Orations*, II.13 trans L. H. G. Greenwood (Harvard University Press (1928)) (describing tax collectors in ancient Rome).

[2] MCL 339.901 *et seq.*

This case requires us to determine whether forwarding companies fall within the statutory definition of collection agencies. We conclude that they do. The statutory definition of a "collection agency" includes "a person directly or indirectly engaged in soliciting a claim for collection."[3] In the context of this statute, soliciting a claim for collection refers to the act of asking a creditor for any unpaid accounts on which the collection agency may pursue payment. The forwarding companies therefore come within the definition of collection agency when they contact creditors asking for debts to allocate to local collection agents.

Accordingly, we vacate Part III(B) of the Court of Appeals judgment and remand this case to the circuit court for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

I. FACTS AND PROCEEDINGS

Plaintiff George Badeen, a licensed collection agency manager, owns and operates Midwest Recovery and Adjustment, Inc., a licensed collection agency doing business in Michigan. The primary business of Midwest Recovery is repossessing automobiles when it is assigned a delinquent account by a financing company.

This dispute's origins lie in the shifting landscape of collection practices. In the past, when a creditor needed a debt collected or something repossessed, it would contact and retain a collection agent wherever the debtor was located. But the business model has changed with the introduction of forwarding companies. Now forwarding companies act as middlemen between the lenders and the local collection agents. The forwarding companies operate nationwide, and when a creditor

[3] MCL 339.901(b).

needs a collection it contracts with a forwarding company, which, in turn, allocates the collection to a collection agent in the appropriate location. The forwarding companies maintain networks of collection agents and negotiate favorable rates that save creditors money and allow the forwarding companies to make a profit. Plaintiffs allege that this business model negatively affects licensed local collection agents.

Badeen, on behalf of himself and other licensed collection agents and collection agencies in Michigan, filed a class action against the lenders and forwarding companies doing business in Michigan. He alleged that the forwarding companies were acting as collection agencies under Michigan law but were doing so without a license in violation of MCL 339.904(1). The lenders that hired the forwarding companies, in turn, were allegedly violating Michigan law by hiring unlicensed collection agencies in contravention of MCL 445.252(s). Defendants, Badeen argued, injured the members of the plaintiff class by impeding their business while not complying with Michigan law.

Badeen argued that the forwarding companies "solicit[ed] a claim for collection" when they contacted creditors for unpaid accounts to allocate to local collection agents, thereby satisfying the statutory definition of collection agencies and requiring licensure. In the circuit court, defendants moved for summary disposition, arguing that the forwarding companies did not satisfy the definition because soliciting a claim for collection referred to asking the debtor to pay his or her debt, which the forwarding companies did not do. The circuit court agreed and granted defendants' motion for summary disposition. The Court of Appeals affirmed the circuit court's decision, holding that "the phrase 'soliciting a claim for collection,' found in MCL 339.901(b),

means requesting *the debtor* to fulfill his or her obligation on the debt."[4]

Badeen sought leave to appeal in this Court. We directed the Clerk of the Court to schedule oral argument on whether to grant the application or take other action and asked the parties to address "whether the defendant forwarding companies engage in 'soliciting a claim for collection' and therefore are 'collection agenc[ies]' as defined by MCL 339.901(b)."[5]

II. STANDARD OF REVIEW AND RULES OF STATUTORY INTERPRETATION

A statutory interpretation issue like the meaning of "soliciting a claim for collection" is a question of law that we review de novo. The primary goal of statutory interpretation is, of course, to give effect to the Legislature's intent. The focus of our analysis must be the statute's express language, which offers the most reliable evidence of the Legislature's intent. When construing a statutory phrase such as the one at issue in this case, we must consider it in the context of the statute as a whole.[6] "Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context."[7] When reviewing a statute, courts should avoid a construction that would render any part of the statute surplusage or nugatory.[8]

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[4] *Badeen v PAR, Inc*, 300 Mich App 430, 444; 834 NW2d 85 (2013).

[5] *Badeen v PAR, Inc*, 495 Mich 921 (2014).

[6] *Klooster v City of Charlevoix*, 488 Mich 289, 295-296; 795 NW2d 578 (2011).

[7] *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003).

[8] *Omelenchuk v City of Warren*, 466 Mich 524, 528; 647 NW2d 493 (2002), quoting *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992).

III. STATUTORY BACKGROUND

Article 9 of the Occupational Code requires a person to apply for and obtain a license before operating a collection agency or commencing in the business of a collection agency.[9] The definition of "collection agency" is

> a person directly or indirectly engaged in soliciting a claim for collection or collecting or attempting to collect a claim owed or due or asserted to be owed or due another, or repossessing or attempting to repossess a thing of value owed or due or asserted to be owed or due another arising out of an expressed or implied agreement.[10]

Additionally, "claim" or "debt" means "an obligation or alleged obligation for the payment of money or thing of value arising out of an expressed or implied agreement or contract for a purchase made primarily for personal, family, or household purposes."[11]

IV. ANALYSIS

The forwarding companies satisfy the statutory definition of a collection agency. In MCL 339.901(b), "soliciting a claim for collection" refers to the act of asking a creditor for unpaid debt that the collection agency can pursue. "Solicit" is defined as "to try to obtain by earnest plea or application."[12] The statute defines "claim" as "an obligation . . . for the payment of money or thing of value."[13] "For" is defined as "with the object or purpose of."[14] And "collection" is "the act of collect-

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[9] MCL 339.904(1).

[10] MCL 339.901(b).

[11] MCL 339.901(a).

[12] *Random House Webster's College Dictionary* (1997).

[13] MCL 339.901(a).

[14] *Random House Webster's College Dictionary* (1997).

ing."[15] Combining these definitions, "soliciting a claim for collection" means to try to obtain an obligation with the object or purpose of engaging in the act of collecting.

Unfortunately, applying these dictionary definitions does not end our inquiry because the solicitation could still be directed at the debtor or the creditor depending on how the term "obligation" is understood. An obligation for the payment of money can be understood in two ways. On the one hand, a debtor has an obligation in the sense that he or she must pay the creditor the sum of money owed. But on the other hand, a creditor holds all of its debtors' obligations.[16] Thus, the statutory language, without further context, could produce a conclusion that "soliciting a claim for collection" means *either* asking a debtor to pay his or her debts or asking a creditor for any unpaid debts that it needs collected. Looking at the statute as a whole and applying the strictures of statutory interpretation leads to a conclusion that "soliciting a claim for collection" refers to asking a creditor for any unpaid debts that the collection agency may pursue.

Interpreting "soliciting a claim for collection" as asking the creditor for any unpaid debts to pursue is the only construction that avoids rendering the subsequent portions of the definition redundant. Defendants suggest that soliciting a claim for collection refers to asking the debtor to fulfill his obligation. But this construction would be subsumed by the very next definition of "collection agency"—a person engaged in "collecting or attempting to collect a claim owed or due." Surely asking a debtor to pay his or her debts constitutes an "attempt[] to collect." Put another way, under defen-

[15] *Id.*

[16] Indeed, an "obligation" can be the indebtedness itself or evidence of the indebtedness. *Id.*

dants' construction, "soliciting a claim for collection" would have no meaning not covered by "attempting to collect a claim owed or due." And no meaningful line can be drawn between asking a debtor to pay and attempting to collect the debt that would allow defendants' interpretation could be salvaged. In short, defendants' construction of MCL 339.901(b) violates the rule of statutory interpretation counseling against a construction that renders any part of a statute surplusage or nugatory.

The narrative arc of MCL 339.901(b) suggests that "soliciting a claim for collection" means contacting the creditor regarding any unpaid claims that the collection agency can pursue. Taken together, the three acts that render a person a collection agency—soliciting a claim for collection, attempting to collect, and actually collecting the debt—make up the entire continuum of the debt-collection process. The first step that a collection agency takes is contacting creditors to inquire about any unpaid debts that the collection agency can pursue on the creditors' behalf. Then, the collection agency attempts to collect the debt. Finally, the collection agency, if successful, actually collects the debt. Therefore, the Legislature's apparent desire to impose regulation on the actors in the debt-collection process from beginning to end is best served by our understanding of "soliciting a claim for collection."[17]

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[17] Importantly, the phrases in MCL 339.901(b) defining a collection agency are separated by the disjunctive "or." Thus, a person need not engage in *all* phases of the collection process to satisfy the statutory definition. Rather, a person need only engage in *one* of the enumerated actions to satisfy the definition. So defendant forwarding companies satisfy the definition despite never directly collecting or attempting to collect debts because they solicit claims for collection. Because it is not essential to our resolution of this case, we express no opinion regarding whether the forwarding companies *indirectly* collect or attempt to collect debts when they contract with a local collection agency. See MCL

The actions that the Occupational Code prohibits a licensed collection agency from engaging in also lend support to our interpretation of "soliciting a claim for collection." MCL 339.915 and MCL 339.915a list acts that a licensee shall not commit. According to MCL 339.915a(f), a licensed collection agency is prohibited from "[s]oliciting, purchasing or receiving an assignment of a claim for the sole purpose of instituting an action on the claim in court." This prohibition necessarily assumes that a person would be a collection agency, and therefore a licensee, when he or she solicits an assignment of a claim for the purpose of instituting an action on the claim in court. Defendants' construction of "soliciting a claim for collection" would render this prohibition meaningless. It makes no sense to say that a person is not a collection agency, and therefore need not obtain a license, until the person contacts a debtor when the Occupational Code regulates collection-agency conduct that occurs *before* any contact is made with a debtor. Our interpretation, on the other hand, brings a person within the definition of "collection agency" at the precise time that the prohibition in MCL 339.915a(f) comes into play—when the person solicits the claim from the creditor.

Consistent with our interpretation is the fact that this Court has described the conduct of contacting a creditor regarding unpaid debts as soliciting claims for collection. In *Bay County Bar Association v Finance System, Inc*, we described the defendant's action of asking creditors for unpaid claims as "solicit[ing] claims for collection."[18] And ours is not the only court to use

339.901(b) (" 'Collection agency' means a person *directly or indirectly* engaged in soliciting a claim for collection or collecting or attempting to collect a claim . . . .") (emphasis added).

[18] *Bay Co Bar Ass'n v Fin Sys, Inc*, 345 Mich 434, 436; 76 NW2d 23 (1956).

some version of the phrase "soliciting a claim for collection" to refer to the conduct of asking a creditor for unpaid debts to pursue; rather, our interpretation reflects the common understanding of the language at issue.[19] Our own previous use of the language at issue

[19] This caselaw from other jurisdictions employing the same understanding of what it means to solicit a claim for collection shows that our interpretation is consistent with the common understanding of that phrase. See *LeBlanc v Unifund CCR Partners*, 601 F3d 1185, 1198 (CA 11, 2010) ("Unifund, as a debt collector, requests or seeks new clients from other creditors and then attempts to gain business by acquiring charged off consumer debt accounts. . . . Accordingly, we find that Unifund 'solicits' consumer debt accounts."); *Nelson v Smith*, 107 Utah 382, 392; 154 P2d 634 (1944) ("When the defendants solicit the placement of claims with them for collection, they are asking third parties to allow them to render the service of collecting the claim"); *Missouri ex rel McKittrick v C S Dudley & Co*, 340 Mo 852, 863; 102 SW2d 895 (1937) ("[R]espondent, a corporation, solicits the claims and turns them over to an attorney to institute legal proceedings to enforce the collection of these claims . . . ."); *Washington State Bar Ass'n v Merchants' Rating & Adjusting Co*, 183 Wash 611, 615; 49 P2d 26 (1935) ("[U]pon complying with the condition imposed, a person, firm, association, or copartnership may . . . engage in the business of soliciting the right to collect any account . . . ."); *J H Marshall & Assoc, Inc v Burleson*, 313 A2d 587, 591 (DC, 1973) ("[Appellant] publicly solicits accounts for collection and advertises 'no charge unless we collect' "); *New Mexico ex rel Norvell v Credit Bureau of Albuquerque, Inc*, 85 NM 521, 524; 514 P2d 40 (1973) ("One of [the defendant's] principal purposes is the solicitation of claims for collection. The claims are taken pursuant to an agreement between the creditor and the [defendant]."); *West Virginia ex rel Frieson v Isner*, 168 W Va 758, 773; 285 SE2d 641 (1981) (quoting *Nelson* in discussion of the transaction between the collection agency and the creditor); *Thibodeaux v Creditors Servs, Inc*, 191 Colo 215, 217; 551 P2d 714 (1976) ("Section 123 of [the collection agency licensing] statute provides that a 'licensee can solicit claims for collection, take assignments thereof and pursue the collection thereof with necessary collection procedure.' "); *Streedbeck v Benson*, 107 Mont 110, 112; 80 P2d 861 (1938) ("[I]t is alleged that plaintiff operates a collection agency, solicits delinquent accounts, receives the assignment thereof, and attempts by various means and methods to collect the same . . . ."); *Masoni v San Francisco Bd of Trade*, 119 Cal App 2d 738, 739-740; 260 P2d 205 (1953) ("When the Board became aware that somebody was indebted to various creditors it invited said creditors to meet with the Board at its offices and caused

and this extraterritorial caselaw consistent with our use are not dispositive, but they demonstrate our interpretation's satisfaction of the Legislature's command that "words and phrases shall be construed and understood according to the common and approved usage of the language."[20] In contrast, defendants' understanding of the phrase—that "soliciting a claim for collection" means asking the debtor to pay his or her debts—runs contrary to the common understanding.

Defendants argue that forwarding companies should not be considered collection agencies because their lack of contact with the debtors takes them outside the intended scope of the Occupational Code's regulation. The forwarding industry did not exist in 1980 when the Legislature passed the statutes at issue in this case, but it does not follow that the forwarding companies must be exempt from regulation. The meaning of the statutory language has not changed, and any person that falls under that language is considered a collection

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those that came to elect a creditors' committee, and said creditors' committee to adopt a resolution authorizing the Board to solicit from all creditors assignments of their claims to an agent of the Board, granting said assignee the right to bring action for collection of said claims, for which collection a fee was charged to the creditors."); *Collection Ctr, Inc v Wyoming*, 809 P2d 278, 279 (Wyo, 1991) (quoting Wy Stat Ann 33-11-114, which states, in part, "[A]ny licensee can solicit claims exclusively for the purpose of collection . . . by suit or otherwise, and for such purpose, shall be deemed to be the real party in interest in any suit brought upon such assigned claim"); *Bryce v Gillespie*, 160 Va 137, 145; 168 SE 653 (1933) ("It is a matter of common knowledge that in recent years there has developed a form of business designated collection agencies. . . . The ethics of the legal profession prevent its members from soliciting business. There is no such restraint upon these collection agencies. On the contrary, they actively solicit claims for collection and numerous claims of doubtful value . . . .").

[20] MCL 8.3a. See *Grange Ins Co v Lawrence*, 494 Mich 475, 493; 835 NW2d 363 (2013) ("Normally, this Court will accord an undefined statutory term its ordinary and commonly used meaning.").

agency. We are sympathetic to the fact that the forwarding companies are included in this language even though the Legislature could not have known when it defined collection agencies that the forwarding industry would come to exist. But any revision of the statutory language must be left to the Legislature.[21] Put another way, our concern is not whether forwarding companies, by virtue of their unique business model, *should* be considered collection agencies; this Court may only decide whether forwarding companies satisfy the existing statutory definition. The Legislature might wish to consider revising the definition of "collection agency" in the future. But under existing law, forwarding companies fall within the statutory definition of "collection agency," and this Court will not strain the statute's language just to exempt forwarding companies from the definition.

V. PROCEEDINGS ON REMAND

Ordinarily, a collection agency—like defendant forwarding companies—is subject to the Occupational Code's licensing requirements.[22] Because the circuit court found its interpretation of the definition of "collection agency" dispositive, it expressly disclaimed any decision regarding defendants' other arguments in their motions for summary disposition, including an argument pertaining to the applicability of MCL 339.904(2).[23] Specifically, the circuit

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[21] *Herald Co v Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000) ("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.").

[22] MCL 339.904(1).

[23] MCL 339.904(2) provides that a collection agency need not obtain a license "if the person's collection activities in this state are limited to interstate communications." We express no opinion regarding the appli-

court stated: "Defendants have presented several other arguments . . . including . . . potential issues with regard to the regulation of interstate commerce. Although the court notes that relief may be justified based on these arguments as well, the court finds it unnecessary to address these arguments . . . ." Because the circuit court has not considered defendants' other arguments, we remand this case to the circuit court for further proceedings not inconsistent with this opinion.

Additionally, plaintiffs filed a motion to supplement the record shortly before this Court heard arguments in the case. The evidence attached to that motion did not play a role in this Court's determination of the statutory issue at hand. We therefore deny the motion, but we do so without prejudice to plaintiffs' ability to present the evidence to the circuit court in a properly filed motion on remand.

VI. CONCLUSION

The forwarding companies satisfy the definition of "collection agency" in MCL 339.901(b) because they solicit claims for collection when they contact creditors seeking unpaid debts to allocate to local collection agents. Our interpretation of the phrase "soliciting a claim for collection" is required by the express statutory language and the maxims of statutory interpretation. Ours is the only interpretation of the phrase "soliciting a claim for collection" that avoids rendering another provision of the definition of "collection agency" nugatory. Our interpretation is also consistent with the common understanding of what it means to solicit a claim for collection. Accordingly, we vacate Part III(B)

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cability of this exemption to defendant forwarding companies at issue; instead, we leave the applicability of MCL 339.904(2) for the trial court to address in the first instance.

of the Court of Appeals' judgment and remand this case for proceedings consistent with this opinion. We do not retain jurisdiction.

YOUNG, C.J., and CAVANAGH, MARKMAN, KELLY, MCCORMACK, VIVIANO, JJ., concurred with ZAHRA, J.

PEOPLE v WILSON

Docket No. 146480. Argued December 10, 2013 (Calendar No. 8). Decided June 18, 2014.

Dwayne E. Wilson was charged in the Macomb Circuit Court, Matthew Switalski, J., with first-degree premeditated murder, MCL 750.316(1)(a); first-degree felony murder, MCL 750.316(1)(b); first-degree home invasion, MCL 750.110a(2); second-degree murder, MCL 750.317; assault with intent to commit great bodily harm less than murder, MCL 750.84; felony-firearm, MCL 750.227b; and two counts of unlawful imprisonment, MCL 750.349b. The first-degree home invasion was the only predicate offense that supported the felony-murder charge. The jury found defendant guilty on all counts except the charges of first-degree premeditated murder and first-degree home invasion. Defendant appealed. The Court of Appeals, SAAD, P.J., and JANSEN and K. F. KELLY, JJ., reversed his convictions in an unpublished opinion per curiam, issued May 10, 2011 (Docket No. 296693), holding that the trial court had committed error by denying defendant's constitutional right to represent himself, and remanded the case for a new trial. The Supreme Court denied the prosecution's application for leave to appeal. 490 Mich 861 (2011). The prosecution subsequently filed an amended information that set forth as charges all the offenses that defendant had initially been convicted of. Defendant moved to dismiss the felony-murder charge, arguing that the Double Jeopardy Clause prevented a second prosecution on that charge because he had previously been acquitted of the only predicate felony for that crime, the predicate crime being one of the elements of felony murder. The trial court granted defendant's motion to dismiss, agreeing that a second jury could not reconsider the home-invasion element of felony murder given the preclusive effect of defendant's acquittal of first-degree home invasion. Following the granting of the prosecution's interlocutory application for leave to appeal, the Court of Appeals, MURPHY, C.J., and O'CONNELL and WHITBECK, JJ., reversed in an unpublished opinion per curiam, issued November 15, 2012 (Docket No. 311253), reinstated the felony-murder charge, and remanded the case. Citing *United States v Powell*, 469 US 57 (1984), for the proposition that a jury has the prerogative to return inconsistent verdicts, the panel held that because the jury's verdict had been inconsistent, the inconsistency negated the application of the

collateral-estoppel doctrine to the second prosecution. The Supreme Court granted defendant leave to appeal. 494 Mich 853 (2013).

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

The collateral-estoppel strand of the Double Jeopardy Clause prevents the prosecution from charging a defendant with felony murder a second time when the defendant was convicted in the first trial of felony murder but was acquitted of the only predicate felony that supported the felony-murder charge and the felony-murder conviction was subsequently vacated.

1. The Double Jeopardy Clause of the Fifth Amendment protects defendants against the threat of successive prosecutions for the same offense and multiple punishments for the same offense. Collateral estoppel, also known as issue preclusion, is a common-law doctrine that requires that once a court has decided an issue of fact or law necessary to its judgment, the decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. Double jeopardy and collateral estoppel conceptually overlap, and in *Ashe v Swenson*, 397 US 436 (1970), the United States Supreme Court constitutionalized collateral estoppel within the Fifth Amendment's guarantee against double jeopardy. *Ashe* involved a defendant who had been tried and acquitted of robbing one member of a poker game and was subsequently charged with and convicted of the robbing a different poker player. Considering the question of whether a rational jury could have grounded its verdict on an issue other than that which the defendant sought to foreclose from consideration, *Ashe* held that the single rationally conceivable issue in dispute before the jury was whether the defendant had been one of the robbers and that the second prosecution, which necessarily required relitigating this already determined issue, violated the Fifth Amendment. *Yeager v United States*, 557 US 110 (2009), involved a jury that acquitted the defendant of various fraud charges but could not reach a verdict on insider-trading charges. The acquittals and hung counts were therefore logically inconsistent because to have acquitted the defendant of the fraud counts, the jury would have had to decide that he had not possessed insider information, which should have led a rational jury to also acquit him of the insider-trading charges. *Yeager* held that this apparent inconsistency did not change the preclusive force of the acquittal under the Double Jeopardy Clause in a second prosecution because a hung count was not legally meaningful and could not defeat the preclusive force of the acquittals.

2. *Dunn v United States*, 284 US 390 (1932), held that inconsistent verdicts within a single jury trial are permissible because they might have been the result of compromise or a mistake on the part of the jury, but verdicts cannot be upset by speculation or inquiry into those matters. Inconsistent verdicts do not require reversal because juries are not held to any rules of logic and are not required to explain their decisions. *Powell* reaffirmed this principle in the situation of a defendant who had been acquitted of the predicate felony but convicted of the compound felony and argued that the principles of collateral estoppel should be incorporated into an inconsistent-verdict case.

3. Because *Powell* involved an appeal from a single trial, no double jeopardy concerns were present. While the verdict in *Powell* was inconsistent, the doctrine of collateral estoppel was not relevant. Collateral estoppel, like double jeopardy more broadly, necessarily presupposes some passage of time between a final adjudication of an issue at one time and the threat of a subsequent adjudication of the same issue. The Court of Appeals apparently extrapolated from *Powell* the proposition that application of collateral estoppel is only appropriate when there was a prior consistent verdict. Since *Powell* did not concern a second prosecution, however, and therefore no double jeopardy concerns were implicated, the Court of Appeals' reliance on *Powell* to authorize charging defendant with felony murder a second time was misplaced given that his objection sounded in double jeopardy, not the inconsistency of his initial verdict.

4. *Yeager* embodied the proposition that if an issue has been finally resolved at one moment in time, the same issue cannot be resolved differently at a subsequent time. Defendant was acquitted of first-degree home invasion (the only predicate felony that could support a conviction of felony murder and was therefore an element of felony murder), a charge that defendant again faced. Convicting him of felony murder would require the same factual basis as home invasion (of which he had been previously and finally acquitted), which *Yeager* prevents. Given that defendant had been acquitted of home invasion, the prosecution was barred from charging him with that crime again, even though a legal error at his first trial required vacating his convictions. The inconsistency in defendant's initial jury verdict did not alter this fundamental principle given the subsequent appellate reversal of all his convictions. The initial guilty verdicts were gone. Although defendant had been convicted of felony murder, that conviction had since been vacated because it was constitutionally infirm and defendant no longer stood convicted of that crime. The only final

adjudication that would carry into his second trial would be his acquittal of first-degree home invasion, which must be given effect in the retrial under the collateral-estoppel prong of double jeopardy. Defendant's reversed felony-murder conviction here must be treated exactly as the hung counts were treated in *Yeager*. Neither a hung count nor a count that is reversed on appeal can defeat the preclusive effect of an acquittal. Like a hung count, a reversed count is not a final adjudication; by operation of law, the finality of the conviction has been undone. When a legal error requires the reversal of a defendant's convictions, those convictions are no longer adjudications at all. Reversal for trial error, as distinguished from evidentiary sufficiency, does not constitute a decision to the effect that the prosecution failed to prove its case. It implies nothing with respect to the guilt or innocence of the defendant. The same is not true of a defendant's acquittal. An acquittal is never recast or disturbed, no matter what error might have produced it. Defendant would begin his second trial in this case with only one perfected adjudication: his acquittal of first-degree home invasion. The prosecution would be free to retry defendant on all the other vacated convictions, but the Double Jeopardy Clause collaterally estopped a new prosecution for felony murder.

Reversed and remanded.

Justice MARKMAN, joined by Justices ZAHRA and VIVIANO, dissenting, would have affirmed the judgment of the Court of Appeals and permitted the prosecution to retry defendant for first-degree felony murder. Principles of collateral estoppel apply only when a defendant can demonstrate that a rational jury resolved an issue of ultimate fact in the defendant's favor. To prevail on his collateral-estoppel argument, defendant had to demonstrate that the first jury actually and necessarily determined that he had not engaged in conduct satisfying the elements of the predicate offense of first-degree home invasion. When a jury has rendered an inconsistent verdict, however, a defendant is unable to establish that the jury actually and necessarily determined any issue of ultimate fact. Defendant's jury rendered an inconsistent verdict in this case by convicting him of the compound offense of first-degree felony murder while acquitting him of the predicate offense of first-degree home invasion. Accordingly, defendant was unable to satisfy his burden of establishing that the jury actually and necessarily determined an issue of ultimate fact in his favor. That defendant's conviction on the compound offense was subsequently overturned does not alter what factual determinations the jury actually and necessarily resolved in defendant's favor. Despite

the majority's holding to the contrary, *Yeager* was decided in accordance with the holdings of *Powell* and *Dunn* because *Yeager* merely held that a verdict containing acquittals and hung counts is not a truly inconsistent verdict that obviates the use of principles of collateral estoppel. Thus *Yeager* did not require the result that the majority reached in this case. In addition, the majority's conclusion stood apart from the holdings of all other courts that had addressed the issue and was detached from 80 years of federal caselaw concerning constitutional principles of collateral estoppel.

CONSTITUTIONAL LAW — DOUBLE JEOPARDY — FELONY MURDER — SECOND TRIAL — ACQUITTAL OF PREDICATE FELONY.

The collateral-estoppel strand of the Double Jeopardy Clause prevents the prosecution from charging a defendant with felony murder a second time when the defendant was convicted in the first trial of felony murder but acquitted of the only predicate felony that supported the felony-murder charge and the felony-murder conviction was subsequently vacated (US Const, Am V; MCL 750.316(1)(b)).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, and *Joshua D. Abbott*, Chief Appellate Attorney, for the people.

State Appellate Defender (by *Peter Jon Van Hoek*) for defendant.

Amicus Curiae:

Jessica R. Cooper, *Thomas R. Grden*, and *Danielle Walton* for the Prosecuting Attorneys Association of Michigan.

MCCORMACK, J. As this case implicates more than one somewhat complex legal doctrine, it may be useful first to state the practical question we confront in as plain English as possible: Can a defendant whose conviction for felony murder has been reversed on appeal be retried for

that charge when he was also acquitted of the only felony that supported it?

As detailed below, this case turns on the protection afforded by the Double Jeopardy Clause of the United States Constitution. US Const, Am V. This clause protects a criminal defendant from multiple prosecutions and multiple punishments for the same offense. This case also implicates the doctrine of collateral estoppel, which in general imports a final determination from one case into a subsequent case requiring a determination on that same issue. Collateral estoppel and double jeopardy can overlap, and do so here.

We conclude that the collateral-estoppel strand of Double Jeopardy Clause jurisprudence prevents the prosecution from re-charging the defendant with felony murder. Because the defendant's acquittal of the only supporting felony triggers collateral estoppel, the Double Jeopardy Clause precludes a second felony-murder prosecution of the defendant.

I. FACTS AND PROCEDURAL BACKGROUND

In December 2009, the defendant was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b), second-degree murder, MCL 750.317, assault with intent to commit great bodily harm less than murder, MCL 750.84, carrying a firearm during the commission of a felony, MCL 750.227b, and two counts of unlawful imprisonment, MCL 750.349b. The jury acquitted the defendant of first-degree premeditated murder, MCL 750.316(1)(a), and—importantly—first-degree home invasion, MCL 750.110a(2). Because first-degree home invasion was the only *felony* that the defendant was charged with that could have supported the conviction for first-

degree *felony murder*, see MCL 750.316(1)(b), the initial jury verdict was, plainly, inconsistent.

The Court of Appeals reversed the defendant's convictions, holding that the trial court had committed error by denying the defendant's constitutional right to represent himself. *People v Wilson*, unpublished opinion per curiam of the Court of Appeals, issued May 10, 2011 (Docket No. 296693). The Court of Appeals remanded this case to the trial court for a new trial, and this Court denied the prosecution's application for leave to appeal. *People v Wilson*, 490 Mich 861 (2011).

On April 6, 2012, the prosecution filed an amended information setting forth the charges on retrial. The defendant was re-charged with each of the charges of which he was initially convicted. The defendant moved to dismiss the first-degree felony-murder charge, arguing that the Double Jeopardy Clause prevented a second prosecution on that charge because he stood acquitted of the only predicate felony, which is one of the elements of felony murder. On July 6, 2012, the trial court granted the defendant's motion to dismiss, agreeing that a second jury could not reconsider the home-invasion element of felony murder given the preclusive effect of the defendant's acquittal of home invasion.

The Court of Appeals granted the prosecution's interlocutory application for leave to appeal and reversed the trial court's order in an unpublished opinion per curiam. The Court of Appeals held that because the jury's verdict was inconsistent, that inconsistency negated the application of the collateral-estoppel doctrine in the second prosecution, citing *United States v Powell*, 469 US 57, 68; 105 S Ct 471; 83 L Ed 2d 461 (1984), for the proposition that the jury has the prerogative to

return inconsistent verdicts. On May 24, 2013, this Court granted leave to appeal. *People v Wilson*, 494 Mich 853 (2013).

II. LEGAL BACKGROUND

A. DOUBLE JEOPARDY

The Double Jeopardy Clause of the United States Constitution protects defendants against the threat of successive prosecutions for the same offense and multiple punishments for the same offense. US Const, Am V ("No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . .").

A double-jeopardy challenge presents a question of law that this Court reviews de novo. *People v Herron*, 464 Mich 593, 599; 628 NW 2d 528 (2001).

B. COLLATERAL ESTOPPEL

Collateral estoppel, also known as issue preclusion, is a common-law doctrine that gives finality to litigants. In essence, collateral estoppel requires that "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v McCurry*, 449 US 90, 94; 101 S Ct 411; 66 L Ed 2d 308 (1980). See also *Montana v United States*, 440 US 147, 153; 99 S Ct 970; 59 L Ed 2d 210 (1979), citing *Southern Pacific R Co v United States*, 168 US 1, 48-49; 18 S Ct 18; 42 L Ed 355 (1897) ("A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their

privies . . . .' "). The doctrine of collateral estoppel serves many purposes: it "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." *Allen*, 449 US at 94.

In 1970, the United States Supreme Court explicitly recognized the conceptual overlap between double jeopardy and collateral estoppel, and officially linked them by constitutionalizing collateral estoppel within the Fifth Amendment's guarantee against double jeopardy. *Ashe v Swenson*, 397 US 436, 445; 90 S Ct 1189; 25 L Ed 2d 469 (1970). The *Ashe* Court noted, however, that "collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in *United States v. Oppenheimer* [242 US 85; 37 S Ct 68; 61 L Ed 161 (1916)]." *Ashe*, 397 US at 443.[1]

The defendant in *Ashe* had been tried and acquitted of the robbery of one member of a poker game. Following the defendant's acquittal, the prosecution charged him with the robbery of a different poker player, and he was convicted. The Court explained that collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* The question is "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id*. at 444. Because the "single rationally conceivable issue in dispute before the jury was whether the petitioner had

[1] The defendant has not argued that the "same offense" rationale of double jeopardy is implicated. Thus we address only whether the collateral-estoppel strand of double jeopardy is implicated.

been one of the robbers," this second prosecution, which necessarily would have required the relitigation of this already determined issue, violated the Fifth Amendment. *Id*. at 445.

The Supreme Court applied collateral estoppel in the context of a double-jeopardy analysis again in *Yeager v United States*, 557 US 110; 129 S Ct 2360; 174 L Ed 2d 78 (2009). In *Yeager*, a jury acquitted the defendant of certain fraud charges, but could not reach a verdict on the insider-trading charges. The acquittals and hung counts were logically inconsistent with one another; in order to acquit the defendant of the fraud counts, the jury would have had to decide that the defendant had not possessed insider information, which should have led a rational jury to also acquit him of the insider-trading charges. The Court held that this apparent inconsistency did not change the preclusive force of the acquittal in a second prosecution under the Double Jeopardy Clause. "A hung count is not a relevant part of the record of the prior proceeding," and therefore has no place in the collateral-estoppel analysis. *Yeager*, 557 US at 121. In other words, the Court held that the hung counts were not legally meaningful and could not defeat the preclusive force of the acquittals.

C. INCONSISTENT VERDICTS

As with collateral estoppel, the Supreme Court authority concerning the validity of inconsistent jury verdicts is well developed. In *Dunn v United States*, 284 US 390, 393-394; 52 S Ct 189; 76 L Ed 356 (1932), the Court held that inconsistent verdicts within a single jury trial are permissible, explaining "[t]hat the verdict may have been the result of compromise, or of a mistake on the part of the jury . . . . But verdicts cannot be upset by speculation or inquiry into such matters." This

Court has similarly held that inconsistent verdicts do not require reversal, because "[j]uries are not held to any rules of logic nor are they required to explain their decisions." *People v Vaughn*, 409 Mich 463, 466; 295 NW 2d 354 (1980).

The Supreme Court reaffirmed this principle in *Powell*, 469 US 57, rejecting the defendant's argument that the principles of collateral estoppel should require a different result. The defendant, who had been acquitted of the predicate felony but convicted of the compound felony, argued that principles of collateral estoppel should be incorporated into the inconsistent verdict case and should require the reversal of the compound-felony conviction. *Id*. at 64 ("[I]ndeed, [the defendant] urges that principles of res judicata or *collateral estoppel should apply to verdicts rendered by a single jury*, to preclude acceptance of a guilty verdict on a [compound felony] where the jury acquits the defendant of the predicate felony.") (emphasis added). The Court disagreed with the defendant, noting that in the case of an inconsistent verdict, "it is unclear whose ox has been gored." *Id*. at 65. The defendant's conviction stood.

III. APPLICATION

Our decision in this case hinges on whether, as the Court of Appeals held, the inconsistent-verdict reasoning of *Dunn* and *Powell* is relevant to the defendant's collateral-estoppel claim such that the rule from *Ashe* and *Yeager* does not apply. As an initial matter, we note that the inconsistent-verdict cases, *Dunn* and *Powell*, feature only direct appeals from a single jury verdict. By definition, collateral estoppel and double jeopardy are simply not applicable to a single verdict, even when that verdict is inconsistent. *Ashe* and *Yeager*, in contrast, each concerned the propriety of a second prosecution.

The very application of the Double Jeopardy Clause necessarily requires more than one trial: Again, double jeopardy is irrelevant within the scope of a single prosecution and the resulting verdict because the defendant is in continuing jeopardy in any single trial. *Yeager*, 557 US at 117; *id*. at 130 (Scalia, J., dissenting) ("As a conceptual matter, it makes no sense to say that events occurring within a single prosecution can cause an accused to be twice put in jeopardy.") (citation and quotation marks omitted).[2] See also *Boston Muni Court Justices v Lydon*, 466 US 294, 308-309; 104 S Ct 1805; 80 L Ed 2d 311 (1984).[3] Relatedly, if a defendant's conviction is reversed on direct appeal, a second prosecution does not implicate double-jeopardy concerns, because in that instance too the defendant is still in continuing jeopardy. In a second prosecution following an appellate reversal, only "[a]cquittals, [not] convictions, terminate the initial jeopardy." *Lydon*, 466 US at 308.

Because *Powell* involved an appeal from a single trial, no double-jeopardy concerns were present, despite the

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[2] The dissent is correct that Justice Scalia relied on *Dunn* and *Powell* "to support his position that the inconsistent nature of the verdict in *Yeager* nullified *Yeager*'s reliance on the valid and final acquittal for collateral estoppel purposes." Justice Scalia's view, however reasonable, is not the rule of law we must apply here as he, of course, dissented in *Yeager*. We cite Justice Scalia's dissent for the unremarkable proposition that double-jeopardy concerns are only implicated when there is a second trial.

[3] There is one exception: in two cases the Supreme Court has applied the Double Jeopardy Clause to midtrial acquittals. In both instances, the Court held that the midtrial acquittals were final and that the Double Jeopardy Clause barred their reconsideration. *Smith v Massachusetts*, 543 US 462, 473; 125 S Ct 1129; 160 L Ed 2d 914 (2005); *Smalis v Pennsylvania*, 476 US 140, 145-146; 106 S Ct 1745; 90 L Ed 2d 116 (1986). These exceptions are, of course, inapplicable to this case in which there was no mid-trial acquittal. Indeed, *Smith* and *Smalis* support the more important proposition for the defendant, that acquittals are final and unassailable in the application of the Double Jeopardy Clause.

defendant's attempt to make them relevant. *Powell*, 469 US at 64. While the verdict in *Powell* was inconsistent, the doctrine of collateral estoppel was not relevant. *Dunn*, 284 US at 393. Collateral estoppel, like double jeopardy more broadly, necessarily presupposes some passage of time between a final adjudication of an issue at one time, and the threat of a subsequent adjudication of the same issue. In this case, the Court of Appeals apparently extrapolated from *Powell* the proposition that application of collateral estoppel is only appropriate when there was a prior *consistent* verdict. Since *Powell* did not concern a second prosecution, and therefore no double-jeopardy concerns were implicated, the inconsistent-verdict analysis that *Powell* provides does not address the important issue presented in the case at hand.[4] The Court of Appeals' reliance on *Powell* to authorize re-charging the defendant with felony murder was misplaced, given that his objection sounded in double jeopardy, not the inconsistency of his initial verdict.

It is instead the *Yeager* holding that demonstrates why the prosecution cannot re-try the defendant for felony murder. *Yeager* embodies the unremarkable but fundamental proposition that if an issue has been finally resolved at one moment in time, the same issue cannot be resolved differently at a subsequent time. The defendant in this case finds himself facing exactly

[4] We agree with the dissent that the Supreme Court squarely and thoroughly addressed whether collateral-estoppel principles are relevant to inconsistent verdicts in *Powell*, but we are not similarly troubled by why the Court did so given that double-jeopardy concerns are simply not applicable within the scope of a single trial. The defendant made the argument that collateral estoppel should bar his inconsistent verdict and managed to convince the United States Court of Appeals for the Ninth Circuit of his view. The Supreme Court disagreed, and naturally explained its reasoning.

this problem; he stands acquitted of first-degree home invasion, the only predicate felony that could support a conviction for felony murder and which is thus an element of felony murder, a charge he is facing again. Convicting him of felony murder would, therefore, require the same factual basis as home invasion, for which he was previously and finally acquitted. This is what *Yeager* prevents.

The importance of an acquittal in the context of the Double Jeopardy Clause is well established. It is of course long settled that, given his acquittal of home invasion, the prosecution is barred from re-charging the defendant again with home invasion, even though the legal error at trial required vacating his convictions. That error does not permit him to be retried for home invasion, even had the error contributed to his acquittal of that charge just as it contributed to his convictions (which does not seem to be the case here). An acquittal is final and unassailable; double jeopardy is a one-way ratchet. *Ball v United States*, 163 US 662, 671; 16 S Ct 1192; 41 L Ed 300 (1896) ("The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the constitution. However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense."). See also *Fong Foo v United States*, 369 US 141, 143; 82 S Ct 671; 7 L Ed 2d 629 (1962) (finding an acquittal to be an absolute bar to a subsequent prosecution even when the acquittal was "based upon an egregiously erroneous foundation"); *United States v DiFrancesco*, 449 US 117, 129; 101 S Ct 426; 66 L Ed 2d 328 (1980) ("The law attaches particular significance to an acquittal."); *Yeager*, 557 US at 119 ("[T]he jury's acquittals unquestionably terminated

petitioner's jeopardy with respect to the issues finally decided in those counts.").

The inconsistency in the defendant's initial jury verdict here—though distracting and confounding as illogical verdicts are—does not alter this fundamental principle, given the subsequent appellate reversal of his convictions. Notwithstanding the dissent's lengthy protest to the contrary, the initial guilty verdicts are no more. Although the defendant was convicted of felony murder, that conviction has since been vacated because it was constitutionally infirm; the defendant no longer stands convicted, not of anything, not at all. The only final adjudication the defendant carries into his second trial, then, is his acquittal of first-degree home invasion, which must be given effect pursuant to the collateral-estoppel prong of double jeopardy in the retrial. *Lydon*, 466 US at 308.

Yeager thus controls: The defendant's reversed felony-murder conviction here must be treated exactly as the hung counts were treated in *Yeager*. Neither a hung count nor a count that is reversed on appeal can defeat the preclusive effect of an acquittal. Like a hung count, a reversed count is not a final adjudication; by operation of law the finality of the conviction has been undone. By holding that a legal error required the reversal of a defendant's convictions, we have legally proclaimed that those convictions are no longer adjudications at all.[5] Indeed, the legal meaning of a reversed conviction is settled. As the Supreme Court has said:

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[5] We know of no other situation in a criminal prosecution in which we permit a defendant's vacated conviction to be used to the defendant's detriment and see no reason why we should create an exception. See, e.g., *People v Holt*, 54 Mich App 60, 63-64; 220 NW2d 205 (1974) (stating that a vacated conviction cannot be used for sentencing purposes); *People v Crable*, 33 Mich App 254, 257; 189 NW2d 740 (1971) (stating that a vacated conviction cannot be used to impeach a defendant).

> [R]eversal for trial error, as distinguished from evidentiary sufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect . . . . [*Burks v United States*, 437 US 1, 15; 98 S Ct 2141; 57 L Ed 2d 1 (1978) (emphasis added).][6]

The same is not true of the defendant's acquittal. An acquittal is never recast or disturbed, no matter what error might have produced it. *Ball*, 163 US at 671. The defendant begins his second trial with only one perfected adjudication—his acquittal of first-degree home invasion. Just as in *Yeager*, the acquittal must be given preclusive effect.[7] Our disagreement with the dissent

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[6] We disagree with the dissent's understanding of *Burks*: *Burks* stands for the proposition that a reversed conviction is legally meaningless, which is what matters for our purposes. Of course it is always the case that "society maintains a valid concern for insuring that the guilty are punished," *Burks*, 437 US at 15, and that concern animates the authority that permits the prosecution to retry the defendant for all of the offenses that were vacated but for which there is no double-jeopardy constraint. In this case it is only the felony-murder charge that is barred on retrial, not second-degree murder, assault with intent to commit great bodily harm less than murder, carrying a firearm during the commission of a felony, and two counts of unlawful imprisonment. The defendant remains in continuing jeopardy on these vacated convictions, and would so remain with respect to his felony-murder conviction but for the preclusive force of his home-invasion acquittal.

[7] The *Yeager* Court's discussion of the rationality of verdicts in determining whether collateral estoppel applies is not particularly relevant here, where there is only one verdict to consider. It is noteworthy, however, that the jury verdict in *Yeager* was not obviously rational or consistent. The Supreme Court instead rationalized the verdict by treating the hung counts, which were inconsistent with the acquittals, as legal "nonevents," given that they were not final adjudications. The Court of Appeals' reversal of the defendant's felony-murder conviction in this case renders that conviction a "nonevent" as well. A reversed conviction is of even less legal consequence than a hung count. Although it is understandable that the Supreme Court

boils down to exactly this point: The dissent believes that a legally vacated conviction is still meaningful for the purposes of collateral-estoppel analysis.[8] We see no available way to bring that legally vacated conviction back to life.[9]

The prosecution is free to retry the defendant on all the other vacated convictions. But the Double Jeopardy Clause collaterally estops a new prosecution for felony murder.

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would need to dedicate some time to analyzing the proper weight to give a hung count—an undisturbed jury "determination" of a sort—at the time of the defendant's second trial when analyzing how to give meaning to a jury's findings, it is much easier to determine what weight should be given a reversed conviction—none. *Burks*, 437 US at 15. A reversed conviction, like a hung count, cannot be considered a relevant part of the record of the prior proceeding. See *Yeager*, 557 US at 121.

[8] The *Yeager* and *Ashe* Courts were not considering *vacated* convictions in their collateral-estoppel analyses, of course, but undisturbed jury findings. Those undisturbed findings, therefore, were still available for discernment. In cases, like *Yeager* and *Ashe*, in which there is an undisturbed jury verdict to examine at the time of retrial, a reviewing court must delve into the facts and circumstances of the jury's findings in order to understand the verdict's specific meaning. When, as here, there simply is no conviction to be so analyzed, as it was previously vacated by the Court of Appeals, we are bound by that legal finding. We cannot undo the reversal and delve back into a jury finding that has been held to be invalid. The dissent jumps over this critical step. Because a reversal renders a conviction meaningless, there is nothing left for a reviewing court to examine or decipher.

[9] Neither *State v Kelly*, 201 NJ 471; 992 A2d 776 (2010), nor *Evans v United States*, 987 A2d 1138 (DC, 2010), are helpful to our analysis. Although the dissent is correct that these cases involve similar facts, neither engages the argument that a vacated conviction functions as a proclamation that a jury determination is a legal nullity. It is difficult to understand whether *United States v Bruno*, 531 Fed Appx 47, 49 (CA 2 2013), has any persuasive force, given that it is an unpublished order devoid of any specific factual background as to the nature of the convicted and acquitted counts. But from the cursory facts that are presented, it does not appear that the charges decided differently involved the same conduct or subject matter, which would alone foreclose a collateral-estoppel claim. Of course we are not bound by any opinion from a sister jurisdiction reaching the opposite conclusion that we reach here, especially when none addresses the issue we find decisive.

IV. CONCLUSION

We conclude that the Double Jeopardy Clause prevents the prosecution from re-charging the defendant with felony murder when the only verdict that remains is the defendant's acquittal of the predicate felony. Therefore, we reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings.

YOUNG, C.J., and CAVANAGH and KELLY, JJ., concurred with MCCORMACK, J.

MARKMAN, J. (*dissenting*). Defendant, armed with a handgun, entered his ex-girlfriend's apartment while she was out with another man, Kenyetta Williams. Defendant lay in wait for his ex-girlfriend to return, and when she did so with Williams, he fired his handgun three times, killing Williams. Defendant's charges included first-degree premeditated murder, first-degree felony murder predicated on first-degree home invasion, second-degree murder, and first-degree home invasion.

Defendant sought to represent himself at his first trial, but the trial court denied his motion to do so. Defendant's first trial resulted in the jury's convicting him of first-degree felony murder and second-degree murder, but acquitting him of first-degree premeditated murder and first-degree home invasion. Because the offense of first-degree felony murder was predicated on the first-degree home invasion charge, and the jury could only rationally convict defendant of first-degree felony murder if it also convicted defendant of first-degree home invasion, the verdict rendered by the jury was inconsistent and irrational. Defendant appealed his convictions for first-degree felony murder and second-degree murder, contending that he was denied his right

to represent himself as guaranteed by the Sixth Amendment. The Court of Appeals reversed defendant's convictions and remanded for a new trial on the first-degree felony murder charge and the second-degree murder charge.[1] *People v Wilson*, unpublished opinion per curiam of the Court of Appeals, issued May 10, 2011 (Docket No. 296693).

Back before the trial court, defendant moved to dismiss the first-degree felony murder charge on the theory that retrial was barred by the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution because defendant's first jury had acquitted him of the felony of first-degree home invasion on which the first-degree felony murder charge was predicated. The trial court granted defendant's motion, but the prosecutor filed an interlocutory appeal and the Court of Appeals reversed. *People v Wilson*, unpublished opinion per curiam of the Court of Appeals, issued November 15, 2012 (Docket No. 311253). This Court then granted leave to appeal on the question whether the protection against double jeopardy found in the Fifth Amendment prevents retrial of a compound offense when the first trial resulted in the jury's convicting defendant of such offense but acquitting defendant of the predicate offense and the conviction on the compound offense was subsequently overturned.[2] *People v Wilson*, 494 Mich 853 (2013). Defendant asks

[1] As defendant's first jury acquitted him of first-degree premeditated murder and first-degree home invasion, retrial on those offenses was barred by the Double Jeopardy Clause of the Fifth Amendment. Retrial on those charges is not at issue in this appeal, and the jury's verdicts of acquittal of first-degree premeditated murder and first-degree home invasion have been given full effect.

[2] A "compound offense" is one that has as an element the commission of some other enumerated offense. *People v Robideau*, 419 Mich 458, 508 n 7; 355 NW2d 592 (1984) (CAVANAGH, J., dissenting). The enumerated offense is the "predicate offense."

this Court to answer that question in the affirmative, on the basis of the collateral-estoppel strand of the Double Jeopardy Clause. See *Ashe v Swenson*, 397 US 436, 445-446; 90 S Ct 1189; 25 L Ed 2d 469 (1970).[3]

I. COLLATERAL ESTOPPEL

A. PRINCIPLES

The seminal case involving collateral estoppel and the protection against double jeopardy is *Ashe*. In *Ashe*, the prosecutor believed that the defendant and several other masked persons broke into a house and participated in the robbery of six individuals. *Id*. at 437. The prosecutor put the defendant on trial for the robbery of one of the six individuals. *Id*. at 438. The sole defense raised was that the defendant was not one of the masked persons who had participated in the robbery, *id*. at 438-439, and the jury acquitted him. *Id*. at 439. Despite the acquittal, the prosecutor brought a new charge against the defendant for the robbery of another of the individuals who had been robbed. *Id*. After the defendant's second trial resulted in a conviction, he contended that his first jury had determined that he was not a participant in the robbery and to convict him of the robbery of the second individual would be to derogate the finding made by the first jury about whether the defendant participated in the robbery. *Id*. at 440.

Before *Ashe*, collateral estoppel had not been viewed as a basis for raising a double jeopardy claim. *Id*. at 440-441, citing *Hoag v New Jersey*, 356 US 484; 78 S Ct

[3] Defendant specifically eschews any reliance on the argument that first-degree felony murder and the predicate offense of first-degree home invasion are the "same offense" for double jeopardy purposes. See *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

829; 2 L Ed 2d 913 (1958). *Ashe*, however, concluded that the doctrine of collateral estoppel is "embodied in the Fifth Amendment guarantee against double jeopardy" and prohibits a retrial when "an issue of ultimate fact has once been determined by a valid and final judgment, [such that the] issue cannot again be litigated between the same parties in any future lawsuit." *Ashe*, 397 US at 443, 445-446.

When the doctrine of collateral estoppel has been invoked by defendant, "[t]he burden is 'on [him] to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding.' " *Schiro v Farley*, 510 US 222, 233; 114 S Ct 783; 127 L Ed 2d 47 (1994), quoting *Dowling v United States*, 493 US 342, 350; 110 S Ct 668; 107 L Ed 2d 708 (1990).[4] In assessing a defendant's reliance on a verdict of acquittal and the doctrine of collateral estoppel, a court must

> "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a *rational jury* could have grounded its verdict upon an issue *other* than that which the defendant seeks to foreclose from consideration." [*Ashe*, 397 US at 444, quoting Mayers & Yarbrough, Bis

[4] The majority opinion entirely overlooks that *defendant* bears the burden of demonstrating what issues of ultimate fact were decided during the first trial. This causes it to embark upon its analysis from the wrong starting point—whether defendant is being denied his double jeopardy rights rather than whether defendant has made out his collateral-estoppel defense—leading it to the mistaken conclusion that retrying defendant on the first-degree felony murder charge would amount to using his subsequently reversed conviction against him. When the burden is rightly placed on defendant to demonstrate that the first jury resolved an "issue of ultimate fact" in his favor, the jury's verdict convicting defendant of first-degree felony murder cannot properly be said to have been "used to [his] detriment." After all, it is *defendant* in these circumstances who has come forward and who seeks to rely on the verdict containing the first-degree felony murder conviction.

Vexari: New Trials and Successive Prosecutions, 74 Harv L Rev 1, 38-39 (1960) (emphasis added).]

Put another way, a defendant will only prevail in sustaining his burden when the court, " 'with an eye to *all the circumstances* of the proceedings' " is convinced that the first jury, in acquitting the defendant, resolved the issue of ultimate fact in defendant's favor. *Ashe*, 397 US at 444, quoting *Sealfon v United States*, 332 US 575, 579; 68 S Ct 237; 92 L Ed 180 (1948). In this sense, *Ashe*, by inquiring what a "rational jury" determined, premised defendant's invocation of collateral estoppel on the existence of a rational jury whose verdict has a singular and unmistakable explanation favoring defendant on the issue of ultimate fact.

Conversely, if "[t]here are *any number* of possible explanations for the jury's acquittal verdict at [defendant's] first trial," he will be unable to satisfy his burden and the doctrine of collateral estoppel will not preclude relitigation of the issue from the first verdict upon which defendant seeks to rely. *Dowling*, 493 US at 352 (emphasis added.). In other words, "unless the record establishes that the issue was *actually* and *necessarily* decided in the defendant's favor," the issue may be relitigated without offending the Fifth Amendment guarantee against double jeopardy. *Schiro*, 510 US at 236 (emphasis added). To assess whether an issue of ultimate fact was "actually and necessarily decided in the defendant's favor," a court must "scrutinize a jury's decisions." *Yeager v United States*, 557 US 110, 123; 129 S Ct 2360; 174 L Ed 2d 78 (2009). Relevant to this case, for defendant to prevail on his collateral-estoppel argument, he must demonstrate that the first jury "actually and necessarily" determined that he had not engaged in conduct satisfying the elements of the predicate offense of first-degree home invasion.

B. INCONSISTENT VERDICTS

The United States Supreme Court has had multiple opportunities to discuss whether a defendant can satisfy his burden of demonstrating that an issue of ultimate fact was actually and necessarily determined by a jury that rendered a "truly inconsistent" verdict. See *United States v Powell*, 469 US 57, 64; 105 S Ct 471; 83 L Ed 2d 461 (1984); *Dunn v United States*, 284 US 390; 52 S Ct 189; 76 L Ed 356 (1932). As background, *Dunn* involved a defendant charged with three counts: (1) "maintaining a common nuisance by keeping for sale at a specified place intoxicating liquor;" (2) "unlawful possession of intoxicating liquor;" and (3) "unlawful sale of such liquor." *Dunn*, 284 US at 391. The jury convicted the defendant of the first count but acquitted him of the second and third counts. *Id*. at 391-392. The defendant argued that when the evidence supporting each of the three counts was essentially identical, his conviction on the first count should be discharged on the basis of his acquittals on the second and third counts. *Dunn* held that "[c]onsistency in the verdict is not necessary" for the verdict to be valid. *Id*. at 393. In doing so, it stated that "an acquittal on one [of the counts] could not be pleaded as res judicata of the other." *Id*.[5]

Powell involved an even more logically inconsistent verdict in which the jury convicted the defendant of several compound offenses while acquitting her of several predicate offenses required to be proved to sustain the convictions for the compound offenses. *Powell*, 469

[5] This Court similarly has upheld the validity of inconsistent verdicts and rejected a defendant's attempt to employ a verdict's inconsistent character to undermine charges for which he had been *convicted* by way of charges for which he had been *acquitted*. *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980).

US at 60-61.[6] Relying on *Ashe*, Powell argued that the jury's verdict of acquittal on the predicate offense collaterally estopped the jury from convicting her of the compound offense. *Id*. at 64. In assessing the jury verdict, the United States Supreme Court noted that when a jury has rendered an inconsistent verdict, "the verdict[] cannot rationally be reconciled." *Id*. at 69. This is so because when a jury renders an inconsistent verdict, the jury has acted in "error" or with "irrationality" in that it has not accurately or faithfully followed the jury instructions in applying the law to its factual conclusions. See *id*. at 65, 67 ("Inconsistent verdicts therefore present a situation where 'error,' in the sense that the jury has not followed the court's instructions, most certainly has occurred . . . .") That the jury verdict is the product of "error" or "irrationality" has fatal consequences for a defendant's ability to rely on the verdict to show that an issue of ultimate fact has been resolved in the defendant's favor:

> The problem is that the same jury reached inconsistent results; once that is established, principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful. [*Id*. at 68]

Accordingly, the Court rejected Powell's double jeopardy argument premised on collateral estoppel, uphold-

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[6] Notably, the inconsistency in the verdict in the instant case is the same as the inconsistency in the verdict in *Powell*. Wilson was convicted of first-degree felony murder but acquitted of home invasion (the predicate-felony), and Powell was convicted of the "compound offenses" of using the telephone in committing and in causing and facilitating certain felonies—conspiracy to possess with intent to distribute and possession with intent to distribute cocaine—but acquitted of conspiracy to knowingly and intentionally possess with intent to distribute cocaine and possession of cocaine with intent to distribute (the predicate felonies).

ing her conviction for the compound offense despite the jury's acquittal on the predicate offense.

The reason that "principles of collateral estoppel . . . are no longer useful" when there is an inconsistency in the verdict relied on by the defendant for an issue of ultimate fact is that it is simply not possible to apprehend whether the jury resolved the issue of ultimate fact in the defendant's favor in accordance with the part of the verdict acquitting the defendant, or in the prosecutor's favor in accordance with the part of the verdict convicting the defendant. Pertinent to the verdict in the instant case, it is simply not possible to apprehend whether the jury resolved the issue of ultimate fact in defendant's favor in accordance with the part of the verdict acquitting him of first-degree home invasion, or in the prosecutor's favor in accordance with the part of the verdict convicting him of first-degree felony murder, a charge necessarily encompassing a finding that he had "engaged in conduct satisfying the elements of the predicate offense of first-degree home invasion."

It is well understood that there are multiple potential explanations for why juries sometimes render inconsistent verdicts. At least some (if not most) of these explanations fail to support the conclusion that the jury "actually and necessarily" decided an issue of ultimate fact in the defendant's favor. Perhaps, the most commonplace explanation for why a jury might do this is that the jury simply sought to grant the defendant some degree of mercy or lenity.[7] Speaking to the jury's mindset in this regard, *Dunn* stated:

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[7] As the majority opinion appears to believe that the particular explanation for an inconsistent verdict is irrelevant once the convictions have been reversed, it never affords consideration to what might have caused the jury here to render an inconsistent verdict. Under this analysis, even if it were *known* with certainty that the jury had acquitted defendant of the predicate offense out of mercy or lenity, the majority opinion would

> "The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity." [*Dunn*, 284 US at 393, quoting *Steckler v United States*, 7 F2d 59, 60 (CA 2, 1925)][8]

Obviously, when mercy or lenity are the precipitating causes of a jury's inconsistent verdict, it becomes impossible to argue that it has "actually and necessarily decided the issue of ultimate fact in defendant's favor." Indeed, when an inconsistent verdict is the product of mercy or lenity by the jury, the exact opposite conclusion must result, to wit, that the jury "actually and necessarily decided the issue of ultimate fact *against* defendant," for had it not, there would be no need for mercy or lenity.

Other typical explanations for why a jury might have rendered an inconsistent verdict are equally of little

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still reach the same conclusion, barring retrial of the first-degree felony murder charge based on the acquittal of the first-degree home invasion charge.

[8] This Court has similarly concluded that mercy and lenity are the most likely explanations for why a jury might render an inconsistent verdict:

> Juries are not held to any rules of logic nor are they required to explain their decisions. The ability to convict or acquit another individual of a crime is a grave responsibility and an awesome power. An element of this power is the jury's capacity for leniency. Since we are unable to know just how the jury reached their conclusion, whether the result of compassion or compromise, it is unrealistic to believe that a jury would intend that an acquittal on one count and conviction on another would serve as the reason for defendant's release. . . . But we feel that the mercy-dispensing power of the jury may serve to release a defendant from some of the consequences of his act without absolving him of all responsibility. [*People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980) (citations omitted).]

avail in a defendant's attempt to demonstrate that the jury "actually and necessarily decided an issue of ultimate fact in defendant's favor." For instance, in *Powell* it was suggested that in addition to lenity, "mistake" or "compromise" might well explain why a jury has rendered an inconsistent verdict. *Powell*, 469 US at 65. However, when an inconsistent verdict is the product of a mistake, it is impossible to know whether a jury mistakenly *convicted*, or mistakenly *acquitted*, defendant because it is "unclear whose ox has been gored"—the prosecutor's or the defendant's—by the mistake. *Id*. And when an inconsistent verdict is the product of compromise, a jury simply cannot be said even to have decided any issue of ultimate fact.

In the end, the mere fact alone that there *are* myriad explanations for why a jury has rendered an inconsistent verdict only underscores that there is no way of determining whether such a jury has "actually and necessarily decided the ultimate issue of fact upon which defendant seeks to rely." It is for this reason that it is usually as possible that a jury determined the issue of ultimate fact *against* defendant as that the jury determined the issue of ultimate fact in *favor* of defendant:

> The rule that the defendant may not upset [an inconsistent] verdict embodies a prudent acknowledgment of a number of factors. First, . . . inconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then . . . arrived at an inconsistent conclusion on the lesser offense.

* * *

> Second, respondent's argument that an acquittal on a predicate offense necessitates a finding of insufficient evidence on a compound felony count simply misunderstands the nature of the inconsistent verdict problem. . . . [Defendant's] argument necessarily assumes that the acquittal on the predicate offense was proper—the one the jury "really meant." This, of course, is not necessarily correct; all we know is that the verdicts are inconsistent. The Government could just as easily—and erroneously—argue that since the jury convicted on the compound offense the evidence on the predicate offense must have been sufficient. [*Id*. at 65-68.]

Just as a prosecutor is unable to prevail on a collateral-estoppel argument by relying on the convicted charges to seek retrial on the acquitted charges, a defendant in support of a claim of collateral estoppel is unable to rely on the acquitted charges to avoid retrial on the convicted charges. *Id*. When the burden of proof is on the defendant to sustain the claim of collateral estoppel, the inconsistency in the verdict, which prevents a reviewing court from knowing with any certainty what the defendant's jury actually and necessarily determined, will foreclose the defendant's ability to prevail on the claim.

The verdict here on which defendant relies for his collateral-estoppel defense was genuinely inconsistent. Because the jury convicted defendant of first-degree felony murder predicated on the first-degree home invasion charge but acquitted him of first-degree home invasion, it is not possible to know what determination it "actually and necessarily" made regarding whether defendant engaged in conduct satisfying the elements of first-degree home invasion. The appellate reversal of defendant's conviction for first-degree felony murder because he was not permitted to represent himself during his first trial neither alters what factual findings the jury actually and necessarily made nor enables any rationality to be ascribed to the jury's verdict.

II. RESPONSE TO MAJORITY OPINION

The majority opinion offers three arguments for why *Powell* and *Dunn* are not "relevant" to the instant case: (1) *Powell*'s and *Dunn*'s discussions of the doctrine of collateral estoppel took place within the context of a single trial and should not be applied when, as here, a second trial is involved, (2) *Powell* and *Dunn* are in conflict with *Ashe* and *Yeager*, which should control this case, and (3) reliance on *Powell* and *Dunn* to defeat defendant's collateral-estoppel defense would alter the "legal meaning" given to defendant's reversed conviction and in so doing conflict with *Burks v United States*, 437 US 1; 98 S Ct 2141; 57 L Ed 2d 1 (1978).

A. MULTIPLE TRIALS

The majority opinion distinguishes *Powell* and *Dunn* on the grounds that they "feature only direct appeals from a single jury verdict" and that principles of "collateral estoppel and double jeopardy are simply not applicable to a single verdict." There is no dispute that principles of collateral estoppel and double jeopardy have no place within the context of a single trial, but the majority opinion fails to ever consider why this is so. In overlooking this basic question, the majority opinion erroneously dismisses *Powell*'s and *Dunn*'s counsel regarding the interplay between inconsistent verdicts and collateral estoppel.

The only time a defendant might, even theoretically, advance a claim of collateral estoppel within the context of a single trial is when a jury has rendered an inconsistent verdict. This is because, in order for a defendant to advance a claim of collateral estoppel, he must first identify an issue of ultimate fact that the jury has resolved in his favor. The only time he can identify such

an issue is when the jury has (a) acquitted the defendant or (b) acquitted the defendant of a charge that shares a disputed issue of ultimate fact with another charge of which the jury convicted the defendant, thus producing an inconsistent verdict. No explanation is required for why the defendant would lack cause, or justiciable interest, to appeal a full acquittal. Therefore, the only time a defendant might attempt to raise a collateral-estoppel argument on direct appeal in the single trial context is when the jury has rendered an inconsistent verdict. Accordingly, the *reason* that principles of collateral estoppel have no place within the context of a single trial is because of the holdings from *Powell* and *Dunn* that principles of collateral estoppel are "no longer useful" when the jury has rendered an inconsistent verdict, the one and only scenario in which a defendant might even theoretically attempt to raise a collateral-estoppel defense within the context of a single trial.

If *Powell* and *Dunn* stand only for what the majority opinion views as the pedestrian proposition that collateral estoppel and double jeopardy have no relevance in the context of a single trial, then what explains the United States Supreme Court's decision to discuss at length in those cases principles of collateral estoppel and inconsistent verdicts and ground its holdings on those very issues? If the majority opinion's position regarding *Powell*'s significance is correct, the unanimous Court in *Powell* could have easily authored a one-page opinion stating that (a) *Dunn* allowed for inconsistent verdicts and (b) principles of double jeopardy never apply within the context of a single trial because the defendant has only been tried once. Instead, however, the Court clearly, and without any qualification, announced that when the jury renders a truly inconsistent verdict, principles of collateral estop-

pel are "no longer useful." *Powell*, 469 US at 68.[9] It is only as a result of *this* conclusion that *Powell* effectively determined that principles of collateral estoppel and double jeopardy have no place within a single trial. As such, there is no obvious reason that *Powell*'s holding should be limited to cases involving a single trial because to do so would be to divorce *Powell*'s reasoning from the effect of *Powell*'s rule.

The majority opinion's narrow reading of *Powell* is all the more perplexing in light of what Supreme Court caselaw after *Powell* has understood *Powell* to represent. See *part* II(B) of this opinion. In this respect, *Powell*'s rule is not in conflict with other cases examining principles of collateral estoppel, but is in full concert with the manner in which other cases understand how and when principles of collateral estoppel prevent the retrial of a defendant.

B. *POWELL* CONSISTENT WITH *YEAGER* AND *ASHE*

Yeager is the most recent United States Supreme Court case to apply collateral-estoppel principles within the context of the Double Jeopardy Clause. The defendant in *Yeager* was charged with various counts of fraud and insider trading predicated on the fraud. *Yeager*, 557 US at 113. His first trial resulted in the jury's acquitting him of the predicate fraud offenses but not reaching a verdict on the compound offense of insider trading. *Id*. at 115. When the government sought to retry the defendant on the insider-trading charge, he sought to dismiss the prosecution on double jeopardy grounds. *Id*. He argued that principles of collateral estoppel barred retrial of the compound offenses on which the

[9] Notably, the majority opinion fails to give any weight to *Powell's unequivocal statement on this point.*

jury had been hung given that the jury had acquitted defendant of the predicate offenses. *Id*.

At issue was whether a verdict encompassing acquittals and hung counts is the type of verdict from which a court can conclude that the jury "actually and necessarily determined an issue of ultimate fact" such that principles of collateral estoppel would preclude retrial of the hung counts, *id*. at 118-119, or whether such a verdict instead implicates *Powell*'s holding that principles of collateral estoppel do not apply within the context of an inconsistent verdict, *id*. at 124-125. *Yeager* held that a verdict consisting of acquittals and *hung counts* (as opposed to a verdict consisting of acquittals and *convictions*) was not a truly inconsistent verdict, but was only "seemingly inconsistent" and not indicative of a jury that had acted irrationally, such that principles of collateral estoppel were applicable. *Id*. at 122-123. Nonetheless, *Yeager* once again emphasized that principles of collateral estoppel are only applicable when the jury's verdict is consistent and rational, and premised its application of collateral estoppel on being able to ascribe sufficient consistency and rationality to the verdict rendered by the jury in the defendant's case. *Id*. at 123-125.

In speaking of the proposition of law for which *Powell* stands, *Yeager* stated that *Powell* "reason[ed] that issue preclusion is 'predicated on the assumption that the jury acted rationally.' " *Yeager*, 557 US at 124, quoting *Powell*, 469 US at 68. In distinguishing *Powell* from *Yeager*, the Supreme Court's *sole* focus was on the rationality/irrationality of the verdicts in each case and *not* on the fact that *Powell* involved a single trial while *Yeager* involved the retrial of a defendant. Indeed, not a single justice saw fit to concur in *Yeager* for the purpose of distinguishing that decision from *Powell* on

single/multiple trial grounds. No substantive reference to this reading of *Powell* can be found anywhere in *Yeager*'s majority, concurring, or dissenting opinions.[10]

Yeager rejected the government's attempt to rely on *Powell* to label the verdict in *Yeager* as inconsistent because to do so would take "*Powell*'s treatment of inconsistent *verdicts* and import[] it into an entirely different context involving both *verdicts* and seemingly inconsistent *hung counts*." *Id*. In rejecting the government's reliance on *Powell*, the Court noted that relevant to the question of what facts the jury has, in fact, determined, a hung count "is evidence of nothing—other than, of course, that [the jury] has failed to decide anything." *Id*. at 125. In considering the range of

[10] The majority opinion quotes Justice Scalia's dissent in *Yeager* for the proposition that "[a]s a conceptual matter, it makes no sense to say that events occurring within a single prosecution can cause an accused to be 'twice put in jeopardy.' " This quotation, however, is removed from context as the next three sentences of Justice Scalia's dissent proceed to discuss how *Dunn* and *Powell* accepted the validity of inconsistent verdicts, but rejected the application of collateral estoppel in the context of an inconsistent verdict. *Yeager*, 557 US at 130 (Scalia, J., dissenting). Thus, Justice Scalia ultimately relied on *Dunn* and *Powell*, as well as on *Ashe*, to support his position that the inconsistent nature of the verdict in *Yeager* nullified Yeager's reliance on the valid and final acquittal for collateral-estoppel purposes:

> And our cases, until today, have acknowledged that. Ever since *Dunn v. United States*, 284 U.S. 390, 393 (1932), we have refused to set aside convictions that were inconsistent with acquittals in the same trial; and we made clear in *United States v. Powell*, 469 U.S. 57, 64–65 (1984), that *Ashe* does not mandate a different result. There is no reason to treat perceived inconsistencies between hung counts and acquittals any differently. [*Id.]*

When read in full, Justice Scalia's argument is not that *Yeager* understood collateral estoppel differently from *Dunn*, *Powell*, and *Ashe*, but that *Yeager* applied principles of collateral estoppel because it erroneously concluded that a verdict featuring hung counts and acquittals was not an inconsistent or irrational verdict.

evidence from which one might draw conclusions as to what issues a jury actually and necessarily determined, the Court described hung counts as the "*thinnest reed of all*." *Id*. (emphasis added). Accordingly, unlike *Powell* and *Dunn* in which attempts to rely on collateral estoppel were rejected because the Court was presented with "jury verdicts that, on their face, were logically inconsistent," the mixed verdict of acquittals and *hung counts* in *Yeager* created "merely a *suggestion* that the jury may have acted irrationally." *Id*.

But for the government's failure to persuade the Supreme Court that a hung count supported its claim that the jury acted irrationally, there is no indication that *Yeager* would not have identically applied *Powell* and *Dunn* to defeat the defendant's collateral-estoppel defense. *Id*.[11] Thus, *Yeager* is in no way a departure from *Powell* and *Dunn*, but is fully consistent. *Yeager*, like *Powell* and *Dunn*, assessed the defendant's collateral-estoppel defense by determining what facts the *jury* "actually and necessarily" decided. In the instant case, as in *Powell* and *Dunn*, there is simply no way to know this; in *Yeager*, however, there was.

Ashe, like *Powell*, *Dunn*, and *Yeager*, also focused the collateral-estoppel analysis on what "a rational jury" has determined. *Ashe*, 397 US at 444; *Powell*, 469 US at 68. In this sense, *Ashe* makes the existence of a rational jury a prerequisite for any defendant to prevail on a collateral-estoppel defense. Put in practical terms, absent a finding in the defendant's favor that is part of a

[11] In fact, the primary disagreement between the majority and the dissent in *Yeager* was whether hung counts demonstrated that the jury had acted irrationally. Justice Scalia disagreed with the majority only in viewing the hung counts, in combination with the acquittals, as evidencing that there was "no clear, unanimous jury finding," thus preventing defendant from satisfying his burden under *Ashe*. *Yeager*, 557 US at 132 (Scalia, J., dissenting).

rational and consistent verdict, the defendant cannot sustain his burden and prevail on a collateral-estoppel defense. In the instant case, defendant cannot establish that the first jury acted rationally when it convicted him of first-degree felony murder while acquitting him of first-degree home invasion, the sole predicate offense supporting the first-degree felony murder charge. Therefore, the subsequent reversal of his conviction for first-degree felony murder neither alters the factual determinations actually and necessarily made by the jury nor serves to turn the jury's otherwise inconsistent and irrational verdict into a consistent and rational verdict.[12] Accordingly, because *Ashe*'s application of collateral estoppel is premised on a "rational jury," *Ashe* too is consistent with *Powell*, *Dunn*, and *Yeager* and serves to undermine defendant's reliance on collateral estoppel to preclude retrial of the first-degree felony murder charge of which his first jury convicted him.

To overlook the factual findings made by defendant's first jury with regard to the first-degree felony murder conviction would also run afoul of *Ashe*'s requirement that a court reviewing a defense of collateral estoppel do so " 'with an eye to all the circumstances of the proceedings.' " *Ashe*, 397 US at 444, quoting *Sealfon*, 332 US at 579. In examining only the jury's *acquittal* on the first-degree home invasion charge and not the jury's *conviction* on the first-degree felony-murder charge, the majority opinion considers only those circumstances of the proceeding that *support* defendant's collateral-estoppel claim, disregarding those circumstances that

[12] Defendant does not argue, and no reasonable argument could be made, that this is a case in which the error resulting in the reversal—defendant's being denied his right to represent himself on any of the charges— somehow explains the jury's irrational verdict as might be the case when, for example, there was some instructional error affecting only the charge on which defendant was convicted by the jury.

are *barriers* to his claim. Regardless of whether a defendant's conviction has or has not been subsequently overturned, it remains that a jury verdict constitutes a "circumstance" of the proceedings and, as such, must be given consideration under *Ashe*.

C. "LEGAL MEANING"

The majority opinion argues that allowing retrial would give new "legal meaning" to defendant's reversed conviction and permit it to be used against defendant in a manner inconsistent with *Burks*. Respectfully, it is incorrect for three reasons.

First, when the defendant has the burden of establishing that the jury determined an issue of ultimate fact in his favor, and must do so in light of "all the circumstances of the proceeding," the reversed conviction is not being "used to the defendant's detriment." Instead, the jury's findings in convicting defendant are "circumstances" that the defendant is simply unable to overcome in establishing his collateral-estoppel defense. See footnote 4 of this opinion.

Second, determining whether collateral estoppel applies to prohibit retrial focuses on a highly factual analysis. Only the underlying factual elements of defendant's reversed conviction are given continuing effect, not the reversed conviction itself. The distinction between giving effect to factual elements of a reversed conviction and giving continued legal effect to a reversed conviction can be demonstrated by looking at *People v Crable*, 33 Mich App 254; 189 NW2d 740 (1971), a case cited by the majority opinion. *Crable* held that a defendant who testifies cannot be impeached by way of questioning him concerning the fact that he was convicted of an offense when that conviction was later

reversed. *Id*. at 257. In this respect, the conviction itself no longer has any relevant legal significance once it has been reversed.

That is not to say, however, that *factual elements* from the first trial, which resulted in the reversed conviction, must also be ignored or disregarded and cannot have any continuing relevant legal significance. For instance, if a hypothetical defendant testified at both trials (his first trial ending with a conviction that was subsequently reversed), and the defendant's testimony at the first trial contradicted his testimony at the second trial, that the conviction from the first trial was reversed would not preclude the prosecutor from impeaching defendant at the second trial with his testimony from the first. Cf. *United States v Havens*, 446 US 620, 627-628; 100 S Ct 1912; 64 L Ed 2d 559 (1980) (holding that because ensuring truthful testimony "is a fundamental goal of our legal system," otherwise excludable evidence may be used for impeachment purposes on cross-examination when the evidence contradicts a defendant's testimony on direct examination). In this sense, while a reversed conviction has no continuing legal significance and the occurrence of such a conviction may not be "used to the defendant's detriment," specific factual elements from the conviction may persist in their legal significance. In the context of a collateral-estoppel defense, it is not the *conviction* that is being used against the defendant in this case but the underlying *factual findings* made by the jury in convicting defendant of the compound offense.[13]

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[13] In this regard, I do not, as the majority opinion contends, "jump[] over [the] critical step" of recognizing that defendant's conviction was reversed but simply view the reversal as nullifying only the *legal consequences* associated with the conviction and not the *factual elements* of the first trial. The reversal of Wilson's conviction is just not relevant to the collateral-estoppel analysis.

Third, and most importantly, the majority opinion's reliance on *Burks* is misplaced as a result of its failure to recognize the full scope of *Burks*'s statement about reversed convictions. The majority opinion quotes *Burks* as follows:

> [R]eversal for trial error, as distinguished from evidentiary sufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect . . . . [*Burks*, 437 US at 15.]

However, the very next sentence of *Burks* premises the proposition that a reversed conviction "implies nothing with respect to the guilt or innocence of the defendant" on the specific fact that when a conviction is reversed, *retrial* is possible:

> When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished. [*Id*. at 15-16, citing Note, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence*, 31 U Chi L Rev 365, 370 (1964).]

When the ability to retry a defendant on a reversed conviction is foreclosed, the reversal, coupled with the inability to retry the defendant, necessarily implies something about defendant's guilt or innocence. The premise of a collateral-estoppel defense is that, on the basis of factual findings by a jury, defendant cannot be guilty of the charged offense, thus implying something about defendant's guilt or innocence. Despite relying on *Burks*, which held that a reversed conviction "implies nothing with respect to the guilt or innocence of the defendant," the majority opinion employs principles of

collateral estoppel to forever foreclose the possibility of retrying defendant for first-degree felony murder, thus in fact implying something significant about defendant's guilt or innocence on that charge.

III. MAJORITY OPINION STANDS APART

In foreclosing the state's ability to retry a defendant when a jury returns an inconsistent verdict and the convictions are subsequently overturned, the majority opinion stands apart from all other courts that have addressed this issue. Unanimous high courts in New Jersey and the District of Columbia have determined that when the jury renders an inconsistent verdict, principles of collateral estoppel have no place even if the convictions that make up the inconsistent verdict are subsequently overturned. *State v Kelly*, 201 NJ 471; 992 A2d 776 (2010); *Evans v United States*, 987 A2d 1138 (DC, 2010), cert den 131 S Ct 1043 (2011). Both *Kelly* and *Evans* expressly rejected the comparison that the majority opinion purports to make between a verdict, such as that in *Yeager*, that includes hung counts and acquittals and a verdict that includes acquittals and subsequently reversed convictions. *Kelly*, 201 NJ at 494; *Evans*, 987 A2d at 1142. *Evans* stated in this regard:

> The Supreme Court's recent decision in *Yeager* does nothing to undermine this analysis. The distinguishing feature in *Yeager* was that the jury had acquitted on some counts and hung on others. The Court treated "the jury's inability to reach a verdict on the insider trading counts [as] a nonevent[,]" 129 S. Ct. at 2367, "hold[ing] that the consideration of hung counts has no place in the issue-preclusion analysis." *Id*. at 2368. It explained that the situation was "quite dissimilar" from that presented in *Powell*, where "respect for the jury's verdicts counseled giving each verdict full effect, however inconsistent." *Yea-*

> *ger*, 129 S. Ct. at 2369. In *Yeager*, there was no inconsistent verdict of guilt standing in opposition to the acquittals, and the Court held that "conjecture about possible reasons for a jury's failure to reach a decision should play no part in assessing the legal consequences of a unanimous verdict that the jurors did return." *Id*. at 2368. [*Evans*, 987 A2d at 1142.]

Both *Kelly* and *Evans* understood correctly the threshold premise that principles of collateral estoppel are only applicable when the jury has acted rationally, and in so doing, both *Kelly* and *Evans* relied on *Powell* to resolve the defendants' claims of collateral estoppel. *Kelly*, 201 NJ at 488; *Evans*, 987 A2d at 1141-1142.

Similarly, the United States Court of Appeals for the Second Circuit reached this same conclusion in *United States v Bruno* and found the answer to the issue sufficiently clear to enable it to resolve the case by summary order, stating,

> We see *no merit* to Bruno's argument because, unlike the cases [including *Ashe*] on which he relies (where collateral estoppel barred retrial), Bruno was *convicted* of the offenses that are now the subject of retrial. These convictions are significant because they indicate that, notwithstanding the acquittals, the jury found that Bruno possessed the requisite intent to devise a scheme to defraud. See 18 U.S.C. § 1341 (including intent as an element of mail fraud). While Bruno argues that the now-vacated convictions should be considered a non-event and the jury's determinations on those counts should be ignored, there is *no legal or factual support* for this proposition. [*United States v Bruno*, 531 Fed Appx 47, 49 (CA 2, 2013) (second emphasis added).][14]

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[14] The majority opinion's attempt to diminish the relevance of *Bruno* on the basis that the convicted and acquitted counts in that case did not share in common an issue of ultimate fact does nothing to call into question the *legal* proposition that *Bruno* stands for. The Second Circuit delivered its opinion on the *assumption* that the convicted and acquitted

In reaching the opposite conclusion, the majority opinion does not cite a single case from a state high court, an intermediate court from another jurisdiction, or a federal court at any level that has resolved the instant question in the fashion that the majority opinion resolves it.[15] This leaves Michigan to stand alone on the issue of whether the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, by way of principles of collateral estoppel, bars retrial when a jury renders an inconsistent verdict and the convictions within the inconsistent verdict are subsequently reversed.

IV. CONCLUSION

Principles of collateral estoppel are only applicable when a defendant can demonstrate that a rational jury has resolved an issue of ultimate fact in the defendant's favor. A defendant is unable to establish that the jury "actually and necessarily determined any issue of ultimate fact" when it has rendered an inconsistent verdict. Defendant's jury rendered an inconsistent verdict by convicting defendant of the compound offense of first-degree felony murder while acquitting him of the predicate offense of first-degree home invasion. Accordingly, defendant is unable to satisfy his burden of establishing that the jury actually and necessarily de-

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counts shared in common an issue of ultimate fact. *Bruno*, 531 Fed Appx at 49, citing the Brief for Defendant-Appellant at 32 ("Next, Bruno argues that the counts on which he was acquitted reflect a finding by the jury that he 'did not possess the requisite intent to devise a scheme to defraud,' and, therefore that the government is collaterally estopped from charging him with such a scheme now.").

[15] This is, of course, not to say that this Court is reliant on the decisions of other courts, but merely to point out that the majority opinion has failed to identify a single authority for the proposition it asserts concerning the meaning of *Ashe*, *Powell*, and *Yeager*.

termined an issue of ultimate fact in his favor. The majority opinion's contrary decision enables defendant, having once been convicted of first-degree felony murder, to escape retrial and the mandatory "life without parole" sentence that would attend any such reconviction. It reaches this conclusion by an analysis that is novel, singular, and detached from 80 years of federal caselaw concerning constitutional principles of collateral estoppel. I would affirm the Court of Appeals and permit the prosecutor to retry defendant for first-degree felony murder.

ZAHRA and VIVIANO, JJ., concurred with MARKMAN, J.

PEOPLE v SMITH

Docket No. 147187. Argued April 2, 2014 (Calendar No. 2). Decided June 18, 2014.

Ryan C. Smith was charged in the Wayne Circuit Court with carrying a concealed weapon without a permit (CCW) in violation of MCL 750.227. Defendant pleaded guilty to a reduced charge of attempted CCW on May 12, 2011. At sentencing, defense counsel urged the court to delay sentencing for one year under MCL 771.1(2), but the prosecutor objected to a delayed sentence and asked that defendant be sentenced to probation in accordance with the plea agreement. The court, Vera Massey-Jones, J., expressing concern that a felony conviction would limit defendant's employment opportunities, asked the parties to file sentencing memoranda and return to court to discuss whether delayed sentencing would be appropriate. The court noted its desire to delay sentencing for one year and a day, at which point it would have lost jurisdiction over the case. When the parties returned to court, the court announced that it would delay the sentencing for one year and stated on the record that it was scheduling defendant's sentencing for June 15, 2012, which would have occurred within the one-year statutory period. However, the order signed that day, as well as the entry in the register of actions, reflected that the court had actually scheduled defendant's sentencing for June 18, 2012, precisely one year and one day later. At sentencing on that date, over the prosecutor's objection, the court refused to sentence defendant and dismissed the case entirely, citing its lack of jurisdiction. The prosecutor filed a delayed application for leave to appeal in the Court of Appeals, arguing that MCL 771.1 did not permit dismissal of the case. The Court of Appeals denied the prosecutor's delayed application for leave to appeal in an unpublished order issued May 7, 2013 (Docket No. 312242). The Supreme Court granted the prosecutor's application for leave to appeal. 495 Mich 858 (2013).

In an opinion by Chief Justice YOUNG, joined by Justices MARKMAN, KELLY, ZAHRA, MCCORMACK, and VIVIANO, the Supreme Court *held*:

MCL 771.1(2) does not divest a sentencing judge of jurisdiction if a defendant is not sentenced within one year after the imposition of a delayed sentence. The one-year limitation MCL 771.1(2) places on the period in which a court may delay sentencing designates the maximum amount of time that sentencing may be delayed in order to provide defendant the chance to establish his worthiness of leniency. After one year, sentencing may no longer be delayed for that purpose, and the judge is required to sentence defendant as provided by law.

Previous Court of Appeals cases were overruled to the extent they held that a court may not sentence a defendant if the one-year period of delay was exceeded.

Dismissal reversed; conviction reinstated; case remanded to the Wayne Circuit Court for sentencing by a different judge.

Justice CAVANAGH concurred in the result only.

SENTENCING — DELAYED SENTENCING — JURISDICTION.

MCL 771.1(2), which allows a court to delay sentencing for not more than one year to give a defendant the opportunity to prove his eligibility for probation or other leniency, does not divest a sentencing judge of jurisdiction if a defendant is not sentenced within one year after the imposition of a delayed sentence; after one year, sentencing may no longer be delayed for that purpose, and the judge is required to sentence defendant as provided by law.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training and Appeals, and *Ana I. Quiroz*, Assistant Prosecuting Attorney, for the people.

Daniel J. Rust for defendant.

YOUNG, C.J. The issue to be determined in this case is whether MCL 771.1(2) divests a sentencing judge of jurisdiction if a defendant is not sentenced within one year after the imposition of a delayed sentence. We hold that it does not.

The unambiguous language of the statute provides that the court may delay sentencing "for not more than 1 year to give the defendant an opportunity to prove to the court his or her eligibility for probation or other leniency compatible with the ends of justice and the defendant's rehabilitation . . . ."[1] The one-year limitation designates the maximum amount of time that sentencing may be delayed in order to provide defendant the chance to establish his worthiness of leniency. After one year, sentencing may no longer be delayed for that purpose, and the judge is required to sentence defendant as provided by law.

Court of Appeals caselaw holding that a court may not sentence a defendant if the one-year period of delay is exceeded is overruled. We reverse the trial court's dismissal of the case, reinstate defendant's conviction, and remand to Wayne County Circuit Court for sentencing. Upon remand, the matter is to be assigned to a different judge.

I. FACTS AND PROCEDURAL HISTORY

On February 10, 2011, defendant was a passenger in an automobile that was stopped by the police for a traffic violation. As defendant exited the vehicle, officers observed defendant drop a silver automatic handgun into the map pocket of the car door and quickly close the door.[2] After establishing that defendant did not possess a permit to carry a concealed weapon, he was arrested and subsequently charged with the crime of carrying a concealed weapon (CCW) in violation of MCL 750.227. Defendant, age 21 at the time, was a college student with no prior criminal history.

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[1] MCL 771.1(2).

[2] An investigation revealed that the handgun had been previously stolen from a nearby police department.

The prosecutor permitted defendant to plead guilty to the reduced charge of attempted CCW[3] and recommended a probationary sentence. Defendant tendered his guilty plea on May 12, 2011. At sentencing, defense counsel urged the court to delay sentencing for one year, at which time defendant would be "very close to graduating from college" and the prosecutor's office might change its mind and either dismiss the case entirely or permit defendant to plead guilty to a misdemeanor. The prosecutor objected to a delayed sentence and asked that defendant be sentenced to probation. The trial court expressed concern that defendant would "end up with a felony," thus limiting his employment opportunities. The court asked the parties to file sentencing memoranda and return to court to discuss whether delayed sentencing would be appropriate. Expressing its unhappiness with the prosecutor's position, the court stated that it would consider "the delayed sentence with one day over a year; then [the court] would have lost jurisdiction."[4]

The parties returned to court on June 17, 2011. Defense counsel requested that sentencing be delayed for one year under MCL 771.1 to give defendant the opportunity to show that he deserved "significant leniency" from the court. The prosecutor continued to object to delayed sentencing, stating that the prosecutor's office did not intend to reduce the criminal charge any further. The trial court stated that it found it "disturb[ing]" that the prosecutor opposed letting defendant's sentence "go a day over 365 days," which would allow defendant to "end[] up with no record"

[3] MCL 750.227; MCL 750.92.

[4] It was obvious from the beginning that the trial judge did not like the prosecutor's position and was entertaining ways of avoiding sentencing the defendant for the crime to which he had pleaded guilty.

because the court would "lose jurisdiction."[5] The trial court announced that it would exercise its discretion and delayed the imposition of defendant's sentence for one year. On the record, the trial court scheduled defendant's sentencing for June 15, 2012, which would have occurred within the one-year statutory period. However, consistent with statements the trial judge had made on the record that she desired to "lose" jurisdiction in the case, the order signed that day, as well as the entry in the Register of Actions, reflect that the court scheduled defendant's sentencing for June 18, 2012—precisely one year *and one day later*.

At sentencing, defense counsel reminded the judge that delayed sentencing was sought so that defendant could prove "he was worthy of a dismissal." Counsel noted that defendant had complied with all court conditions, paid all fines and costs, and would graduate from college. Abruptly interrupting defense counsel's colloquy, the trial court stated that defendant's sentencing was "past a year," meaning that the court had "lost jurisdiction." Over the prosecutor's objection, the trial court not only refused to sentence the defendant, it dismissed the case entirely.

The prosecutor filed a delayed application for leave to appeal with the Court of Appeals, arguing that the trial court had no legal authority to dismiss the case over the prosecution's objections, because MCL 771.1 did not permit dismissal of the case. The Court of Appeals

[5] The trial court's willingness to circumvent the prosecutor's insistence that the defendant be sentenced to probation for attempted CCW could not be more clear when the trial judge stated that she was unhappy with the prosecutor's position and suggested twice on the record at different hearings that she might schedule the delayed sentence in order to lose jurisdiction under the then prevailing interpretation of MCL 771.1.

issued an order denying the delayed application for leave to appeal for lack of merit.[6] This Court granted leave to appeal.[7]

II. STANDARD OF REVIEW

The consequences, if any, for a trial court's failure to sentence a defendant within one year pursuant to MCL 771.1 is a question of statutory interpretation that this Court reviews de novo.[8]

The Court's primary responsibility in statutory interpretation is to determine and give effect to the Legislature's intent.[9] The words of a statute are the most reliable indicator of the Legislature's intent and should be interpreted according to their ordinary meaning and the context within which they are used in the statute.[10] Once the Legislature's intent has been discerned, no further judicial construction is required or permitted, as the Legislature is presumed to have intended the meaning it plainly expressed.[11]

III. ANALYSIS

The statutory provision at issue in this case, MCL 771.1(2), is contained in Chapter XI of the Code of

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[6] *People v Smith*, unpublished order of the Court of Appeals, entered May 7, 2013 (Docket No. 312242). Judge MURRAY would have peremptorily reversed the trial court's order of dismissal and reinstated defendant's conviction. He conceded that defendant could not be sentenced pursuant to binding Court of Appeals precedent, but would have "allow[ed] the parties to address the appropriate remedy on remand."

[7] *People v Smith*, 495 Mich 858 (2013).

[8] *People v Koonce*, 466 Mich 515, 518; 648 NW2d 153 (2002).

[9] *Id*.

[10] *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

[11] *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001).

Criminal Procedure, which concerns probation. The statute provides in relevant part:

> (2) In an action in which the court may place the defendant on probation, the court *may delay sentencing the defendant for not more than 1 year* to give the defendant an opportunity to prove to the court his or her eligibility for probation or other leniency compatible with the ends of justice and the defendant's rehabilitation, such as participation in a drug treatment court . . . . When sentencing is delayed, the court shall enter an order stating the reason for the delay upon the court's records. *The delay in passing sentence does not deprive the court of jurisdiction to sentence the defendant at any time during the period of delay*.[12]

The plain language of the statute permits a trial court to delay sentencing for up to one year for those defendants who are eligible for placement on probation.[13] The purpose of delaying a defendant's sentence pursuant to this statutory provision is entirely for the benefit of the convicted defendant—it is to "give the defendant an opportunity to prove to the court" that he is worthy of "probation or other leniency compatible with the ends of justice" and rehabilitation. Read in its entirety, the statute provides a simple and straightforward time limit, indicating the maximum amount of time the court may delay sentencing in order to give the

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[12] MCL 771.1(2) (emphasis added).

[13] MCL 771.1(1) delineates the criminal offenses for which a defendant may be placed on probation rather than serve a term of imprisonment. The trial court has the discretion to impose a term of probation for all misdemeanors or felonies with the exception of murder, treason, criminal sexual conduct in the first or third degree, armed robbery, and major controlled substance offenses. The statute further requires that the court make the determination "that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law . . . ."

defendant a chance to prove himself.[14] The statute also indicates that the imposition of a delayed sentence is not irrevocably binding upon the trial court, in that it does not "deprive the court of jurisdiction to sentence the defendant at any time during the period of delay."[15]

In urging this Court to uphold the actions of the trial court, defendant relies on a series of Court of Appeals cases holding that an unexcused violation of the one-year limit contained in MCL 771.1(2) results in the trial court losing jurisdiction to *sentence* a defendant.[16] However, the action taken by the trial court in this case was not simply limited to abstaining from sentencing defendant Smith. There is simply no basis in our law for the trial court to do as it did in this case. Without citing a scintilla of legal authority, the trial court *dismissed* the case over the objection of the prosecutor. Aside from flagrantly ignoring contrary Court of Appeals precedent in entirely dismissing the case,[17] the trial court usurped the prosecutor's role in violation of the separation of

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[14] The language providing that sentencing may be delayed "for *not more than* 1 year" indicates that sentencing could be delayed for a lesser period of time.

[15] Thus, regardless whether defendant's behavior during the period of delay is abhorrent or exemplary, a sentencing judge is not required to wait until the period of delay has elapsed in order to sentence defendant in accordance with the law and dispense whatever leniency the Court is inclined to provide.

[16] See *People v McLott*, 70 Mich App 524; 245 NW2d 814 (1976) (jurisdiction to impose sentence was not lost where the delay was only six days and because the trial court could not be present); *People v Turner*, 92 Mich App 485; 285 NW2d 340 (1979); *People v Dubis*, 158 Mich App 504; 405 NW2d 181 (1987); *People v Boynton*, 185 Mich App 669; 463 NW2d 174 (1990).

[17] MCR 7.215(C)(2). See, *e.g.*, *Boynton* 185 Mich App at 671. There, the Court of Appeals reversed the trial court's dismissal of charges against defendant, emphasizing "that an unexcused violation of the one-year limit contained in the delayed sentencing statute affects *only* the court's authority to sentence the defendant, nothing more."

powers principles contained in our constitution.[18] It is axiomatic that the power to determine whether to charge a defendant and what charge should be brought is an executive power, which vests *exclusively* in the prosecutor.[19] The trial court had no legal basis to trump the prosecutor's charging decision, much less dismiss the case *after* the defendant had pleaded to the charge and had never sought to withdraw his plea.

Furthermore, in so far as the Court of Appeals cases relied upon by defendant have construed MCL 771.1(2) to preclude sentencing when there is a failure to impose a sentence within 365 days of the imposition of a delayed sentence, those cases have incorrectly interpreted the statute. Nothing in the language of the statute requires this, and the Legislature is certainly capable of explicitly divesting a court of jurisdiction had such a remedy been intended.[20] Indeed, the only mention of the word "jurisdiction" in the entire statutory provision simply clarifies that a court *retains* its ability to sentence a defendant at any time during the period of delay. The fact that the Legislature explicitly permits a court to sentence defendant at any time during the

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[18] See Const 1963, art 3, § 2. "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." The trial judge's oath of office required her to solemnly swear to support the Michigan and federal Constitutions and to faithfully discharge the duties of a circuit court judge. See MCL 168.420; Const 1963, art 11, § 1.

[19] *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683; 194 NW2d 693 (1972).

[20] See MCL 780.133, which provides the remedy for a violation of MCL 780.131: "In the event that, within the time limitation set forth in section 1 of this act, action is not commenced on the matter for which request for disposition was made, *no court of this state shall any longer have jurisdiction thereof*, nor shall the untried warrant, indictment, information or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." (Emphasis added.)

period of delay simply does not create the affirmative pregnant underlying the rationale of the cases cited by defendant—namely, that the court is not permitted to sentence a defendant outside the period of delay. Thus, in the absence of a clear and unambiguous indication that the Legislature intended that a defendant avoid all punishment as a remedy for not being sentenced within one year when his sentence is delayed under MCL 771.1(2), we decline to impose such a remedy.[21] After the one-year statutory limitation elapses, sentencing may no longer be delayed for the purpose of permitting a defendant the opportunity to prove that he is worthy of leniency, and the judge is required to sentence defendant as provided by law. We overrule *People v McLott*, *People v Turner*, *People v Dubis*, and *People v Boynton* to the extent they hold that a court loses jurisdiction to sentence a defendant as a remedy for a violation of MCL 771.1(2).

This is not to say, however, that there are no limitations on a trial court's ability to delay the imposition of a defendant's sentence. Longstanding Michigan law requires that a defendant be sentenced within a reasonably prompt time as part of defendant's right to a speedy trial.[22] In determining whether a defendant's right to a speedy trial has been violated, a four-part balancing test is used that considers (1) the length of

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[21] See *Lash v Traverse City*, 479 Mich 180, 193; 735 NW2d 628 (2007); *People v Anstey*, 476 Mich 436, 445 n 7; 719 NW2d 579 (2006) ("Because the Legislature did not provide a remedy in the statute, we may not create a remedy that only the Legislature has the power to create.").

[22] See *People v Kennedy*, 58 Mich 372, 376-377; 25 NW 318 (1885); *People v McIntosh*, 103 Mich App 11, 20-21; 302 NW2d 321 (1981); *People v Bracey*, 124 Mich App 401; 335 NW2d 49 (1983). See also MCR 6.425(E)(1) ("The court must sentence defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law.").

delay, (2) the reason for the delay, (3) defendant's assertion of his right, and (4) prejudice to the defendant.[23]

Applying those factors to the facts of this case does not indicate that defendant's speedy trial rights were violated. Regarding the first factor, the length of the delay was a mere *one day* past the one-year limitation contained in MCL 771.1(2). Second, the reason for the delay, as can be inferred from the record before us, was a calculated effort by the trial court to circumvent the law[24] and avoid the charging decision of the prosecutor in order to spare defendant the consequences of acquiring a criminal record. Third, defendant makes no claim, and the record does not reveal, any indication that defendant ever asserted his desire to be sentenced before the one-year period of delay had elapsed. Indeed, such an assertion would have been antithetical to defense counsel's stated goal of having the case dismissed. Lastly, defendant makes no claim that he has been prejudiced by the one-day delay in sentencing. In short, application of the relevant factors militates against the conclusion that defendant's speedy trial rights were violated.

IV. CONCLUSION

Because the plain language of MCL 771.1(2) does not deprive a sentencing judge of jurisdiction if a defendant is not sentenced within one year after the imposition of a delayed sentence, we overrule the Court of Appeals decisions in *People v McLott*, *People v Turner*, *People v Dubis*, and *People v Boynton* to the extent they hold otherwise. We reverse the trial court's dismissal of the

[23] *People v Chism*, 390 Mich 104, 111; 211 NW2d 193 (1973); *Barker v Wingo*, 407 US 514, 530; 92 SCt 2182; 33 L Ed 2d 101 (1972).

[24] *In re Justin*, 490 Mich 394; 809 NW2d 126 (2012).

case, reinstate defendant's conviction, and remand to the Wayne County Circuit Court for sentencing.

Because the trial judge in this case demonstrated overt hostility to the prosecution of this case by manipulating the scheduling of sentencing in order to thwart the prosecutor's charging decision and by entirely dismissing the case, thereby exceeding even the scope of incorrectly decided Court of Appeals precedent, we remand for sentencing before a different judge.

MARKMAN, KELLY, ZAHRA, MCCORMACK, and VIVIANO, JJ. concurred with YOUNG, C.J.

CAVANAGH, J. I concur in the result only.

PEOPLE v CUNNINGHAM

Docket No. 147437. Argued April 3, 2014 (Calendar No. 5). Decided June 18, 2014.

Frederick L. Cunningham pleaded guilty in the Allegan Circuit Court to obtaining a controlled substance by fraud in violation of MCL 333.7407(1)(c) and was sentenced to 12 to 48 months' imprisonment. In addition, defendant was ordered to pay $130 for the crime victim's rights assessment, $68 in minimum state costs, and $1,000 in unspecified court costs. Defendant moved to reduce or vacate the amount of court costs imposed to reflect the amount of actual costs incurred by the circuit court in connection with defendant's case. The court, Margaret Z. Bakker, J., denied the motion. The Court of Appeals, MARKEY, P.J., MURPHY, C.J., and BOONSTRA, J., remanded the case to the circuit court in an unpublished order issued October 2, 2012 (Docket No. 309277), to determine the reasonable costs for felony cases in Allegan Circuit Court in light of *People v Sanders*, 296 Mich App 710 (2012). On remand, the circuit court ruled that a reasonable relationship existed between the court costs imposed and the actual court costs on the basis of testimony that the average cost per criminal case in the circuit court was $1,238.48. After remand, the Court of Appeals, FITZGERALD, P.J., and O'CONNELL, J. (SHAPIRO, J., dissenting), relying on *Sanders*, affirmed the circuit court's order. 301 Mich App 218 (2013). The Supreme Court granted defendant's application for leave to appeal. 495 Mich 897 (2013).

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

MCL 769.1k(1)(b)(*ii*) does not provide courts with the independent authority to impose costs upon criminal defendants. Rather, it gives courts the authority to impose only those costs that the Legislature has separately authorized by statute. Therefore, the circuit court erred when it relied on MCL 769.1k(1)(b)(*ii*) as independent authority to impose $1,000 in court costs, and the Court of Appeals erred as well by affirming the imposition of such costs. *Sanders* and other Court of Appeals decisions were overruled to the extent they were inconsistent with this opinion.

1. A court may impose costs in a criminal case only if those costs are authorized by statute. The statute under which defendant was convicted, MCL 333.7407, did not provide courts with the authority to impose costs. While MCL 769.1k(1) gives courts the authority to impose certain financial obligations on a defendant, including any cost in addition to the minimum state cost, the fact that the Legislature proceeded beyond its reference to "any cost" to specify with particularity that courts may require criminal defendants to pay certain other costs suggested strongly that the Legislature did not intend MCL 769.1k(1)(b)(*ii*) to provide courts with the independent authority to impose any cost. Further, interpreting MCL 769.1k(1)(b)(*ii*) as providing courts with the independent authority to impose "any cost" would essentially render nugatory, in violation of the Court's duty to harmonize and reconcile related statutes, the cost provisions within other statutes in effect when MCL 769.1k was enacted that provided courts with the authority to impose specific costs for certain offenses. The Legislature's decision to continue to enact provisions providing courts with authority to impose specific costs for certain offenses also suggested strongly that it did not intend MCL 769.1k(1)(b)(*ii*) to provide courts with the independent authority to impose "any cost." Also, a logical outgrowth of holding that MCL 769.1k(1)(b)(*ii*) provided courts with the independent authority to impose any cost would have been that MCL 769.1k(1)(b)(*i*) would have provided courts with the independent authority to impose "any fine," which would have nullified the provisions within those statutes that expressly fix the amount of fines that courts may impose for certain offenses. For these reasons, MCL 769.1k(1)(b)(*ii*) did not provide courts with the independent authority to impose any cost; rather, it provided courts with the authority to impose only those costs that the Legislature separately authorized by statute.

2. Because the Legislature did not intend MCL 769.1k(1)(b)(*ii*) to provide courts with the independent authority to impose any cost, *Sanders* was overruled to the extent that it was inconsistent with this opinion.

Court of Appeals' judgment reversed; circuit court order vacated in part; case remanded for further proceedings.

COSTS — IMPOSITION OF COURT COSTS — STATUTORY AUTHORITY.

MCL 769.1k(1)(b)(*ii*) does not provide courts with the independent authority to impose costs upon criminal defendants; rather, it gives courts the authority to impose only those costs that the Legislature has separately authorized by statute.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, *Frederick L. Anderson*, Prosecuting Attorney, and *Judy Hughes Astle*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender Office (by *Anne M. Yantus*) for defendant.

Amicus Curiae:

Christopher M. Smith and *Miriam J. Aukerman* for the American Civil Liberties Union Fund of Michigan.

MARKMAN, J. At issue is whether MCL 769.1k(1)(b)(*ii*) provides courts with the independent authority to impose costs upon criminal defendants. We hold that it does not. Instead, we hold that MCL 769.1k(1)(b)(*ii*) provides courts with the authority to impose only those costs that the Legislature has separately authorized by statute. Therefore, the circuit court erred when it relied on MCL 769.1k(1)(b)(*ii*) as independent authority to impose $1,000 in "court costs," and the Court of Appeals erred as well by affirming the imposition of such costs. Accordingly, we reverse the decision of the Court of Appeals, vacate the portion of the circuit court's order imposing $1,000 in court costs, and remand for further proceedings not inconsistent with this opinion.

I. FACTS AND HISTORY

In March of 2011, defendant acquired the prescription drug Norco by presenting a forged prescription to a pharmacy. Defendant pleaded guilty in the Allegan County Circuit Court to obtaining a controlled sub-

stance by fraud in violation of MCL 333.7407(1)(c) and was sentenced to 12 to 48 months' imprisonment. In addition, defendant was ordered to pay $130 for the crime victim's rights assessment, $68 in minimum state costs, and $1,000 in unspecified "court costs."[1] Defendant filed a motion to correct what he viewed as an invalid sentence, arguing that the circuit court should reduce or vacate the amount of court costs imposed to reflect the amount of actual costs incurred by the circuit court in connection with defendant's case. The circuit court denied this motion and held that the court costs were permissible under the "general taxing authority of MCL 769.1k and MCL 769.34(6)."

In light of *People v Sanders*, 296 Mich App 710; 825 NW2d 87 (2012), the Court of Appeals then remanded to the circuit court to "factually establish the reasonable costs figure for felony cases in Allegan County Circuit Court." *People v Cunningham*, unpublished order of the Court of Appeals, issued October 2, 2012 (Docket No. 309277).[2] At the ensuing hearing, the Circuit Court Administrator testified that the average cost per criminal case in the circuit court was

[1] As more fully explained in this opinion, in imposing $1000 in what it deemed to be "court costs," the circuit court relied on MCL 769.1k(1)(b)(*ii*), which speaks generally of "*any cost* in addition to the minimum state cost." Thus, while the circuit court labeled the $1000 in costs that it imposed as "court costs," this case more broadly concerns the meaning of the phrase "any cost" as it appears in MCL 769.1k(1)(b)(*ii*).

[2] In *Sanders*, the Court of Appeals held that "a trial court may impose a *generally reasonable amount* of court costs under MCL 769.1k(1)(b)(*ii*) without the necessity of separately calculating the costs involved in the particular case . . . ." *Sanders*, 296 Mich App at 715 (emphasis added). However, finding that there must be a reasonable relationship between the costs imposed and the actual costs incurred, the Court of Appeals remanded to the circuit court "to factually establish the reasonable costs figure for felony cases in the Berrien Circuit Court." *Id*. at 716. In *People v Sanders (After Remand)*, 298 Mich App 105, 108; 825 NW2d 376 (2012), the Court of Appeals found that the trial court had established "a

$1,238.48.[3] Accordingly, the circuit court found that a reasonable relationship existed between the court costs imposed and the actual court costs incurred in connection with defendant's conviction. Relying on *Sanders*, the Court of Appeals affirmed the circuit court's order. *People v Cunningham (After Remand)*, 301 Mich App 218; 836 NW2d 232 (2013). One judge dissented on the grounds that courts may not include the general costs of maintaining the judicial branch of government in calculating such court costs. *Id.* at 222-225 (SHAPIRO, J., dissenting). On November 20, 2013, this Court granted defendant's application for leave to appeal. *People v Cunningham*, 495 Mich 897 (2013).

II. STANDARD OF REVIEW

Questions of statutory interpretation are questions of law that are reviewed de novo. *Martin v Beldean*, 469 Mich 541, 546; 677 NW2d 312 (2004).

III. ANALYSIS

"The right of the court to impose costs in a criminal case is statutory." *People v Wallace*, 245 Mich 310, 313; 222 NW 698 (1929). Thus, courts may impose costs in criminal cases only where such costs are authorized by statute. *Id.*[4] In a variety of circumstances, the Legisla-

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sufficient factual basis to conclude that $1000 in court costs under MCL 769.1k(1)(b)(*ii*) is a reasonable amount in a felony case conducted in the Berrien Circuit Court."

[3] Of this figure, $462.84 was attributed to the circuit court's operating expenses, $563.15 was attributed to attorney costs, and $212.48 was attributed to clerk and deputy costs.

[4] The authority of sentencing courts is "confined to the limits permitted by the statute under which it acts." *People v Tims*, 127 Mich App 564, 565-566; 339 NW2d 488 (1983), citing *In re Callahan*, 348 Mich 77, 80; 81 NW2d 669 (1957). In this regard, in sentencing defendants, "the court performs a ministerial function with discretion confined to the limits

ture has chosen to provide courts with the authority to impose costs. For instance, with regard to certain offenses, courts may require criminal defendants to pay the "costs of prosecution."[5] With regard to other offenses, courts may require criminal defendants to "reimburse the state or a local unit of government for expenses incurred in relation to that incident including but not limited to expenses for an emergency response and expenses for prosecuting the person."[6] MCL 769.1f(1). Re-

permitted by . . . statute." *Callahan*, 348 Mich at 80, citing *In re Duff*, 141 Mich 623; 105 NW 138 (1905); *In re Evans*, 173 Mich 25; 138 NW 276 (1912).

[5] See, e.g., MCL 750.49(5) (providing that courts may require individuals convicted of offenses related to fighting, baiting, or shooting an animal to pay "the costs of prosecution"); MCL 750.50(4)(b) (providing that courts may require individuals convicted of offenses related to animal cruelty to pay "the costs of prosecution"); MCL 750.159j(2) (providing that courts may require individuals convicted of offenses related to racketeering activity to pay "court costs" or "the costs of the investigation and prosecution that are reasonably incurred"); MCL 752.845 (providing that individuals convicted of injuring or killing another person by firearm "shall, upon conviction thereof, be fined not more than $100.00 and costs of prosecution"); MCL 324.80178(2) (providing that courts may require individuals convicted of operating a vessel on the waters of this state while under the influence of intoxicating liquor or a controlled substance, MCL 324.80176(3), "to pay the costs of the prosecution" "pursuant to the code of criminal procedure, 1927 PA 175, MCL 760.1 to MCL 777.69").

[6] See MCL 769.1f(1)(a) through (i) (listing the specific offenses). As detailed in the statute, the offenses for which reimbursement may be ordered include various offenses related to operating some type of motor vehicle while under the influence of intoxicating liquor or a controlled substance, committing a moving violation causing death, false reporting of a crime or threat, and violating a personal protection order. Several statutes also provide that courts may require individuals "to reimburse this state or a local unit of government of this state for expenses incurred in relation to the violation in the same manner that expenses may be ordered to be reimbursed under section 1f of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.1f." See MCL 750.145d (using the Internet or a computer in a prohibited manner); MCL 750.411s (posting a message through an electronic medium without consent); MCL

gardless of the offense committed, when a criminal defendant is placed on probation, courts may require the probationer to pay "expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer." MCL 771.3(5). Additionally, when a criminal defendant receives a conditional sentence, courts may "order the person to pay a fine, with or without the costs of prosecution." MCL 769.3(1).

In 1994, when the Legislature laid the foundation for the criminal sentencing guidelines, it amended the Code of Criminal Procedure to add MCL 769.34, which provides in pertinent part that when a criminal defendant is sentenced for an offense subject to the guidelines, "[a]s part of the sentence, the court may order the defendant to pay any combination of a fine, costs, or applicable assessments," and "[t]he court shall order payment of restitution as provided by law." MCL 769.34(6), as added by 1994 PA 445.

In 2005, the Legislature further amended the Code of Criminal Procedure to add the statute immediately at issue, MCL 769.1k, which provides:

> (1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:
>
> (a) The court shall impose the minimum state costs as set forth in section 1j of this chapter.
>
> (b) The court may impose any or all of the following:

750.462j (providing or obtaining the labor or services of another by force, fraud, or coercion); MCL 750.543x (violating the Michigan Anti-Terrorism Act); MCL 752.797 (accessing a computer with an intent to defraud); MCL 752.1084 (organized retail crime).

(*i*) Any fine.

(*ii*) *Any cost in addition to the minimum state cost set forth in subdivision (a).*

(*iii*) The expenses of providing legal assistance to the defendant.

(*iv*) Any assessment authorized by law.

(*v*) Reimbursement under section 1f of this chapter.

(2) In addition to any fine, cost, or assessment imposed under subsection (1), the court may order the defendant to pay any additional costs incurred in compelling the defendant's appearance.

(3) Subsections (1) and (2) apply even if the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation.

(4) The court may require the defendant to pay any fine, cost, or assessment ordered to be paid under this section by wage assignment.

(5) The court may provide for the amounts imposed under this section to be collected at any time.

(6) Except as otherwise provided by law, the court may apply payments received on behalf of a defendant that exceed the total of any fine, cost, fee, or other assessment imposed in the case to any fine, cost, fee, or assessment that the same defendant owes in any other case. [2005 PA 316, as amended by 2006 PA 655 (emphasis added.)]

Thus, under MCL 769.1k(1), when a criminal defendant pleads guilty or *nolo contendere*, or is otherwise found guilty, courts may impose certain financial obligations at the time of sentencing, or earlier if sentencing is delayed or entry of judgment of guilt is deferred. Courts may impose these obligations even if the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation. MCL 769.1k(3). Moreover, the amounts imposed under MCL 769.1k may be collected at any time. MCL 769.1k(5).

In this case, the statute under which defendant was convicted, MCL 333.7407, does not provide courts with the authority to impose costs.[7] Nonetheless, the prosecutor argues that the $1,000 in court costs imposed by the circuit court were proper under MCL 769.1k(1)(b)(*ii*). In the prosecutor's view, MCL 769.1k(1)(b)(*ii*) provides courts with the independent authority to impose "any cost," *to wit*, any kind of cost that a court might incur. In defendant's view, however, MCL 769.1k(1)(b)(*ii*) does not provide courts with the independent authority to impose "any cost," but merely allows courts to impose those costs that the Legislature has separately authorized by statute. Thus, the pertinent issue in this case concerns the extent to which MCL 769.1k(1)(b)(*ii*) authorizes courts to impose costs.

In giving meaning to MCL 769.1k(1)(b)(*ii*), we examine the provision within the overall context of the statute "so as to produce, if possible, a harmonious and

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[7] MCL 333.7407 provides, in relevant part:

> (1) A person shall not knowingly or intentionally:
>
> * * *
>
> (c) Acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge.
>
> * * *
>
> (2) A person shall not refuse or knowingly fail to make, keep, or furnish any record, notification, order form, statement, invoice, or other information required under this article.
>
> (3) A person who violates this section is guilty of a felony, punishable by imprisonment for not more than 4 years, or a fine of not more than $30,000.00, or both.

Thus, while MCL 333.7407 contemplates a sentence that may include imprisonment and/or a fine, it does not anywhere provide courts with the authority to impose costs.

consistent enactment as a whole." *Grand Rapids v Crocker*, 219 Mich 178, 182-183; 189 NW 221 (1922). This Court "must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). We also consider the statute's " 'placement and purpose in the statutory scheme,' " *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) (citation omitted), and in interpreting related statutes, those *in pari materia*, we construe the statutes together "so as to give the fullest effect to each provision," *Glover v Parole Bd*, 460 Mich 511, 527; 596 NW2d 598 (1999), citing *Parks v DAIIE*, 426 Mich 191, 199; 393 NW2d 833 (1986).

Although MCL 769.1k(1)(b)(*ii*) allows courts to impose "any cost in addition to the minimum state cost," this provision cannot be read in isolation, but instead must be read reasonably and in context. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236-237; 596 NW2d 119 (1999). When read "reasonably and in context," it is evident to us that MCL 769.1k(1)(b)(*ii*) does not provide courts with the independent authority to impose "any cost." Rather, MCL 769.1k(1)(b)(*ii*) provides courts with the authority to impose only those costs that the Legislature has separately authorized by statute.

First, while MCL 769.1k allows courts to impose "any cost in addition to the minimum state cost," it also authorizes courts to impose other costs, including "the expense of providing legal assistance to the defendant," MCL 769.1k(1)(b)(*iii*), and "any additional costs incurred in compelling the defendant's appearance," MCL 769.1k(2). If, as the prosecutor argues, MCL 769.1k(1)(b)(*ii*) provides courts with the independent authority to impose "any cost," there would, of course,

have been no need for the Legislature to have particularly specified that courts may require individuals to pay for the latter costs. In other words, if MCL 769.1k(1)(b)(*ii*) provides courts with the independent authority to impose "any cost," the Legislature could simply have left it at that and conferred upon trial courts, as they saw fit to exercise it, broad discretion to require criminal defendants to pay costs. However, the fact that the Legislature proceeded beyond its reference to "any cost" to specify with particularity that courts may require criminal defendants to pay certain other costs suggests strongly that the Legislature did not intend MCL 769.1k(1)(b)(*ii*) to provide courts with the independent authority to impose "any cost."

Moreover, in addition to allowing courts to impose "any cost in addition to the minimum state cost," MCL 769.1k also allows courts to order "reimbursement under [MCL 769.1f]." MCL 769.1k(1)(b)(*v*). Under MCL 769.1f, courts may require defendants convicted of certain offenses "to reimburse the state or a local unit of government for specific expenses incurred in relation to the incident including but not limited to expenses for an emergency response and expenses for prosecuting the person." MCL 769.1f(1) and (9). As detailed in MCL 769.1f, the expenses for which reimbursement may be ordered include "the salaries, wages, or other compensation, including, but not limited to, overtime pay of prosecution personnel for time spent investigating and prosecuting the crime or crimes resulting in conviction." MCL 769.1f(2)(d). If MCL 769.1k(1)(b)(*ii*) provided courts with the independent authority to impose "any cost," there would have been no need for the Legislature to specify in MCL 769.1k(1)(b)(*v*) that a court may order "reimbursement under MCL 769.1f," and thereby impose particular costs. That the Legislature included a specific provision authorizing reim-

bursement under MCL 769.1f further suggests that it did not intend MCL 769.1k(1)(b)(*ii*) to provide courts with the independent authority to impose "any cost."

Second, at the time the Legislature enacted MCL 769.1k, numerous statutes provided courts with the authority to impose specific costs for certain offenses. See, e.g., footnote 5 of this opinion. Interpreting MCL 769.1k(1)(b)(*ii*) as providing courts with the independent authority to impose "any cost" would essentially render the cost provisions within those statutes nugatory, as courts could nonetheless impose "any cost," regardless of whether the Legislature had particularly provided courts with the authority to impose specific costs for the relevant offense. In determining the proper meaning of MCL 769.1k(1)(b)(*ii*), it is our duty to harmonize and reconcile related statutes,[8] and we decline to adopt an interpretation of MCL 769.1k(1)(b)(*ii*) that would leave the cost provisions of other statutes without any practical or effective meaning. See *Koenig v South Haven*, 460 Mich 667, 677, 597 NW2d 99 (1999) ("[A] court's duty is to give meaning to all sections of a statute and to avoid, if at all possible, nullifying one by an overly broad interpretation of another.").

Moreover, after the Legislature enacted MCL 769.1k, it has *continued* to enact provisions providing courts with the authority to impose particular costs for certain offenses.[9] Because we presume that the Legislature acts

[8] The purpose of the Code of Criminal Procedure is to "codify the laws relating to criminal procedure," Title, MCL 760.1 *et seq*., and we find it proper to read MCL 769.1k together with the substantive statutes that the Legislature has enacted that define crimes and prescribe fines and costs. See *People v Smith*, 423 Mich 427, 442; 378 NW2d 384 (1985) (holding that the Penal Code and the Code of Criminal Procedure "relate generally to the same thing and must therefore be read *in pari materia* . . . .").

[9] For example, in 2008 and 2012, the Legislature expanded the offenses for which reimbursement may be ordered pursuant to MCL 769.1f. See

"with a full knowledge of existing statutes," *In re Reynolds' Estate*, 274 Mich 354, 362; 264 NW 399 (1936), we presume that the Legislature enacted these provisions with full knowledge of MCL 769.1k. The Legislature's decision to continue to enact provisions providing courts with authority to impose specific costs for certain offenses again suggests strongly that it did not intend MCL 769.1k(1)(b)(*ii*) to provide courts with the independent authority to impose "any cost." We again operate on the presumption that the Legislature did not intend to do a useless thing. *Klopfenstein v Rohlfing*, 356 Mich 197, 202; 96 NW2d 782 (1959) ("[I]t will not be presumed that the legislature intended to do a useless thing . . . .").

Third, if this Court were to hold that MCL 769.1k(1)(b)(*ii*) provides courts with the independent authority to impose "any cost," a logical outgrowth of that holding would be that MCL 769.1k(1)(b)(*i*) provides courts with the independent authority to impose "any fine." However, at the time the Legislature enacted MCL 769.1k, numerous statutes provided that certain offenses are punishable by a fine up to a specific amount, with such amounts widely differing. Interpreting MCL 769.1k(1)(b)(*i*) as providing courts with the independent authority to impose "any fine" would also nullify the provisions within those statutes that expressly fix the amount of fines that courts may impose for certain offenses, as courts could impose "any fine," presumably in any amount, and presumably without reference to the limitations that the Legislature has set forth in other statutes. Once

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2008 PA 466; 2012 PA 331. In addition, in 2013, the Legislature authorized courts to order an individual convicted of soliciting a personal injury victim, MCL 750.410b, "to pay the costs of prosecution as provided in the code of criminal procedure, 1927 PA 175, MCL 760.1 to MCL 777.69." See 2013 PA 219.

again, we do not believe that by enacting MCL 769.1k(1)(b)(*i*) the Legislature intended to leave the fine provisions of numerous statutes without practical meaning or effect. *Koenig*, 460 Mich at 677.[10] Thus, our belief that MCL 769.1k(1)(b)(*i*) does not provide courts with the independent authority to impose "any fine" suggests further that MCL 769.1k(1)(b)(*ii*) does not provide courts with the independent authority to impose "any cost."

In light of the foregoing analysis, we conclude that MCL 769.1k (1)(b)(*ii*) does not provide courts with the independent authority to impose "any cost." Instead, we hold that MCL 769.1k(1)(b)(*ii*) provides courts with the authority to impose only those costs that the Legislature has separately authorized by statute.[11] In other words, we find that MCL 769.1k(1)(b)(*ii*) seeks comprehensively to incorporate by reference the full realm of statutory costs available to Michigan courts in sentencing defendants, so that the Legislature need not

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[10] In addition, as acknowledged by both parties, interpreting MCL 769.1k(1)(b)(*i*) as providing courts with the independent authority to impose "any fine" would also raise constitutional concerns, as "the ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature." *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). As this Court has previously recognized, " 'the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.' " *Loose v Battle Creek*, 309 Mich 1, 13; 14 NW2d 554 (1944) quoting *Bowerman v Sheehan*, 242 Mich 95; 219 NW 69 (1928).

[11] In the same vein, upon examining the existing statutory scheme, we also conclude that MCL 769.34(6), which provides that "as part of the sentence, the court may also order the defendant to pay any combination of a fine, costs, or applicable assessments," does not provide courts with the independent authority to impose any fine or cost. Rather, as with MCL 769.1k, MCL 769.34(6) allows courts to impose only those costs or fines that the Legislature has separately authorized by statute.

compendiously list each such cost in MCL 769.1k.[12] Our understanding of MCL 769.1k(1)(b)(*ii*), we believe, accords respect to its language, to the language of other cost provisions within MCL 769.1k, and to the language of other statutes enacted by the Legislature conferring upon courts the authority to impose specific costs for certain offenses.

In affirming the circuit court's order imposing $1,000 in court costs, the Court of Appeals relied on *People v Sanders*, 296 Mich App 710; 825 NW2d 87 (2012), and *People v Sanders (After Remand)*, 298 Mich App 105; 825 NW2d 376 (2012). However, in *Sanders*, the Court of Appeals assumed that MCL 769.1k(1)(b)(*ii*) "authorizes the imposition of costs without any explicit limitation . . . ." 296 Mich App at 712. As set forth in this opinion, we do not believe that the Legislature intended MCL 769.1k(1)(b)(*ii*) to provide courts with the independent authority to impose "any cost." Accordingly, we overrule *Sanders* to the extent that it is inconsistent with this opinion.[13]

IV. CONCLUSION

The circuit court erred when it relied on MCL 769.1k(1)(b)(*ii*) as independent authority to impose $1,000 in court costs,[14] and the Court of Appeals erred

[12] Given the Legislature's use of the phrase "*any* cost," we believe that the Legislature intended MCL 769.1k(1)(b)(*ii*) to incorporate by reference not only existing statutory provisions that provide courts with the authority to impose specific costs, but also *future* provisions that the Legislature might enact providing courts with the same authority, unless the Legislature states to the contrary.

[13] Moreover, to the extent that other decisions of the Court of Appeals are consistent with *Sanders*, and inconsistent with this opinion, we overrule those decisions as well.

[14] Our holding today defines the extent to which MCL 769.1k(1)(b)(*ii*) *authorizes* courts to impose costs. It does not define the *scope* of any particular statutory provision that is incorporated by reference into MCL 769.1k(1)(b)(*ii*).

as well by affirming the circuit court's imposition of such costs.[15] Accordingly, we reverse the decision of the Court of Appeals, vacate the portion of the circuit court's order imposing $1,000 in court costs, and remand for further proceedings not inconsistent with this opinion.

YOUNG, C.J., and CAVANAGH, KELLY, ZAHRA, MCCORMACK, and VIVIANO, JJ., concurred with MARKMAN, J.

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[15] In granting defendant's application for leave to appeal, we directed the parties to address:

> (1) whether *People v Sanders*, 296 Mich App 710; 825 NW2d 87 (2012), and *People v Sanders (After Remand)*, 298 Mich App 105; 825 NW2d 376 (2012), correctly held that the Legislature's intent in authorizing an assessment of "[a]ny cost" under MCL 769.1k(1)(b)(ii) was to adopt a "reasonable flat fee" approach that does not require precision, and does not require separately calculating the costs involved in a particular case; (2) whether assessments of "court costs" are similar to, or interchangeable with, "costs of prosecution"; (3) whether the general principles set out in *People v Wallace*, 245 Mich 310; 222 NW 698 (1929), *People v Teasdale*, 335 Mich 1; 55 NW2d 149 (1952), and *People v Dilworth*, 291 Mich App 399; 804 NW2d 788 (2011), which dealt with statutory costs of prosecution and probation costs, have any applicability to an assessment pursuant to MCL 769.1k(1)(b)(ii); and (4) whether the Court of Appeals in this case properly applied *Sanders* to affirm the assessment of $1,000 in court costs on the basis that it was reasonably related to the $1,238.48 average actual cost per criminal case in Allegan Circuit Court, which included overhead costs and indirect expenses. [*People v Cunningham*, 495 Mich 897 (2013).]

However, in light of our conclusion that MCL 769.1k(1)(b)(*ii*) does not provide courts with the independent authority to impose "any cost," we need not address the second and third issues listed in the grant order.

ANDRIE INC v DEPARTMENT OF TREASURY

Docket No. 145557. Argued November 6, 2013 (Calendar No. 1). Decided June 23, 2014.

Andrie Inc. brought an action in the Court of Claims, seeking a refund of use taxes it had paid under protest for the years 1999 through 2006 after an audit by the Department of Treasury determined that Andrie had understated the taxes it owed for that period under the Use Tax Act (UTA), MCL 205.91 *et seq*., by $398,755. To arrive at this amount, the department's auditor had reviewed Andrie's purchases of fuel and other tangible items, some of which Andrie had purchased in Michigan from Michigan sellers, for use in its business of shipping asphalt and other products across the Great Lakes. The auditor requested that Andrie provide proof that sales tax due under the General Sales Tax Act (GTSA), MCL 205.51 *et seq*., was paid, either by Andrie or the retail seller, on items that were determined to be subject to use tax, applying the exemption in MCL 205.94(1)(a) if Andrie did so and assessing Andrie use tax for those items if not. The department ultimately imposed use tax on fuel and supply purchases Andrie made in Michigan, from Michigan-based retail sellers, if the invoice did not list sales tax as a separate line item and establish that sales tax had been paid. Andrie filed suit in the Court of Claims, arguing that it was entitled to rely on an alleged requirement of the GSTA that the sales tax be included in the price of the goods purchased regardless of whether the sales tax was separately stated. The Court of Claims, Paula J. M. Manderfield, J., held that Andrie was entitled to a partial refund of use tax for those purchases that were subject to sales tax, reasoning that because Andrie was entitled to a presumption that sales tax was included in the price of goods purchased, Andrie was not required to provide proof that the retail sellers had remitted sales tax to the department. The department appealed. The Court of Appeals, FITZGERALD, P.J., and WILDER and MURRAY, JJ., affirmed on this issue, holding that because the retailer was responsible for paying sales tax, it was erroneous to place a duty on the purchaser to show that the sales tax had been paid. 296 Mich App 355 (2012). The Supreme Court granted the department's

motion to stay the precedential effect of the Court of Appeals opinion and also granted the department's application for leave to appeal. 493 Mich 900 (2012).

In an opinion by Chief Justice YOUNG, joined by Justices MARKMAN, KELLY, MCCORMACK, and VIVIANO, the Supreme Court *held*:

In order to be entitled to the exemption from the use tax found in MCL 205.94(1)(a), one must show that the sales tax was both due and paid on the sale of that tangible personal property. The burden of demonstrating entitlement to the use tax exemption rested on the taxpayer seeking it. Because Andrie did not submit any evidence that sales tax had been paid, Andrie was not entitled to the use tax exemption. The Court of Appeals judgment was reversed to the extent it held that the use tax could never be levied on property if the purchase of that property was subject to sales tax.

1. The use and sales taxes are complementary and supplementary, and their potential applications are not mutually exclusive. The UTA imposes a 6% tax on the use, storage, and consumption of all tangible personal property in Michigan, while the GSTA imposes a 6% tax on the sale of all tangible personal property in Michigan. Absent an exception, tangible personal property sold and used in Michigan is subject to both use and sales tax. The text of each taxing statute indicates that they may be levied on the same property, as long as the respective predicate taxable events have taken place. The legal responsibility for the use tax falls solely on the consumer, while the legal responsibility for the sales tax falls on the retail seller. The retail seller is authorized to pass the economic burden of the sales tax by collecting the tax at the point of sale from the consumer, but whether the consumer remits sales tax to the retail seller or the seller pays the sales tax from another source, the seller is responsible for remitting the sales tax to the department. Under MCL 205.94(1)(a), property sold in Michigan on which tax was paid under the GSTA is exempt from use tax if the tax was due and paid on the retail sale to a consumer. This provision unambiguously requires payment of the sales tax before the exemption applies. Therefore, the department properly assessed use tax on those in-state purchases for which Andrie failed to submit evidence that sales tax was actually paid at the time of sale.

2. Taxpayers are not entitled to a presumption that sales tax was included in the prices paid to retailers when their receipts to do not list sales tax as a separate line item. A taxpayer is entitled

to the use tax exemption in MCL 205.94(1)(a) when it proves that it paid sales tax to the retail seller, even if the retail seller, who bears the legal responsibility for payment of the sales tax, did not remit the tax to the department. However, a purchaser was not entitled to a presumption that it paid the sales tax at the point of sale. The burden of proving entitlement to an exemption rests on the party asserting the right to the exemption, and a presumption of sales tax payment would shift this burden to the department. Furthermore, a presumption that sales tax is always included in an item's purchase price would effectively entitle a purchaser to the exemption whenever sales tax is merely due without having to satisfy its burden to show the tax was paid, which would render superfluous the requirement in MCL 205.94(1)(a) that sales tax be both due and paid. Because Andrie submitted no evidence that it paid sales tax to the retail seller, or that the seller remitted sales tax to the department on that sale, it did not meet its burden, and it was not entitled to the exemption.

3. MCL 205.73(1), which states that a retail seller may not state or imply that an item's purchase price does not include sales tax, did not relieve Andrie of its duty to prove that sales tax was paid. MCL 205.73(1), as an advertising statute, was only a restriction on retail sellers' representations to the public; it did not purport to define the actual components of an item's purchase price.

Court of Appeals' judgment reversed in part.

Justice CAVANAGH concurred in the result only.

Justice ZAHRA, dissenting, stated that because MCL 205.52(1) places the burden of paying sales tax only on retailers and not on consumers, the Court should have afforded consumers a presumption that retailers had actually paid sales tax if it was evident that sales tax was due under the statute. He would have permitted the state to rebut this presumption by producing evidence that the tax was not paid or that the consumer transacted with an erroneous belief that, if true, would have entitled the transaction to be exempted from sales tax. Once the presumption was rebutted, the burden would return to the consumer to present evidence that the sales tax was actually paid or to establish that the consumer was properly entitled to some other exemption.

1. TAXATION — SALES TAXES — USE TAXES.

Absent an exception, tangible personal property sold and used in Michigan is subject to taxation under both the General Sales Tax

Act, MCL 205.51 *et seq*., and the Use Tax Act, MCL 205.91 *et seq*., as long as the respective predicate taxable events have taken place.

2. TAXATION — SALES TAXES — USE TAXES — USE TAX EXEMPTIONS — BURDEN OF PROOF.

A purchaser and user of tangible personal property who seeks to claim an exemption from taxation under the Use Tax Act pursuant to MCL 295.94(1)(a) has the burden of showing that sales tax was both due and paid on the sale of the property.

Honigman Miller Schwartz and Cohn LLP (by *June Summers Haas*, *John D. Pirich*, and *Brian T. Quinn*) for plaintiff.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Jessica A. McGivney*, Assistant Attorney General, for defendant.

Amicus Curiae:

James R. Holcomb for the Michigan Chamber of Commerce.

YOUNG, C.J. Michigan's Use Tax Act (UTA)[1] imposes a 6% tax on a consumer's use, storage, and consumption of all tangible personal property in Michigan.[2] The UTA exempts the use of property from imposition of the use tax when "the [sales] tax was due and paid on the retail sale to a consumer."[3] Concurrently, Michigan's General Sales Tax Act[4] (GSTA) imposes a 6% tax on a retailer's gross proceeds, to be remitted by the retailer to the

[1] MCL 205.91 *et seq*.

[2] MCL 205.93(1). For purposes of this opinion, the use, storage, or consumption of tangible personal property are collectively referred to as "use" of the property.

[3] MCL 205.94(1)(a).

[4] MCL 205.51 *et seq*.

Department of Treasury (the department).[5] At issue before this Court is whether a purchaser and user of tangible personal property may avail itself of the use tax exemption when it is unable to prove payment of sales tax, either by itself to the retail seller at the point of sale or by the retail seller to the department.

The burden of proving entitlement to the exemption rests on the party asserting the right to the exemption.[6] Under the plain language of the use tax exemption, MCL 205.94(1)(a), we hold that when the retail seller does not admit that sales tax was collected or paid on a particular sale of tangible personal property, the user of that property must show that it paid sales tax on the purchase of that property before the user can claim an exemption from the use tax. Accordingly, we reverse the portion of the Court of Appeals' decision that held that the use tax can never be levied on property if the purchase of that property was merely subject to sales tax.

FACTS AND PROCEDURAL HISTORY

Plaintiff Andrie Inc. is a Michigan corporation engaged in marine construction and transportation. Andrie's marine transportation division transports asphalt and other products throughout the Great Lakes to customers in the Midwest and Canada using tugboats and barges. Andrie purchases fuel and other supplies for its business, some of which are purchased in Michigan from Michigan sellers.

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[5] "[T]here is levied upon and there shall be collected from all persons engaged in the business of making sales at retail, by which ownership of tangible personal property is transferred for consideration, an annual tax for the privilege of engaging in that business equal to 6% of the gross proceeds of the business, plus the penalty and interest if applicable as provided by law, less deductions allowed by this act." MCL 205.52(1).

[6] *Elias Bros Restaurant v Treasury Dep't*, 452 Mich 144, 150; 549 NW2d 837 (1996).

The department conducted a use tax audit of Andrie covering November 1, 1999, through July 31, 2006. The department's auditor reviewed Andrie's purchases of tangible items, including the in-state fuel and supply purchases. Where the auditor determined an item was subject to use tax, the auditor requested that Andrie provide proof that sales tax was paid. If Andrie produced a receipt showing that it had paid sales tax to the retail seller, the department applied the exemption in MCL 205.94(1)(a) and did not assess use tax. But if Andrie could not prove that sales tax had been paid, either by itself or the retail seller, the department assessed Andrie the use tax for that property.

The department ultimately imposed use tax on fuel and supply purchases Andrie made in Michigan, from Michigan-based retail sellers, where the invoice did not list sales tax as a separate line item, i.e., where Andrie was unable to prove that sales tax had been paid on those transactions as required by MCL 205.94(1)(a). Notably, the department concedes that it is unaware whether any of these Michigan retail sellers had, in fact, remitted sales tax to the department.

As a result of the audit, the department determined that Andrie understated its use tax in the amount of $398,755.00. Andrie paid the assessments under protest and filed suit in the Court of Claims. In its complaint, Andrie alleges that it was entitled to rely on an alleged requirement of the GSTA that the sales tax be included in the price of the goods purchased regardless of whether the sales tax was separately stated.

The Court of Claims held that Andrie was entitled to a partial refund of use tax for those purchases that were subject to sales tax. That court reasoned that Andrie was entitled to a presumption that sales tax is included in the price of goods purchased, and therefore Andrie

did not have the obligation to provide proof that the retail sellers remitted sales tax to the department. The department appealed. The Court of Appeals affirmed on this issue, holding that "the mere fact that a transaction is subject to sales tax necessarily means that the transaction is not subject to use tax."[7] It further stated that, "[b]ecause the retailer has the ultimate responsibility to pay any sales tax, it is erroneous to place a duty on the purchaser to show that the sales tax was indeed paid to the state. Thus, the transactions are not subject to use tax, and the trial court properly held in favor of plaintiff on this issue."[8]

STANDARD OF REVIEW

Statutory interpretation is a question of law that we review de novo.[9] When interpreting a statute, courts must "ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute."[10] This requires us to consider "the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' "[11]

DISCUSSION

As a preliminary matter, we note that the use and sales taxes are complementary and supplementary.[12]

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[7] *Andrie, Inc v Dep't of Treasury*, 296 Mich App 355, 372; 819 NW2d 920 (2012).

[8] *Id.* (Citation omitted.)

[9] *In re Investigation of March 1999 Riots in East Lansing*, 463 Mich 378, 383; 617 NW2d 310 (2000).

[10] *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

[11] *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1996), quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995).

[12] See *Elias Bros*, 452 Mich at 153.

Contrary to the Court of Appeals' conclusion, their potential applications are not mutually exclusive.[13] The two taxing statutes relate to entirely separate taxable events: the use and the sale of tangible personal property. The UTA imposes a 6% tax on the use, storage, and consumption of all tangible personal property in Michigan:

> 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 specified in section 3a or 3b.[14]

Meanwhile, the GSTA imposes a 6% tax on the sale of all tangible personal property in Michigan:

> [T]here is levied upon and there shall be collected from all persons engaged in the business of making sales at retail, by which ownership of tangible personal property is transferred for consideration, an annual tax for the privilege of engaging in that business equal to 6% of the gross proceeds of the business, plus the penalty and interest if applicable as provided by law, less deductions allowed by this act.[15]

Absent an exception, tangible personal property sold and used in Michigan is subject to *both* use and sales tax. It is plain to see from the text of each taxing statute that they are capable of being levied upon the same property, as long as the respective predicate taxable events (i.e., use and sale) take place.

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[13] In reaching its conclusion, the Court of Appeals relied upon *Elias Bros*, 452 Mich at 146 n 1 ("The [UTA] . . . covers transactions not *subject to* the general sales tax.") (emphasis added). For reasons explained below, this was an inaccurate restatement of the plain language of the UTA and the GSTA, including MCL 205.94(1)(a). Indeed, *Elias Bros* later acknowledges that "the use tax provisions except property acquired in a transaction in this state on which a sales tax *has been paid* . . . ." *Id.* at 153 n 19 (emphasis added).

[14] MCL 205.93(1).

[15] MCL 205.52(1).

Just as each tax is triggered by a separate taxable event, the legal responsibility for each tax falls upon a separate entity. The legal responsibility for the use tax falls solely on the consumer.[16] By contrast, the legal responsibility for the sales tax falls on the retail seller, with the tax being levied for the privilege of making sales at retail.[17] The retail seller is authorized—but not obligated—to pass the economic burden of the sales tax by collecting the tax at the point of sale from the consumer.[18] But whether the consumer remits sales tax to the retail seller or the seller pays the sales tax from another source, the seller is responsible for remitting the sales tax to the department, which tax is calculated as a percentage of the seller's gross proceeds in a taxable period.[19]

Although the use and sales taxes potentially apply to the same tangible personal property, a taxpayer otherwise subject to use tax is entitled to an exemption if it complies with any of the conditions delineated by MCL 205.94. One of these exemptions involves payment of the sales tax:

> (1) The following are exempt from the tax levied under this act . . . :
>
> (a) Property sold in this state on which transaction a tax is *paid* under the general sales tax act, 1933 PA 167, MCL 205.51 to 205.78, if the tax was *due and paid* on the retail sale to a consumer.[20]

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[16] *Terco, Inc v Dep't of Treasury*, 127 Mich App 220, 226, 339 NW2d 17 (1983).

[17] See MCL 205.52(1); *Ammex, Inc v Dep't of Treasury*, 237 Mich App 455, 460; 603 NW2d 308 (1999).

[18] *Ammex, Inc*, 237 Mich App at 460. See also MCL 205.73(1).

[19] See MCL 205.52(1). For reasons explained later in this opinion, the fact that a retail seller has a legal obligation to remit sales tax to the department does not mean that the sales tax necessarily was paid on a retail sale to a purchaser under MCL 205.94(1)(a).

[20] MCL 205.94(1)(a) (emphasis added).

The exemption statute unambiguously requires payment of the sales tax before it exempts the taxpayer from the use tax. It is not enough that the sales tax was due on the retail sale of the property; rather, sales tax must be both "due *and* paid" before the exemption applies. Thus, the department properly assessed use tax on in-state purchases where Andrie failed to submit evidence that sales tax was actually paid at the time of sale.

Our conclusion that the terms of the use and sales taxes render them capable of being applied to the same property does no violence to the "targeted legislative effort to avoid double taxation."[21] Pursuant to MCL 205.94(1)(a), *payment* of the sales tax is mutually exclusive with payment of the use tax, but the same cannot be said of the potential *applicability* of the respective taxes to a given article of tangible personal property. In case law discussing double taxation, the threat of double taxation was a real consequence of the department's position;[22] here, double taxation is at best a hypothetical reality, and at worst a straw man. The taxpayer, as the beneficiary of the exemption, has the tools to ensure that it is not double-taxed. It may, as part of its freedom to contract with retail sellers, demand proof at the point of sale that the sales tax was

[21] See *Elias Bros*, 452 Mich at 152.

[22] For example, in *Elias Bros*, if the taxpayer was not given the benefit of the industrial processing exemption to the use tax, MCL 205.94(g), it was a certainty that the taxpayer would pay tax on the components used or consumed in the product's manufacture *and* on the end product it sold, contradicting the Legislature's purpose in enacting the industrial processing exemption. *Id.* In *World Book, Inc v Dep't of Treasury*, this Court addressed the very real risk of subjecting a taxpayer to multiple states' sales taxes by acknowledging that a retail sale can be consummated in only one state. 459 Mich 403, 411; 590 NW2d 293 (1999), citing *Oklahoma Tax Comm v Jefferson Lines, Inc*, 514 US 175, 186-87; 115 S Ct 1331; 131 L Ed 2d 261 (1995).

paid. Even if it misses that opportunity (which would be its responsibility alone), after the fact, the taxpayer can request an affidavit from the retailer averring that the tax was either collected at the point of sale or remitted to the department.[23] In short, any double taxation that could occur in this situation is traceable to the taxpayer's recordkeeping and not, as seen in other cases, the statutory scheme.

As an alternative to its argument that the use tax can never apply to property on which sales tax should be paid, Andrie asserts that it is entitled to a presumption that sales tax is included in the prices paid to retailers when its receipts to do not list sales tax as a separate line item. A taxpayer is entitled to the use tax exemption in MCL 205.94(1)(a) when it proves that it paid sales tax to the retail seller.[24] This is true even when the retail seller—who technically bears the legal responsibility for payment of the sales tax—does not remit the tax to the department.[25] However, we hold that a purchaser is not entitled to a presumption that it paid the sales tax at the point of sale. The burden of proving entitlement to an exemption rests on the party asserting the right to the exemption.[26] A presumption of sales tax payment would shift this burden to the department,

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[23] This avenue to the exemption in MCL 205.94(1)(a) was conceded by the department at oral argument, and it is consistent with the text of the UTA and GSTA. Admittedly, such affidavit would come at the grace of the retailer.

[24] *Combustion Engineering v Dep't of Treasury*, 216 Mich App 465; 549 NW2d 364 (1996).

[25] *Id.*

[26] *Elias Bros*, 452 Mich at 150. "Exemption from taxation effects the unequal removal of the burden generally placed on all [taxpayers] to share in the support of . . . government." *Michigan Baptist Homes & Dev Co v City of Ann Arbor*, 396 Mich 660, 669-70; 242 NW2d 749 (1976). For that reason, "exemption is the antithesis of tax equality," *id.*, which justifies placing the burden of showing entitlement to an exemption on the taxpayer.

contrary to established law regarding tax exemptions. At the very least, a purchaser-taxpayer must show that it paid tax to the retail seller, or that the seller remitted the sales tax to the department. Andrie submitted no evidence that it paid sales tax to the retail seller, or that the seller remitted sales tax to the department on that sale. As a result, it did not meet its burden, and it is not entitled to the exemption.

Furthermore, in conjunction with the fact that Andrie bears the burden to demonstrate its entitlement to a tax exemption, a presumption that sales tax is always included in an item's purchase price would violate established canons of statutory interpretation. A statute's words should not be ignored, treated as surplusage, or rendered nugatory.[27] MCL 205.94(1)(a) requires that sales tax be both "due and paid" before property is exempted from the use tax. A presumption that a purchaser paid the sales tax would, in effect, entitle a purchaser to the exemption whenever sales tax is merely due without having to satisfy its burden to show the tax was paid. This would render superfluous the plain language of the requirement in MCL 205.94(1)(a) that sales tax be both "due *and paid*." The plain language of the use tax exemption precludes a presumption that sales tax is always paid.

Andrie grounds its statutory argument for a presumption of sales tax payment in MCL 205.73(1),[28]

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[27] *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002).

[28] Andrie also argues that the department's assessments of use tax were unconstitutional, citing *Lockwood v Nims*, 357 Mich 517; 98 NW2d 753 (1959), which rightly held that a former version of the UTA ran afoul of a constitutional ceiling on sales tax. When *Lockwood* was before this Court, the Michigan Constitution then stated that "at no time shall the legislature levy a sales tax of more than 3%." Const 1908, art 10, § 23. Meanwhile, the Legislature enacted a use tax that purported to be levied upon the user; however, via a complicated statutory scheme, the use tax was necessarily

which states:

> A person engaged in the business of selling tangible personal property at retail shall not advertise or hold out to the public in any manner, directly or indirectly, that the tax imposed under this act is not considered as an element in the price to the consumer. This act does not prohibit any taxpayer from reimbursing himself or herself by adding to the sale price any tax levied by this act.

In other words, MCL 205.73(1) states that a retail seller may not *state or imply* that an item's purchase price does not include sales tax, either as a separate line item or otherwise. Although this restriction on retail sellers' representations is certainly consistent with Andrie's proposed presumption that sales tax is always included in an item's purchase price, it does not compel this Court to recognize such a presumption. MCL 205.73(1) is an advertising statute; its terms do not extend beyond a restriction on retail sellers' representations to the public.[29] The statute does not purport to

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collected by the retail seller at the point of sale. See 1937 PA 94, as amended by 1959 PA 263, § 5. Effectively, consumers were paying 1% more than the sales tax ceiling. This Court held *that* use tax structure to be an impermissible end run around the constitutional sales tax ceiling, and it invalidated that use tax statute. *Lockwood* does not hold that any use tax necessarily conflicts with a constitutional ceiling on sales tax. Rather, it holds that what is for all intents and purposes a sales tax may not circumvent a sales tax ceiling simply by wearing a "use tax" nametag.

Today, responsibility for payment of sales and use taxes is separated, falling upon the retail seller and the user, respectively. Further, if payment of sales tax is proved, MCL 205.94(1)(a) prevents taxation under the use tax, whereas the statute overturned in *Lockwood* required payment of use tax without exception. Finally, while today's Constitution still establishes a ceiling on sales tax percentages, the very same section discusses limitations on the use tax, foreclosing any claim that use and sales taxes cannot coexist. See Const 1963, art 9, § 8.

[29] For instance, the department enforced MCL 205.73(1) in a 1970 Letter Ruling, admonishing a retail seller for publishing a coupon stating

define the actual components of an item's purchase price. Thus, MCL 205.73(1) does not relieve Andrie of its duty to prove that sales tax was paid.

In addition to its overbroad reading of the statutory text, Andrie's argument—that MCL 205.73(1) creates a presumption that sales tax is always included in an item's purchase price—is premised on the faulty assumption that a retail seller must *exclusively* use sales revenue to pay its sales tax liability. Were that the case, Andrie might have a point that a purchaser necessarily pays the sales tax at the point of sale; otherwise, the retailer would be unable to remit any sales tax to the department. However, nothing in the GSTA prevents a retail seller from paying its sales tax liability from other sources. Under MCL 205.73(1), a retail seller is "not prohibited" from including sales tax in an item's price, but this leaves the retail seller the option to shoulder the sales tax burden itself. In that event, the retail seller may remit the tax from its gross proceeds or from another source entirely.[30] Because there is no statutory directive in MCL 205.73(1) directing a retail seller to include sales tax in the price it charges purchasers, the statute fails to establish a presumption that sales tax is always included in an item's purchase price.

This Court applied a nearly identically worded predecessor of MCL 205.73(1) in *Swain Lumber Co v*

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that "no sales tax" would be levied on the sale of cigarettes. Therein, the department stated, "*It is quite true that you may not charge sales tax on cigarettes*, however, the sale of cigarettes must be included in your [taxable] gross proceeds." Letter Ruling 70-2 (May 22, 1970) (emphasis added), withdrawn by Revenue Admin Bull 2000-6. At that time, the GSTA applied to the retail sale of cigarettes.

[30] Retail sellers could remit their sales taxes from, e.g., past years' reserves, liquidated assets, assets legally transferred from parent or subsidiary corporations, loans, etc. Further, as sometimes happens, a retailer may understate its sales tax liability or fail to remit the sales tax at all, in violation of its legal obligations under the GSTA.

Newman Dev Co.[31] In that case, the plaintiff believed it was selling to a purchaser at wholesale (to which no sales tax applied), when in fact the nature of the purchaser's business meant that the sale was at retail (to which sales tax applied). After the transaction was complete, the nature of the purchaser's business was discovered, and the department assessed plaintiff the sales tax because the sale was at retail. Plaintiff unsuccessfully sued to recover sales tax from the purchaser. This Court stated:

> No presumption against [a purchaser] arises from the silence of [a purchaser] as to non-inclusion of sales tax in the price before or at the time of [the purchaser]'s paying the price demanded.
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> * * *
>
> [MCL 205.73(1)] creates no liability on the part of the purchaser to pay the tax *unless the tax is incorporated in or added to the price and the purchaser accepts the tangible personal property with such understanding*.[32]

According to Andrie, *Swain Lumber* holds that, whenever sales tax is not listed on an invoice, the sales tax was incorporated into the retail price of the goods and thus paid by the purchaser. This is not accurate.[33]

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[31] *Swain Lumber Co v Newman Dev Co*, 314 Mich 437, 441; 22 NW2d 891 (1946). That statute, as set forth in 1933 PA 167, § 23, stated:

> No person engaged in the business of tangible personal property at retail shall advertise or hold out to the public in any manner, directly or indirectly, that the tax herein imposed is not considered as an element in the price to the consumer. Nothing contained in this act shall be deemed to prohibit any taxpayer from reimbursing himself by adding to his sale price any tax levied hereunder.

[32] *Swain Lumber*, 314 Mich at 441 (emphasis added).

[33] In fact, the Michigan Tax Tribunal has rejected the interpretation of *Swain Lumber* offered by Andrie. In *Kruszka v Dep't of Treasury*, 4 MTT

Swain Lumber merely reiterates that the legal responsibility for the sales tax falls on the retail seller: if a purchaser does not knowingly agree to pay the tax and the seller fails to include the tax in the sale price, a seller may not claw back a separate sales tax reimbursement at a later date. This conclusion allows for the possibility that sales tax is *not* incorporated into an item's sale price. Although a retail seller has a legal obligation to remit sales tax even if it does not affirmatively shift the tax burden to the purchaser, this does not mean that the tax necessarily was paid by the seller such that the use tax exemption in MCL 205.94(1)(a) applies.

RESPONSE TO THE DISSENT

The dissent fails to defer to the rule of statutory construction precluding surplusage in interpreting the phrase "due *and paid*," and instead asks us to apply the use tax exemption whenever sales tax is merely due. To that end, the dissent would reverse the rule that we established unambiguously in *Elias Brothers*: that the burden to prove entitlement to a tax exemption rests upon the person claiming the exemption. But despite the dissent's contention, the consumer is not in need of a presumption that the sales tax was paid, because the consumer is able to prove his entitlement to the exemption in every case.

The dissent states that the consumer never pays the sales tax because the GSTA "places no duty on a

520, 526-527 (Docket No. 88327), issued November 13, 1986, the taxpayer-purchasers claimed that a retail seller's mere obligation to remit sales tax absolved them of their use tax liability. The tribunal held that, while *Swain Lumber* and MCL 205.73(1) purport to address a *seller's* sales tax liability in a given situation, they do not offer guidance relative to a purchasers' use tax liability.

consumer for the payment of the tax."[34] But the fact that a consumer has no *duty* to pay the tax does not mean that the consumer has no *ability* to establish that he is entitled to the exemption. This is supported by statute: MCL 205.73(1) permits the retailer-taxpayer to "reimburs[e] himself or herself by adding to the sale price *any tax levied* by [the GSTA]." Note that the statute does not merely permit the taxpayer to charge the consumer the *value* of the tax—a relevant distinction according to the dissent. Rather, MCL 205.73(1) permits the retailer-taxpayer to include the sales tax itself: the retailer may add "tax" "to the sale price." Therefore, we respectfully disagree that a consumer cannot pay the sales tax for use tax exemption purposes simply because the retail seller is ultimately on the hook for remitting the tax to the department.

Accordingly, one can see that the consumer remains fully equipped to obtain the documentation necessary to later claim the exemption. With knowledge of its burden in mind,[35] at the point of sale the consumer can bargain for a receipt that shows the inclusion of sales tax in the purchase price. Alternatively, it may request an affidavit from the retail seller averring that sales tax was included in the sale price or remitted to the department. In either instance, the consumer shows that the sales tax was paid. It is that simple.

The dissent emphasizes recordkeeping requirements, i.e., retailers' mandate to record their sales tax information, as justification that consumers (who are not

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[34] Quoting *Combustion Engineering v Dep't of Treasury*, 216 Mich App 465, 469; 549 NW2d 364 (1996). The thrust of this argument is that, if the dissent is correct and consumer-taxpayers cannot pay the tax to the retailer themselves and thus be certain that they are entitled to the use tax exemption, the exemption is virtually unavailable to the consumer.

[35] *Adams Outdoor Advertising v East Lansing*, 463 Mich 17, 27 n 7; 614 NW2d 634 (2000) ("People are presumed to know the law.").

required to keep such records) are entitled to a presumption of sales tax payment. Recordkeeping requirements exist so that the *department* may confirm the tax liability of a taxpayer.[36] They do not exist to facilitate a taxpayer's claim of an exemption. Further, "exemptions are the antithesis of tax equality."[37] If a mandatory recordkeeping requirement existed in order to facilitate an exemption claim (rather than to facilitate taxation), it would promote exemptions and, in turn, tax inequality. But that would run counter to the reasoning underlying the *Elias Brothers* rule. Accordingly, recordkeeping requirements are not relevant in determining who has the duty to prove entitlement to an exemption.

Of course, the Legislature could have made it less burdensome for the consumer to avail itself of the use tax exemption. However, under Michigan law, a burden exists, and under *Elias Brothers* that burden is shouldered by the person seeking a tax exemption. Short of ignoring the statutory text of MCL 205.94(1)(a) (". . . and paid") or reversing *Elias Brothers*, the department must prevail in this matter.

CONCLUSION

In order to be entitled to the exemption from the use tax found in MCL 205.94(1)(a), one must show that the sales tax was both due and paid on the sale of that tangible personal property. The burden of demonstrating entitlement to this tax exemption rests on the taxpayer seeking the exemption. Accordingly, because Andrie has not submitted any evidence that sales tax was paid, Andrie has not carried its burden and is not entitled to the exemption delineated in MCL 205.94(1)(a). We reverse

[36] See generally MCL 205.68; MCL 205.104a.

[37] *Elias Bros*, 452 Mich at 150.

that portion of the Court of Appeals' judgment which held that the use tax can never be levied on property if the purchase of that property was subject to sales tax.

MARKMAN, KELLY, MCCORMACK, and VIVIANO, JJ., concurred with YOUNG, C.J.

CAVANAGH, J. I concur in the result only.

ZAHRA, J. (*dissenting*). This case is about whether and when the Department of Treasury must afford consumers a rebuttable presumption that no use tax is due. The majority believes that consumers need only be afforded such a presumption when those consumers can prove either that the retailer actually remitted sales tax to the state or that the consumer paid to the retailer the value of the sales tax (an amount equal to the tax imposed on the retailer pursuant to MCL 205.52(1)). I disagree. MCL 205.52(1) only places the burden of paying sales tax on retailers; it does not impose a sales tax on consumers. In light of the fact that, as a matter of law, only the retailer must pay sales tax, this Court should afford consumers a presumption that the retailer actually paid sales tax if it is evident that sales tax was due under the statute. The Treasury may rebut this presumption by producing some evidence, circumstantial or otherwise, that the tax was not paid or that the consumer transacted with an erroneous belief that, if true, would have entitled the transaction to be exempted from sales tax. Once the presumption is rebutted, the burden returns to the consumer to present evidence that the sales tax was actually paid or to establish that the consumer was properly entitled to some other exemption. Applied to the present case, I would hold that the consumer is entitled to a presumption that the sales tax was paid. Having considered the

record evidence, I would further conclude there was sufficient evidence to rebut this presumption. I would remand to the trial court for further proceedings consistent with this opinion.

I. LAW

This case requires us to interpret the General Sales Tax Act (GSTA)[1] and the Use Tax Act (UTA).[2] When interpreting statutes, we first turn to the words of the statutes. The overriding goal of statutory interpretation is to ascertain and give effect to the Legislature's intent.[3] The words of a statute provide the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the overall context in which they are used.[4] An undefined statutory word or phrase must be accorded its plain and ordinary meaning, unless the defined word or phrase is a "term of art" with a unique legal meaning.[5] A court may look beyond the words of a statute to ascertain legislative intent where the statutory language is ambiguous.[6] A statutory provision is ambiguous only if it irreconcilably conflicts with another provision or is equally susceptible to two or more meanings.[7]

The GSTA and the UTA are "complementary and supplementary" statutes,[8] meaning that the provisions

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[1] MCL 205.51 *et seq*.

[2] MCL 205.91 *et seq*.

[3] *People v Flick*, 487 Mich 1, 10; 790 NW2d 295 (2012).

[4] *Id*. at 10-11.

[5] *People v Thompson*, 477 Mich 146, 151-152; 730 NW2d 708 (2007).

[6] *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[7] See *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004).

[8] *Elias Bros Restaurants, Inc v Treasury Dep't*, 452 Mich 144, 153; 549 NW2d 837 (1996).

of one act are relevant to understanding the provisions of the other.[9] The two statutes are set up so that if Michigan sales tax was paid on an item, then a consumer is not liable for use tax.[10] The GSTA imposes a 6% tax on the sale of all tangible personal property in Michigan:

> [T]here is levied upon and there shall be collected from all persons engaged in the business of making sales at retail, by which ownership of tangible personal property is transferred for consideration, an annual tax for the privilege of engaging in that business equal to 6% of the gross proceeds of the business, plus the penalty and interest if applicable as provided by law, less deductions allowed by this act.[11]

Sales tax is not levied on all sales. It is only levied on sales by "persons engaged in the business of making sales at retail," and only then upon the transfer of "ownership of tangible personal property . . . for consideration." Furthermore, this Court has held that sales tax is only levied on retail sales of personal property that are consummated in Michigan.[12]

Similarly, the UTA imposes a 6% tax on the use, storage, and consumption of all tangible personal property in Michigan:

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[9] *Id*. ("The provisions in the Sales Tax Act are relevant to use tax determinations because the sales and use tax provisions are complementary and supplementary. Both statutes contain a recognition . . . of the provisions and operation of the other.") (Quotation marks omitted.)

[10] See MCL 205.52(1) (defining the amount of sales tax and the sales to which it applies); MCL 205.54a (listing sales exempt from sales tax); MCL 205.93(1) (defining the use tax); MCL 205.94(1)(a) (exempting from use tax any property sold in Michigan on which sales tax is paid under the GSTA).

[11] MCL 205.52(1).

[12] See *World Book, Inc v Treasury Dep't* , 459 Mich 403, 410-411; 590 NW2d 293 (1999).

> 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 . . . .[13]

All consumers must therefore pay use tax unless their transaction is subject to a use tax exemption. There are a number of exemptions to the use tax,[14] the largest of which is the sales tax exception (STE). The STE exempts from use tax any "[p]roperty sold in this state on which transaction a tax is paid under the general sales tax act, 1933 PA 167, MCL 205.51 to 205.78, if the tax was due and paid on the retail sale to a consumer."[15]

The majority interprets the STE as being satisfied if sales tax was either "due and paid" by the consumer to the retailer *or* by the retailer to the Treasury. In my view, this is an improper interpretation of the statute. Consumers are not required to pay tax under the GSTA, and all taxes that are due are only paid to the state, not to retailers. Therefore, it is incorrect to say that consumers pay sales tax to retailers. While it is common for consumers to speak colloquially about paying sales tax on their purchases, consumers are really only paying the *value* of the sales tax to the retailer. The direct incidence of the sales tax falls on retailers alone.[16] The

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[13] MCL 205.93(1).

[14] For example, in this case, Andrie originally claimed that it was entitled to the exemption in MCL 205.94(1)(j) for "fuel, provisions, supplies, maintenance, and repairs for the exclusive use of a vessel of 500 tons or more engaged in interstate commerce."

[15] MCL 205.94(1)(a).

[16] MCL 205.52(1). See also *Combustion Engineering v Treasury Dep't*, 216 Mich App 465, 468-469; 549 NW2d 364 (1996) ("[T]he retailer has the ultimate responsibility for the payment of sales tax. The General Sales Tax Act places no duty on a consumer for the payment of the tax.").

majority, in my view, erroneously relies on the language in MCL 205.73(1) for the proposition that the consumer may actually pay tax to a retailer. MCL 205.73(1) states:

> A person engaged in the business of selling tangible personal property at retail shall not advertise or hold out to the public in any manner, directly or indirectly, that the tax imposed under this act is not considered as an element in the price to the consumer. This act does not prohibit any taxpayer from reimbursing himself or herself by adding to the sale price any tax levied by this act.

The majority believes that this provision permits retailers to actually tax consumers by "adding . . . any tax levied by" the act to the sale price. Not so. As stated in the provision itself, this is a *reimbursement* for a tax that the retailer must pay to the state. It is not a tax on the consumer. Thus, when the STE requires that sales tax be paid, the only reasonable interpretation of this requires that the *retailer* owed the tax and paid it to the state. The statute says nothing about what consumers must pay because consumers are *only* required to pay use tax, never sales tax.[17] Both taxes are due and remitted solely to the state.

This Court has understood the STE to be "an expression of a legislative intent to avoid pyramiding of sales and use tax."[18] In other words, this Court reads MCL 205.52(1), MCL 205.93(1), and MCL 205.94(1)(a) as a scheme created to avoid double taxation on the same transaction. This is because these three statutes, viewed as a whole, create a system that *completely*

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[17] See MCL 205.52(1) (providing that sales tax "shall be collected from all persons engaged in the business of making sales at retail," not from consumers, as it is a "tax for the privilege of engaging in that business").

[18] *Gen Motors Corp v Treasury Dep't*, 466 Mich 231, 237; 644 NW2d 734 (2002).

exempts consumers from liability for a 6% use tax if a 6% sales tax was paid by the retailer.[19]

In a series of attempts to respect the Legislature's intent not to double-tax transactions, this Court has created several presumptions to help retailers and consumers determine who must pay the 6% tax. For example, in *World Book v Dep't of Treasury*, this Court chose to "lessen[ ] the danger of double taxation" by creating a presumption that "a sales transaction is subject to a sales, not a use, tax" when the transaction "was consummated within the state" since "[o]nly a transaction consummated within Michigan is a taxable 'sale at retail' " under the statute.[20] This Court in *World Book* reasoned that such a presumption would clarify the transactions on which sales tax, as opposed to use tax, was due.[21] This Court held that sales tax was not due on an out-of-state transaction and that the purchasers were therefore required to pay use tax.[22] The Court of Appeals employed a similar presumption in *Combustion Engineering v Dep't of Treasury*.[23] The court held that a consumer who purchased an item from a retailer, the price of which reflected the value of the sales tax, was entitled to a presumption that it need not pay use tax on the item.[24] The court in *Combustion Engineering* came to the conclusion that there was no statutory

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[19] But since the tax must be actually paid by the retailer, MCL 205.94(1)(a) leaves open the possibility that the Treasury can recover a use tax from the consumer on the occasion that the retailer breaks the law and fails to pay sales tax.

[20] *World Book*, 459 Mich at 410-411.

[21] See *id*. at 408-409, 411, 413-418.

[22] *Id*.

[23] *Combustion Engineering*, 216 Mich App 465.

[24] *Id*. at 468. The court in *Combustion Engineering* fell prey to the same incorrect colloquialism that the majority does: it referred to consumers *paying sales tax to retailers*. As noted, taxes are only paid to the

requirement that the consumer "prove that the [value of the] sales tax it paid to vendors was actually remitted to the state."[25] This is because "the retailer has the ultimate responsibility for the payment of sales tax," and "[t]he General Sales Tax Act places no duty on a consumer for the payment of the [sales] tax."[26]

Another provision of the GSTA, MCL 205.73(1), makes it clear that retailers are solely responsible for paying sales tax and cannot mislead the consumer into believing that sales tax is not paid on a retail sale. Specifically, MCL 205.73(1) prevents retailers from "advertis[ing] or hold[ing] out to the public in any manner, directly or indirectly, that [sales tax] is not considered as an element in the price to the consumer." In *Swain Lumber Co v Newman Dev*,[27] this Court held that MCL 205.73(1) has the effect of placing the burden of paying sales tax on the retailer, even if the retailer mistakenly believed that it was entitled to an exemption. The bar in MCL 205.73(1) on retailers' "advertis[ing] or hold[ing] out . . . that [sales tax] is not considered as an element in the price to the consumer" therefore affects the parties' contract for the goods: in the absence of a contrary agreement, a retailer has impliedly promised to pay sales tax to the Treasury.[28]

Although there is no express provision addressing who must prove that a retailer paid sales tax, there are several provisions in the GSTA and the UTA that imply that the Legislature has placed that burden on retailers,

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government, never to retailers. The only thing remitted by the consumer to the retailer was the *value* of the sales tax.

[25] *Id*. at 469.

[26] *Id*. at 468-469.

[27] *Swain Lumber Co v Newman Dev*, 314 Mich 437; 22 NW2d 891 (1946).

[28] *Id*. at 441.

not on nonretailer consumers. The recordkeeping requirement in the GSTA currently states:

> A person liable for any tax imposed under [the Sales Tax] Act shall keep . . . an accurate and complete beginning and annual inventory and purchase records of additions to inventory, complete daily sales records, receipts, invoices, bills of lading, and all pertinent documents in a form the department requires. If an exemption from the tax under this act is claimed by a person because the sale is for resale at retail, a record shall be kept of the sales tax license number if the person has a sales tax license. These records shall be retained for a period of 4 years after the tax imposed under this act to which the records apply is due or as otherwise provided by law.[29]

This provision requires only persons liable for sales tax (that is, retailers)[30] to "keep accurate and complete beginning and annual inventory and purchase records of . . . daily sales records, receipts, invoices, bills of lading, and all pertinent documents in a form the department requires."[31] Overall, the above provision, MCL 205.68(1), requires that these retailers retain sales tax records only "for a period of 4 years after the [sales tax] is due or as otherwise provided by law." Accordingly, MCL 205.68(1) creates a system under which retailers will have complete records of the transactions upon which they have and have not paid sales tax.

The UTA also includes a recordkeeping requirement, which currently provides:

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[29] MCL 205.68(1). We note that this provision has been amended several times and renumbered since the period at issue in this case; however, those changes do not affect our analysis. See MCL 205.67 as amended by 1995 PA 255.

[30] MCL 205.52(1).

[31] MCL 205.68(1).

> A person in the business of selling tangible personal property and liable for any tax under this [Use Tax] act shall keep . . . accurate and complete beginning and annual inventory and purchase records of additions to inventory, complete daily sales records, receipts, invoices, bills of lading, and all pertinent documents in a form the department requires. If an exemption from use tax is claimed by a person because the sale is for resale at retail, a record shall be kept of the sales tax license number if the person has a sales tax license. These records shall be retained for a period of 4 years after the tax imposed under this act to which the records apply is due or as otherwise provided by law.[32]

Under this recordkeeping requirement, the Legislature requires that any person who is both "in the business of selling tangible personal property *and* liable for" use tax—that is, retailers—keep "daily sales records, receipts, invoices, and bills of lading."[33] Like the recordkeeping provision in the GSTA, this provision only requires that use tax records be retained by retailers for four years.[34]

II. ANALYSIS

Based on the structure of the GSTA and the UTA and the cases that create presumptions to avoid double taxation, I conclude that a nonretailer consumer is entitled to a rebuttable presumption that sales tax was paid if it was due. The Treasury may rebut this presumption by producing some evidence, circumstantial or otherwise, that the tax was not paid or that the consumer transacted with an erroneous belief that, if true, would have entitled the transaction to be exempted from sales tax. Once the presumption is rebutted, the burden returns to the consumer to present

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[32] MCL 205.104a(1).

[33] *Id*.

[34] *Id*.

evidence that the sales tax was actually paid or to establish that the consumer was properly entitled to some other exemption.

A. THE BURDEN OF RECORDKEEPING

The GSTA and the UTA do not state who bears the burden of proving that sales tax was actually paid by the retailer for the purpose of attaining the STE. But between the two recordkeeping requirements, MCL 205.68(1) and MCL 205.104a(1), above, the Legislature clearly created a system in which retailers are charged with keeping for four years the records that document whether sales tax and use tax were actually paid on an item. Retailers are also charged with keeping track of "beginning and annual inventory and purchase records of additions to inventory, complete daily sales records, receipts, invoices, [and] bills of lading."[35] These recordkeeping requirements permit the Treasury to determine whether a retailer has paid the correct amount of sales tax during the four years that retailers are required to keep such records.[36]

In my view, it is noteworthy that the Legislature did not decide to put similar recordkeeping requirements on consumers. Under the *expressio unius est exclusio alterius* rule of statutory construction, a statute's express mention of one thing implies the exclusion of other similar things.[37] Thus, by choosing to impose recordkeeping requirements on retailers that would

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[35] MCL 205.68(1). See also MCL 205.104a(1) (requiring retailers to keep records of "beginning and annual inventory and purchase records of additions to inventory, complete daily sales records, receipts, invoices, [and] bills of lading").

[36] See MCL 205.52(1) (requiring retailers to pay a tax "equal to 6% of the gross proceeds of the business, plus the penalty and interest if applicable as provided by law, less deductions allowed by this act").

[37] See *Bradley v Saranac Community Sch Bd of Ed*, 455 Mich 285, 298; 565 NW2d 650 (1997).

permit the Treasury to determine whether sales tax was indeed paid on an item, the Legislature chose not to require consumers to document (and thereby prove) whether sales tax was actually paid.

This reading fits with other parts of the two statutes. For example, though the GSTA prohibits retailers from "advertis[ing] or hold[ing] out to the public in any manner, directly or indirectly, that [sales tax] is not considered as an element in the price to the consumer,"[38] it also does not require that the cost of sales tax be passed on to the consumer. Rather, a retailer may choose to pay the sales tax on an item without the benefit of collecting the value of the tax from the consumer. Stated differently, the retailer may elect to pay the tax out of its own pocket.[39] By permitting situations such as this, the Legislature created a scheme in which a consumer would have no knowledge about whether a retailer actually remitted sales tax to the Treasury. Despite this, the Legislature decided against putting recordkeeping requirements on nonretailer consumers.

In this case, the rule that the Treasury proposes runs afoul of the Legislature's intent as demonstrated by the language and structure of the statutes. The Treasury demands that Andrie, a nonretailer consumer, prove that the retailers from which it purchased fuel, provisions, supplies, maintenance, and repairs actually remitted sales tax to the state. With regard to the Treasury's proposed rule, I inquire: By what means can a consumer prove this? The Treasury's answer to this question is unconvincing. The Treasury suggests that only "business" consumers, like Andrie, should be required to prove that

[38] MCL 205.73(1).

[39] *Id*.

sales tax was actually remitted to the state. The Treasury also suggests that this should be easy for business consumers to prove because businesses keep records of their transactions and receipts, and the value of sales tax is easily included as a line item on receipts. I disagree with the Treasury for two reasons. First, the GSTA and UTA do not distinguish between business consumers and individual consumers.[40] The only distinction made by the statutes is between retailer consumers and nonretailer consumers;[41] businesses can be either. Second, the Treasury overlooks the fact that there is no requirement that retailers include the value of the sales tax on the receipt or pass along the cost of sales tax to the purchaser. As previously stated, a retailer may choose to pay sales tax out of its own pocket.[42] If it does, a consumer may be left with no proof that the retailer meant to remit or believed that it owed sales tax.

The problem with the Treasury's proposed rule, therefore, is that it effectively eliminates the STE unless and until a consumer can produce documentation that another party paid what it owed to the state. The Treasury does not, however, suggest how a consumer ought to go about collecting such information, which would not be available until sometime after the sale. The Treasury's proposed rule is even more troublesome in this case because even the retailer may no longer know whether it paid sales tax because retailers are required to keep records for four years

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[40] See, e.g. MCL 205.94(1)(a).

[41] See MCL 205.68(1) (requiring all retailers, whether or not they are consumers, to keep records); MCL 205.104a(1) (same).

[42] See MCL 205.73(1) (permitting, but not requiring retailers to pass along the cost of the sales tax to the purchaser by "adding to the sale price any tax levied by this [Sales Tax] act").

only.[43] Here, the Treasury required Andrie to prove that its retailers paid sales tax on some transactions that occurred more than four years prior.[44] This is unacceptable. The statute only places a recordkeeping burden on consumers if they are also retailers, and this burden only remains in place for four years. It seems nearly certain that the Legislature did not intend to require nonretailer consumers to retain *any* purchase and sale records. Thus, it is even less likely that the Legislature intended that consumers keep such records for longer than four years, as the majority requires from Andrie.

B. AVOIDING DOUBLE TAXATION

Because the Treasury's rule would require every consumer to prove the occurrence of something outside of the consumer's control (that retailers actually remitted sales tax to the Treasury), the rule presents the likelihood of double taxation. The high cost consumers will face if they are forced to demand and collect affidavits or tax returns from every retailer from whom they have purchased will often make the prospect of double taxation the only viable economic alternative. Even if a consumer is willing to incur such costs, there is no guarantee the retailer would comply with the purchaser's request. As conceded by the majority, compliance with such a request "would come at the grace of the retailer." Faced with such a high cost and uncertainty, consumers may decide that it is less trouble to

[43] See MCL 205.68(1); MCL 205.104a(1).

[44] The Treasury conducted audits of Andrie from the tax period beginning November 1, 1999 and ending December 31, 2004, and for the tax period beginning January 1, 2005 and ending July 31, 2006. If the Treasury was auditing Andrie for its 2006 taxes, then *at least* the 1999-2001 taxes were more than four years old.

pay use tax to the Treasury upon demand, even if the consumer believes that the retailer paid sales tax.

To prevent the risk of double taxation in other cases, this Court has employed presumptions to clarify who is liable for sales tax and who is liable for use tax. For example, in *World Book*, this court employed a presumption that "a sales transaction is subject to a sales, not a use, tax" when the transaction "was consummated within the state" because "[o]nly a transaction consummated within Michigan is a taxable 'sale at retail' under [the statute]."[45] The Court of Appeals utilized a similar presumption in *Combustion Engineering*, holding that a consumer was entitled to a presumption that it need not pay use tax on a transaction when the consumer had purchased an item from a retailer with the value of the sales tax included on the receipt.[46]

The instant case is similar to *Combustion Engineering*, which recognized that although sales tax must be paid before a consumer is entitled to the STE, consumers should be afforded a presumption that sales tax was paid, despite the fact that the consumer in that case could not prove that the retailer actually paid the tax it owed. The only difference between this case and *Combustion Engineering* is that in *Combustion Engineering*, it was clear that the retailer had passed the cost of the sales tax on to the consumer via an increase in purchase price. At most this suggests that the retailer realized that sales tax was due. In this case, Andrie's receipts are devoid of any mention of sales tax. Thus, it is unclear

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[45] *Id*. The Court in *World Book* reasoned that such a presumption would clarify the transactions upon which sales tax, as opposed to use tax, was due. Cf. *id*. at 408-409, 411, 413-418 (holding that sales tax was not due on an out-of-state transaction and that the purchasers were therefore required to pay use tax).

[46] *Combustion Engineering*, 216 Mich App at 468.

whether Andrie's retailers charged Andrie the value of the sales tax, paid the sales tax out of their own pockets, or believed that the transaction was exempted from sales tax.

C. THE RULE OF *ELIAS BROS* SHOULD NOT APPLY TO THE STE

Notwithstanding the Legislature's direction that sales tax be imposed only on retailers, the textual clues found in the statutory recordkeeping provisions and this Court's jurisprudence employing presumptions against double taxation, the majority erroneously relies on *Elias Bros Restaurant v Treasury Dep't* for its proposition that "[b]ecause tax exemptions are disfavored, the burden of proving entitlement to an exemption rests on . . . the party asserting the right to the exemption."[47] I do not believe the *Elias Bros* holding should be extended to the STE, which is a different exemption from the exemption discussed in *Elias Bros*. Indeed, the rule in *Elias Bros* has never been applied to the STE, and for good reason—the purpose behind the *Elias Bros* rule is simply not served when applied to the STE.

It is significant that the rule in *Elias Bros* is a judicial rule, not a statutory rule.[48] Judicial rules are not

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[47] *Elias Bros*, 452 Mich at 150.

[48] The judicial rule cited by *Elias Bros* can be traced back via citation to *Romeo Homes v Nims*, 361 Mich 128, 137; 105 NW2d 186 (1960), but the rule is older than that. See, e.g., *City of Detroit v Detroit Commercial College*, 322 Mich 142, 149; 33 NW2d 737 (1948) ("[T]he burden is on a claimant to establish clearly his right to exemption . . . ."); *Engineering Soc of Detroit v Detroit*, 308 Mich 539, 542; 14 NW2d 79 (1944) ("The burden of establishing the fact [that a given institution is a scientific or educational institution within the meaning of the tax exemption statutes] rests on plaintiffs . . . ."). Upon reading *Detroit Commercial College*, it becomes clear that the rule that this Court has adopted is supported by a hornbook (or perhaps several hornbooks) about how to

accorded the same weight as statutory rules.[49] Had the Legislature enacted as part of its tax structure a provision declaring that all tax exemptions are disfavored and placing on the party seeking to invoke an exemption the burden of proving entitlement to it, this Court would be required to apply and follow this legislative directive without further consideration. But because *Elias Bros* is a judicially created rule, this Court can and should consider whether this rule should be extended to the STE.

This Court crafted the *Elias Bros* rule because the GSTA and the UTA do not describe who bears the burden of proving entitlement to the various exemptions available under the UTA. In general, the *Elias Bros* rule is premised on the notion that "tax exemptions . . . represent the antithesis of tax equality."[50] That is, the tax structure assumes taxpayers will be taxed according to law and, when an exemption is employed, tax inequality results because the taxpayer invoking the exemption is paying less than those not afforded the exemption.

The majority claims that creating a presumption that sales tax was paid if it was due will violate the rationale of the *Elias Bros* rule because it will tend to create inequality by favoring a tax exemption. In fact, to apply the *Elias Bros* rule to the STE, as the majority does, would have the effect of creating *greater* inequality of taxation. As explained previously, the Legislature cre-

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interpret tax codes. See *Detroit Commercial College*, 322 Mich at 148-149, citing 2 Cooley on Taxation (4th Ed), p 1403, § 672. Because this Court never cites to a statute to defend the rule, it is a judicial rule, not a statutory one.

[49] See, e.g., *People v Goldston*, 470 Mich 523, 541; 682 NW2d 479 (2004) (referring to the exclusionary rule as "judicially created" and "nonbinding").

[50] *Elias Bros*, 452 Mich at 150.

ated a system of sales tax and use tax that together creates one 6% tax on each transaction for the sale of personal property in Michigan. If this Court applies *Elias Bros* to the STE, consumers may be forced to prove that their retailers actually paid sales tax to the state. This rule presumes that a Michigan retailer violated the law by not paying sales tax when it was due, which is contrary to the common law "presumption, that every man has conformed to the law, [which] shall stand till something shall appear to shake that presumption."[51] Furthermore, it is also unlikely that a consumer could prove that a Michigan retailer complied with the law. Because it is unlikely that consumers will be able to prove retailer compliance, the *Elias Bros* rule will result in double taxation on property the Legislature intended to be taxed only once. That is, since it is common for retailers to reimburse themselves by adding the value of the sales tax to the retail price, if any consumer cannot prove that their retailer paid sales tax to the state, that consumer could be forced to both reimburse the retailer for the value of the sales tax *and* pay use tax. This would treat one consumer differently than other consumers, leading to greater tax inequality.

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[51] *Tecom Inc v United States*, 66 Fed Cl 736, 758 n 26 (2005); see also id. at 758 (citing English common law and United States Supreme Court precedent from the 1800s for the maxim that persons are presumed to have conformed to the law unless and until evidence appears to the contrary). The appropriate legal maxim for this is "*Omnia praesumuntur rite, legitime, solemniter esse acta donec probetur in contrarium*," meaning "All things are presumed to have been properly, lawfully, formally done, until proof be made to the contrary." See also *Gray v Gardner*, 3 Mass 399 n 1 (1807) ("*Omnia presumuntur rite et legitime esse acta donec in contrarium probetur*."); cf. *Tucker v Streetman*, 38 Tex 71, 73 (1873) ("[I]n the civil relations of life . . . a party is presumed to have acted legally until the contrary is proven.").

This presumption is also recognized in Michigan law. See *Palmer v Oakley*, 2 Doug 433, 462 (Mich, 1847).

The *Elias Bros* rule simply is not useful when applied to the STE because the consumer does not possess the information it will be forced to produce—that is, information about whether a retailer actually remitted to the state the sales tax due. On the contrary, as previously established, such information would be costly, if not impossible, for the majority of consumers to obtain. It serves no purpose for this Court to extend *Elias Bros* on its own initiative so it can force consumers to produce information they do not have and cannot obtain with reasonable certainty or at a reasonable cost.

D. THE PRESUMPTION AND REBUTTING THE PRESUMPTION

Because the GSTA and UTA already supply a record-keeping requirement, and since this Court interprets those Acts in a way that avoids double taxation, I conclude that this Court should afford consumers a presumption that if sales tax was *due* on a transaction, that it was actually *paid* by the retailer. Nonetheless, the Treasury should be able to rebut such a presumption.[52] The Treasury may rebut this presumption by producing some evidence, circumstantial or otherwise, that sales tax was *not* paid or that the consumer transacted with an erroneous belief that, if true, would have exempted the transaction from sales tax. Once the presumption is rebutted, the burden returns to the consumer to present evidence that the sales tax was actually paid or to establish that the consumer was properly entitled to some other exemption.

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[52] Although critical of the notion that the consumer should be entitled to a presumption, it is worth noting that the majority also applies a presumption, it is just a different one than the one I propose. Whereas I would apply a presumption that sales tax was paid by a retailer if it was due, the majority would apply a presumption that sales tax was paid by a retailer if the retailer charged the value of the sales tax to the consumer.

In this case, the Treasury has presented evidence sufficient to rebut the presumption that sales tax was paid by the retailer. Specifically, there is circumstantial evidence that at least one of the contracting parties represented, at the time of the sale, facts that would have exempted the sales of fuel, provisions, supplies, maintenance, and repairs from both sales tax and use tax. This circumstantial evidence came to light at the Court of Claims, as Andrie claimed that its fuel, provisions, supplies, maintenance, and repairs were entitled to a use tax exemption under MCL 205.94(1)(j), which exempts purchases of fuel, provisions, supplies, and tangible property required to maintain and repair vessels "designed for commercial use of registered tonnage of 500 tons or more."[53] Any purchase exempted from use tax in MCL 205.94(1)(j) also qualifies for an exception from sales tax under MCL 205.54a(d).[54] Therefore, because there is evidence that the retailer did not pay sales tax on the item, the Treasury has rebutted the presumption that sales tax was paid.

Based on this portion of the record, I conclude that Andrie is not entitled to the presumption that its retailers actually paid sales tax on the transactions for fuel, provisions, supplies, maintenance, and repairs for which it claimed an exemption under MCL 205.94(1)(j). If Andrie cannot prove that the retailers actually paid sales tax, Andrie must remit use tax to the Treasury. I

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[53] The Court of Appeals held that Andrie did not qualify for this exemption, see *Andrie, Inc v Treasury Dep't*, 296 Mich App 355, 365-366 (2012), and this Court did not include this issue among those to be briefed by the parties. See *Andrie, Inc v Dep't of Treasury*, 493 Mich 900 (2012).

[54] In its First Amended Complaint, Andrie stated: "Both the Sales Tax Act and the Use Tax Act provide an exemption from sales and use tax for commercial vessels used in interstate commerce that are produced upon special order and for the fuel, provisions, supplies and tangible property required to maintain and repair the vessel. MCL 205.54a(d); MCL 205.94(1)(j).".

would remand this case to the trial court for further proceedings consistent with this dissent.[55]

III. CONCLUSION

Because MCL 205.52(1) only places the burden of paying sales tax on retailers, and not on consumers, this Court should afford consumers a presumption that retailers actually paid sales tax if it is evident that sales tax was due under the statute. I would permit the state to rebut this presumption by producing some evidence, circumstantial or otherwise, that the tax was not paid or that the consumer transacted with an erroneous belief that, if true, would have entitled the transaction to be exempted from sales tax. Once the presumption is rebutted, the burden returns to the consumer to present evidence that the sales tax was actually paid or to establish that the consumer was properly entitled to some other exemption. I would remand to the trial court for further proceedings consistent with this opinion. I would not retain jurisdiction.

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[55] Andrie, on the occasion that it is not able to prove that sales tax was paid, may be able to implead any retailer from whom it purchased fuel and sue for relief based in contract. See generally *Swain Lumber*, 314 Mich 437.

Andrie may also be able to make an argument that the Treasury still bears the burden of proving that sales tax was not paid on sales that occurred more than four years prior to the Treasury's demand that Andrie pay use tax. This is because the recordkeeping statutes' requirement that retailers retain their sales records for only four years could make it difficult or impossible for a nonretailer consumer to obtain an affidavit from a retailer that sales tax was actually paid, thereby leading to double taxation.

PEOPLE v TANNER

Docket No. 146211. Argued November 6, 2013 (Calendar No. 7). Decided June 23, 2014.

George R. Tanner was charged with open murder, MCL 750.316, and mutilation of a dead body, MCL 750.160, in the Livingston Circuit Court. After his arrest, he was taken to jail and read his rights under *Miranda v Arizona*, 384 US 436 (1966). Defendant invoked his right to counsel and questioning ceased. The next day, while speaking with a jail psychologist, defendant stated that he wanted to "get something off of his chest." The psychologist informed jail staff of defendant's request. The jail administrator then spoke with defendant. Defendant told the administrator that he wanted to speak with someone about his case and asked if the administrator could obtain an attorney for him. The administrator stated that he could not provide an attorney for defendant, but could contact the police officers who were handling the case. Defendant agreed. The administrator then contacted both the police and the prosecutor. The prosecutor apparently informed the court of defendant's request for an attorney, and the court sent an attorney to the jail. After the attorney and the police officers arrived at the jail, the jail administrator took the police officers to speak with defendant and asked the attorney to wait in the jail lobby while the officers determined defendant's intentions. Defendant was again read his *Miranda* rights, which he waived without again requesting an attorney and without being made aware of the attorney's presence at the jail. Defendant then made incriminating statements concerning his involvement in the murder. Defense counsel moved to suppress the statements, and the court, David J. Reader, J., granted the motion. The prosecution sought leave to appeal. The Court of Appeals denied the application. The prosecution then sought leave to appeal in the Supreme Court, which granted the application. 493 Mich 958 (2013).

In an opinion by Justice MARKMAN, joined by Chief Justice YOUNG and Justices KELLY, ZAHRA, and VIVIANO, the Supreme Court *held*:

Once it is determined that a suspect's decision not to rely on his or her rights was uncoerced, that at all times the suspect knew he

or she could stand mute and request a lawyer, and that the suspect was aware of the state's intent to use the suspect's statements to secure a conviction, the analysis is complete and a waiver of those rights is valid as a matter of law, overruling *People v Bender*, 452 Mich 594 (1996).

1. Under the Fifth Amendment of the United States Constitution and Article 1, § 17 of Michigan's 1963 Constitution, no person shall be compelled in any criminal case to be a witness against him or herself. In *Miranda*, the United States Supreme Court held that the accused must be given a series of warnings before being subjected to custodial interrogation in order to protect the constitutional right against self-incrimination. A suspect's waiver of the *Miranda* rights must be made voluntarily, intelligently, and knowingly.

2. In *Moran v Burbine*, 475 US 412 (1986), the United States Supreme Court held that the failure of the police to inform a suspect of the efforts of an attorney to reach the suspect does not deprive the suspect of his or her right to counsel or otherwise invalidate a *Miranda* waiver. Michigan's Supreme Court reached a different conclusion in *Bender*, holding that for a suspect's *Miranda* waiver to be made knowingly and intelligently, the police must promptly inform the suspect that an attorney is available when that attorney has made contact with them. Article 1, § 17 of Michigan's 1963 Constitution concerns compelled statements. At the time of the Constitution's ratification, the word "compelled" was commonly understood to refer to the use of coercion, violence, force, or pressure. Accordingly, Article 1, § 17 can be reasonably understood to protect a suspect from the use of his or her involuntary incriminating statements. The language of Article 1, § 17 does not support the decision reached in *Bender*, which pertained not to whether a statement was made voluntarily, but whether it was made knowingly. The lead and majority opinions in *Bender* engaged in an unfounded creation of constitutional rights.

3. Prior Michigan caselaw did not foreshadow or otherwise provide support for *Bender*'s per se exclusionary rule. Before *Bender*, the Michigan Supreme Court examined the effect of an attorney's attempts to contact a suspect on the admissibility of the suspect's confession in *People v Cavanaugh*, 246 Mich 680 (1929), and *People v Wright*, 441 Mich 140 (1992). Neither decision supported *Bender*'s assertion that Michigan courts have historically interpreted Michigan's Self-Incrimination Clause to provide criminal suspects with greater protections than those afforded by the Fifth Amendment. Rather, under Michigan law before *Miranda*, voluntariness constituted the sole criterion for a confes-

sion to be admissible under either the Due Process Clause or Michigan's Self-Incrimination Clause.

4. Although Michigan's Supreme Court need not interpret a provision of the Michigan Constitution in the same manner as a similar or identical federal constitutional provision, the United States Supreme Court's interpretation of the Self-Incrimination Clause of the Fifth Amendment in *Moran* constitutes the proper interpretation of Article I, § 17 as well. Full comprehension of *Miranda* rights is sufficient to dispel whatever coercion is inherent in the interrogation process, and the waiver of those rights cannot be affected by events that are unknown and unperceived, such as the fact that an attorney is available to offer assistance.

5. The application of stare decisis is generally the preferred course, but the Court is not constrained to follow precedent when governing decisions are "unworkable or badly reasoned." Overruling *Bender* would not produce practical real-world dislocations, and less injury would result from overruling it than from maintaining it.

6. In this case, defendant was read his *Miranda* rights and invoked his right to counsel, but then reinitiated contact with the police when he indicated that he wanted to "get something off of his chest." He was again afforded his *Miranda* rights, and waived them, choosing not to reassert his right to counsel. Defendant's lack of awareness of the appointed attorney's presence at the jail did not invalidate his *Miranda* waiver. Therefore, the trial court erred by suppressing defendant's incriminating statements.

Reversed and remanded.

Justice CAVANAGH, dissenting, believed that *Bender* correctly determined that Article 1, § 17 of the Michigan Constitution provides greater protection than its federal counterpart, requiring the police to inform the suspect when an attorney is immediately available to consult with him or her. The majority improperly rooted its contrary conclusion in a hyper-textualist analysis of the word "compelled." In 1929, in *Cavanaugh*, the Michigan Supreme Court ruled that holding an accused incommunicable was forbidden under the laws of this state, foreshadowing *Miranda*'s understanding of the nature of the right protected by the constitutional guarantee that a person will not be compelled to be a witness against him or herself. Although *Cavanaugh* used terminology addressing whether the accused's statement was voluntary, the *Cavanaugh* analysis was consistent with *Miranda*'s knowing-and-intelligent-waivers analysis, indicating that the Michigan Supreme Court did not interpret the Michigan Constitution to prohibit the use of only those confessions obtained through the use

of physical force or cruel treatment. The majority's decision ignores the jurisprudential history of the Court embodied in *Cavanaugh* and continued in *Bender* and *Wright*. Further, under Article 1, § 20 of Michigan's 1963 Constitution, the accused has the right to the assistance of counsel in every criminal prosecution, including the specific right to be informed of an attorney's attempts to contact the accused. A defendant cannot waive the right to speak with an attorney who is immediately available and trying to contact him when he is unaware that the attorney is available and trying to contact him. *Bender* reached the correct result, provided a practical and workable rule, and should have been upheld under the doctrine of stare decisis.

Justice MCCORMACK, dissenting, agreed with Justice CAVANAGH that the *Bender* rule was grounded in Article I, § 17 of the Michigan Constitution with its jurisprudential roots set in *Cavanaugh*, and declined to join the majority's decision, which improperly reached beyond the facts of the case to overrule *Bender*'s settled and sound precedent. Although the fractured treatment of this issue in *Bender* was dissatisfying, none of *Bender*'s shortcomings were sufficient to undermine the substantive integrity of its conclusion or render it wrongly decided. Nor did any other consideration favor disruption of the *Bender* precedent. To the contrary, the facts of this case counseled further against that course of action, as the defendant here, unlike the defendants in *Bender*, made his incriminating statements only after he repeatedly expressed his desire for counsel, but to no avail. The defendant's frustrated attempts to invoke his right to counsel plainly implicated *Cavanaugh*, which persisted regardless of whether *Bender* was overruled. This case thus did not implicate the majority's core concerns with *Bender*, and overruling that precedent did little to resolve whether the defendant's incriminating statements should be suppressed.

CRIMINAL LAW — CONSTITUTIONAL LAW — SELF-INCRIMINATION CLAUSE — WAIVER OF RIGHTS — AVAILABILITY OF AN ATTORNEY.

No person shall be compelled in any criminal case to be a witness against him or herself; the accused must be given a series of warnings before being subjected to custodial interrogation in order to protect the constitutional right against self-incrimination; once it is determined that the accused's decision not to rely on his or her rights was uncoerced, that at all times the accused knew he or she could stand mute and request a lawyer, and that the accused was aware of the state's intent to use his or her statements to secure a conviction, the analysis is complete and a waiver of those rights is valid as a matter of law;

> the waiver of those rights is not affected by events that are unknown and unperceived, such as the fact that an attorney is available to offer assistance (US Const, Am V; Const 1963, art 1, § 17).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *William J. Vailliencourt, Jr.*, Prosecuting Attorney, for the people.

Mark A. Gatesman for defendant.

Amici Curiae:

Kym L. Worthy and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan.

Eve Brensike Primus, *Daniel S. Korobkin*, and *Michael J. Steinberg* for the Criminal Defense Attorneys of Michigan and the American Civil Liberties Union Fund of Michigan.

MARKMAN, J. This Court granted leave to appeal to consider whether the rule announced in *People v Bender*, 452 Mich 594; 551 NW2d 71 (1996), should be maintained. *Bender* requires police officers to promptly inform a suspect facing custodial interrogation that an attorney is available when that attorney attempts to contact the suspect. If the officers fail to do so, any statements made by the suspect, including voluntary statements given by the suspect with full knowledge of his *Miranda* rights,[1] are rendered inadmissible. Because there is nothing in this state's Constitution to support that rule, we respectfully conclude that *Bender* was wrongly decided and that it must be overruled. We therefore reverse the trial court's suppression of certain

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

incriminating statements made by defendant, which suppression was justified solely on the grounds of *Bender*, and remand to the trial court for further proceedings consistent with this opinion.

I. FACTS

Defendant George Tanner was arrested for murder and taken to jail on October 17, 2011. He was read his *Miranda* rights, and when police officers attempted to interview defendant at the jail, he invoked his right to counsel. As a result, the officers informed defendant that he would have to reinitiate contact if he subsequently changed his mind and wished to speak to them. The next day, while a psychologist employed by the jail to interview inmates was speaking with defendant, he said that he wanted to "get something off his chest." The psychologist told defendant that he should not further discuss the case with her, that he might wish to speak to an attorney, and that she could make arrangements for him to speak to the police officers. Defendant again stated that he wanted to "get things off his chest," so the psychologist told defendant that she would inform jail staff of his request. She then contacted the jail administrator and informed him that defendant wished to speak to police officers about his case.

The administrator spoke with defendant, told him that the psychologist had indicated that he wanted to "get something off his chest," and inquired whether he still wished to speak to someone about his case. Defendant replied "yes" and asked if the administrator could obtain an attorney for him. The administrator responded that he could not, because this was not his role, but explained that he could contact the police officers who were handling the case. Defendant replied that this

would be fine, and the administrator contacted the officers. The administrator also called the prosecutor, who advised him that the court would appoint an attorney for defendant should he request one. The prosecutor apparently informed the court of defendant's request, as a result of which an attorney was sent to the jail.

One of the police officers testified that he was contacted by the administrator and apprised that defendant might now be amenable to speaking with the officers. The police officer further testified that he confirmed with the administrator that defendant had not requested that an attorney be present during the interview, and that the administrator believed an attorney had been appointed merely as a contingency in the event defendant sought an attorney during the interview. Subsequently, both the police officers and an attorney appeared at the jail. Apparently unsure of his role, the attorney asked the officers and the administrator if they knew why he was there. The administrator responded and told him to wait in the jail lobby while he took the officers back to speak with defendant and determine his intentions.

Defendant was again read his *Miranda* rights, which he waived this time without requesting an attorney and without being made aware of the attorney's presence. The administrator then instructed the attorney that he could leave. Defendant shortly thereafter made incriminating statements concerning his involvement in the murder. He was eventually charged with open murder, MCL 750.316, and mutilation of a dead body, MCL 750.160. Defendant was bound over to circuit court following a preliminary examination. During this process, defense counsel filed a motion to suppress defendant's statement to the police, alleging that because he

had not been informed that an attorney had been appointed for him before his interrogation, his *Miranda* waiver was invalid under this Court's decision in *Bender*. A hearing was held on October 12, 2011, after which the trial court suppressed defendant's statement. The court determined that defendant had requested an attorney at his October 17, 2011 interrogation, but that he had affirmatively reinitiated contact with police officers on October 18, 2011, without reasserting his right to counsel. However, it also determined that defendant's statement required suppression under *Bender*, because the police officers had failed to inform him that an attorney was present at the jail and had established contact with the officers.

The prosecutor filed an application for leave to appeal in the Court of Appeals, which was denied for lack of merit, and he then filed an application for leave to appeal in this Court, requesting that *Bender* be reconsidered. We granted this application, *People v Tanner*, 493 Mich 958 (2013), and heard oral argument on this case on November 6, 2013.

II. STANDARD OF REVIEW

This court "review[s] a trial court's factual findings in a ruling on a motion to suppress for clear error. To the extent that a trial court's ruling on a motion to suppress involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo." *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

III. BACKGROUND

The Fifth Amendment of the United States Constitution provides that "[n]o person . . . shall be compelled

in any criminal case to be a witness against himself." US Const, Am V. See also Const 1963, art 1, § 17 (containing an identical Self-Incrimination Clause). This federal constitutional guarantee was made applicable to the states through the Fourteenth Amendment. *Malloy v Hogan*, 378 US 1, 3; 84 S Ct 1489; 12 L Ed 2d 653 (1964). Prior to 1966, a suspect's confession was constitutionally admissible if a court determined that it was made "voluntarily."[2] Despite the apparent textual emphasis on the voluntariness of a suspect's confession ("no person shall be compelled"), the United States Supreme Court held in *Miranda v Arizona*, 384 US 436, 444-445, 477-479; 86 S Ct 1602; 16 L Ed 2d 694 (1966), that the accused must be given a series of warnings before being subjected to "custodial interrogation" in order to protect his constitutional privilege against self-incrimination.[3] The right to have counsel present during custodial interrogation is, in the words of the United States Supreme Court, a corollary of the right against compelled self-incrimination, because the presence of counsel at this stage affords a way to "insure that statements made in the government-established atmosphere are not the product of compulsion." *Id*. at 466. See also *id*. at 470. If a suspect is not afforded

[2] See *Brown v Mississippi*, 297 US 278; 56 S Ct 461; 80 L Ed 682 (1936) (a confession is inadmissible if extorted by brutality and violence); *Chambers v Florida*, 309 US 227, 238-239; 60 S Ct 472; 84 L Ed 716 (1940) (the defendant's confession was inadmissible when made "under circumstances calculated to break the strongest of nerves and stoutest resistance"); *Ashcraft v Tennessee*, 322 US 143; 64 S Ct 921; 88 L Ed 1192 (1944) (the modern voluntariness test began to emerge in *Ashcraft*, in which the Court examined the totality of the circumstances to determine whether a confession was voluntary).

[3] "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id*. at 444.

Miranda warnings before custodial interrogation, "no evidence obtained as a result of interrogation can be used against him." *Id*. at 479 (citations omitted).

Once a suspect invokes his right to remain silent or requests counsel, police questioning must cease unless the suspect affirmatively reinitiates contact.[4] *Id*. at 473-474. In *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981) (citations omitted), the United States Supreme Court created "additional safeguards" for when the accused invokes his right to have counsel present during custodial interrogation:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. . . . [H]aving expressed his desire to deal with the police only through counsel, [an accused] is not subject to further interrogation by the authorities until counsel has been made available to

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[4] Some have referred to *Miranda* as establishing what is essentially the equivalent of a "right not to be questioned":

> A final innovation of the *Miranda* decision was the creation of a right on the part of arrested persons to prevent questioning. The Court stated: "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease . . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present."
>
> The right not to be questioned was an addition to the traditional right to refrain from answering questions on grounds of potential self-incrimination. At the time of the Constitution, suspects had no right to cut off custodial interrogation, and no right of this sort was recognized in the Supreme Court's decisions prior to *Miranda* . . . . [United States Department of Justice, Office of Legal Policy, *The Law of Pretrial Interrogation*, 22 U Mich J L Reform 393, 484 (1989), quoting *Miranda*, 384 US at 473-474.]

> him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

However, when a suspect has been afforded *Miranda* warnings and affirmatively waives his *Miranda* rights, subsequent incriminating statements may be used against him. *Miranda*, 384 US at 444, 479. A suspect's waiver of his *Miranda* rights must be made "voluntarily, knowingly, and intelligently." *Id*. at 444. The United States Supreme Court has articulated a two-part inquiry to determine whether a waiver is valid:

> First, the relinquishment of the right must have been "voluntary," in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. [*Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135; 89 L Ed 2d 410 (1986), citing *Fare v Michael C*, 442 US 707; 99 S Ct 2560; 61 L Ed 2d 197 (1979).]

Under the Fifth Amendment construct set forth by the United States Supreme Court, the defendant in the instant case was afforded his *Miranda* rights by the police and invoked his right to counsel on October 17, 2011. Defendant then reinitiated contact with the police the next day when he indicated that he wanted to "get something off his chest" and speak with the officers. He was then afforded his *Miranda* rights a second time, and on this occasion waived those rights and chose not to reassert his right to counsel. During the following custodial interrogation by the police officers, defendant made an incriminating statement concerning his involvement in a murder. The only pertinent question

then is whether defendant's lack of awareness of the appointed attorney's presence at the jail at the time of his *Miranda* waiver following his reinitiation of contact with the police calls into question the validity of that waiver, including the waiver of his right to counsel—rendering it something other than "voluntary, knowing, and intelligent"—and thus requires suppression of any subsequent incriminating statements.

A. *MORAN v BURBINE*

The United States Supreme Court has addressed this question for purposes of the federal criminal justice system in *Moran v Burbine*, 475 US 412; 106 S Ct 1135; 89 L Ed 2d 410 (1986), in which it held that the failure of police to inform a suspect of the efforts of an attorney to reach that suspect does *not* deprive the suspect of his right to counsel or otherwise invalidate the waiver of his *Miranda* rights. In *Moran*, the defendant confessed to the murder of a young woman after he had been informed of, and waived, his *Miranda* rights. While the defendant was in custody, his sister retained an attorney to represent him. The attorney then contacted the police and was assured that all questioning would cease until the next day. However, less than an hour later, the police resumed interrogation of the defendant, and he confessed soon thereafter. At no point during the interrogation did the defendant request an attorney, and at no point did the police inform him that an attorney had contacted them. Before trial, the defendant moved to suppress his confession on the basis that "the police's failure to inform him of the attorney's telephone call deprived him of information essential to his ability to knowingly waive his Fifth Amendment rights." *Id*. at 421. However, the trial court denied the defendant's motion, concluding that he had received *Miranda* warn-

ings, and had "knowingly, intelligently, and voluntarily waived his privilege against self-incrimination [and] his right to counsel." *Id*. at 418. The defendant was subsequently convicted of murder. The Rhode Island Supreme Court affirmed his conviction, and the federal district court denied his habeas corpus petition. The federal appellate court, however, reversed the conviction. On further appeal, the United States Supreme Court reinstated the defendant's conviction, asserting as follows:

> Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right. Under the analysis of the Court of Appeals, the same defendant, armed with the same information and confronted with precisely the same police conduct, would have knowingly waived his *Miranda* rights had a lawyer not telephoned the police station to inquire about his status. Nothing in any of our waiver decisions or in our understanding of the essential components of a valid waiver requires so incongruous a result. No doubt the additional information would have been useful to respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights. Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intentions to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law. [*Id*. at 422-423 (citations omitted).]

Any culpability on the part of the police inherent in their failing to inform the defendant of the attorney's availability had no bearing on the validity of his *Miranda* waiver:

> [W]hether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of [the defendant's] election to abandon his rights. Although highly inappropriate, even deliberate deception of an attorney could not possibly affect a suspect's decision to waive his *Miranda* rights unless he were at least aware of the incident. . . . Granting that the "deliberate or reckless" withholding of information is objectionable as a matter of ethics, such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them. Because respondent's voluntary decision to speak was made with full awareness and comprehension of all the information *Miranda* requires the police to convey, the waivers were valid. [*Id*. at 423-424 (citations omitted).]

A rule requiring a suspect to be kept apprised of an attorney's presence in order for his *Miranda* waiver to be valid would unsettle *Miranda*'s balance between protection of a suspect's Fifth Amendment rights and the maintenance of effective and legitimate law enforcement practices:

> Because, as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process, a rule requiring the police to inform the suspect of an attorney's efforts to contact him contribute to the protection of the Fifth Amendment privilege only incidentally, if at all. This minimal benefit, however, would come at a substantial cost to society's legitimate and substantial interest in securing admissions of guilt. [*Id*. at 427.]

Moran concluded that "nothing disables the States from adopting different requirements of the conduct of its employees and officials as a matter of state law." *Id*. at 428.

B. *PEOPLE v BENDER*

This Court reached a different conclusion from that of *Moran* in *Bender*, 452 Mich 594 (1996), holding that for a suspect's *Miranda* waiver to be made "knowingly and intelligently," police officers must promptly inform a suspect that an attorney is available when that attorney has made contact with them. In *Bender*, two defendants, Jamieson Bender and Scott Zeigler, were arrested for a series of thefts and taken into custody. An officer informed Bender's mother of his arrest. Subsequently, Bender's father called an attorney, who agreed to represent his son. When the attorney called the police and sought to speak with Bender, she was not permitted to do so. Defendant Ziegler's mother called an attorney, who instructed her go to the police station and tell her son not to speak with anyone before speaking with the attorney. Police also did not allow Ziegler's mother to see her son and communicate the attorney's message. Without informing the defendants of their attorneys' efforts to contact them, police read the defendants their *Miranda* rights, defendants waived these rights, and each offered incriminating statements concerning their involvement in the thefts. At no point did the defendants request an attorney or assert their rights either to remain silent or to have counsel.

This Court adopted a per se rule that a suspect who has an attorney waiting in the wings does not make a "knowing and intelligent" waiver of his *Miranda* rights when the police have failed to inform him that an attorney has been made available to him and is at his disposal. *Id*. at 620 (opinion by CAVANAGH, J.). See also *id*. at 621 (opinion by BRICKLEY, C.J.). Although Justices LEVIN and MALLETT concurred with Justice CAVANAGH's lead opinion grounding the rule in Michigan's 1963 Constitution, the Court's holding was not ultimately

grounded upon constitutional principles. Rather, Chief Justice BRICKLEY concurred with the result reached in the lead opinion, but declined to rely upon its interpretation of the Constitution, instead declaring that the requirement that an accused must be informed of an attorney's efforts to contact him constituted, as did *Miranda* itself at the time, a "prophylactic," or precautionary, rule. *Id*. at 620-621 (opinion by BRICKLEY, C.J.).[5] Justices CAVANAGH, LEVIN, and MALLETT also joined Chief Justice BRICKLEY's concurrence, making it the operative opinion in the case.[6] Justice BOYLE, joined by Justices RILEY and WEAVER, dissented.

Although it did not provide the operative holding, the lead opinion grounded its reasoning upon independent state constitutional grounds, concluding, "we hold that, on the basis of Const 1963, art 1, § 17, neither defendant Bender nor defendant Zeigler made a knowing and intelligent waiver of his rights to remain silent and to counsel, because the police failed to so inform them [that attorneys had been retained and sought to contact them] before they confessed."[7] *Id*. at 614 (opinion by CAVANAGH, J.). Holding otherwise would "encourage the police to do everything possible, short of a due process

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[5] In *Dickerson v United States*, 530 US 428, 438-440, 444; 120 S Ct 2326; 147 L Ed 2d 405 (2000), the United States Supreme Court determined that although *Miranda* is "prophylactic in nature," it is nonetheless a "constitutional rule that Congress may not supersede legislatively."

[6] "The clear rule in Michigan is that a majority of the Court must agree on a ground for decision in order to make that binding precedent for future cases." *People v Anderson*, 389 Mich 155, 170; 205 NW2d 461 (1973), overruled on other grounds by *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004).

[7] The lead opinion acknowledged that "neither defendant's statement was involuntary." *Id*. at 604. Consequently, the only focus was upon whether the defendants' statements were made "knowingly and intelligently."

violation, to prevent an attorney from contacting his client before or during interrogation." *Id*. at 615. To further sustain its conclusion, the lead opinion also noted that this Court has held that "the Michigan Constitution imposes a stricter requirement for a valid waiver of the rights to remain silent and to counsel than those imposed by the federal constitution." *Id*. at 611, citing *People v Wright*, 441 Mich 140, 147; 490 NW2d 351 (1992). The lead opinion declined to adopt a "totality-of-the-circumstances test," because the "inherently coercive nature of incommunicado interrogation requires a *per se* rule that can be implemented with ease and practicality to protect a suspect's rights to remain silent and to counsel." *Bender*, 452 Mich at 617 (opinion by CAVANAGH, J.).

In Chief Justice BRICKLEY's "majority opinion,"[8] he stated that

> [t]his case rather clearly implicated both the right to counsel (Const 1963, art 1, § 20) and the right against self-incrimination (Const 1963, art 1, § 17). I conclude that rather than interpreting these provisions, it would be more appropriate to approach the law enforcement practices that are at the core of this case in the same manner as the United States Supreme Court approached the constitutional interpretation task in *Miranda v Arizona*; namely, by announcing a prophylactic rule.
>
> The right to counsel and the right to be free of compulsory self-incrimination are part of the bedrock of constitutional civil liberties that have been zealously protected and in some cases expanded over the years. Given the focus and protection that these particular constitutional provisions have received, it is difficult to accept and constitutionally justify a rule of law that accepts that law enforcement

[8] Although Chief Justice BRICKLEY's opinion is labeled as a concurrence, it is practically speaking a majority opinion, and thus I will refer to it as such throughout this opinion.

> investigators, as part of a custodial interrogation, can conceal from suspects that counsel has been made available to them and is at their disposal. If it is deemed to be important that the accused be informed that he is entitled to counsel, it is certainly important that he be informed that he has counsel. [*Id*. at 620-621 (opinion by BRICKLEY, C.J.) (citations omitted).]

Thus, the majority opinion, although referring to Michigan's Constitution for its "implications," declined nonetheless to interpret its provisions. Rather, it concluded that "we invite much mischief if we afford police officers 'engaged in the often competitive enterprise of ferreting out crime' the discretion to decide when a suspect can and cannot see an attorney who has been retained for a suspect's benefit." *Id*. at 622, quoting *Girodenello v United States*, 357 US 480, 486; 78 S Ct 1245; 2 L Ed 2d 1503 (1958). Instead, according to Chief Justice BRICKLEY, *Bender*'s rule would ensure that the criminal justice system remained accusatorial and not inquisitorial in nature, because the "good will of state agents is often insufficient to guarantee a suspect's constitutional rights." *Bender*, 452 Mich at 623 (opinion by BRICKLEY, C.J.).

Justice BOYLE, joined by Justices RILEY and WEAVER, dissented:

> [W]ithout a single foundation in the language, historical context, or the jurisprudence of this Court, a majority of the Court engrafts its own "enlightened" view of the Constitution of 1963, art 1, § 17, on the citizens of the State of Michigan. With nothing more substantial than a disagreement with the United States Supreme Court as the basis for its conclusion, a majority of the Court ignores our obligation to find a principled basis for the creation of new rights and imposes a benefit on suspects that will eliminate voluntary and knowledgeable confessions from the arsenal of society's weapons against crime. [*Id*. at 624 (BOYLE, J., dissenting).]

According to the dissent in *Bender*, the guarantee against compelled self-incrimination found in Article 1, § 17 of the Michigan Constitution provides no greater protection than the Fifth Amendment of the United States Constitution, and there is no justification for an interpretation of Michigan's Constitution that affords protections differently than the federal Constitution. *Id*. at 628-629. The *Bender* dissent concluded that

> [i]n its haste to create a novel "*Miranda*-like right[]," a majority of the Court blurs the distinction between the constitutional right to be free from compelled self-incrimination and the safeguards—*Miranda* warnings—created to protect that right. In effect, a majority of the Court creates prophylactic rules to protect prophylactic rights. The argument seems to be that it is necessary to inform a suspect that an attorney is attempting to contact him, which, in turn, effectuates the suspect's right to counsel, which, in turn, effectuates a suspect's right to remain silent, which, in turn, effectuates a suspect's right to be free from compelled self-incrimination. Safeguards for safeguards is absurd and is not required by the Michigan Constitution, the federal constitution, or *Miranda*.
>
> Given . . . that neither the Michigan nor the federal constitution require extension of the *Miranda* litany, the majority's only possible justification for requiring the police to inform a suspect that an attorney wishes to speak with him must be grounded on policy concerns, not constitutional mandates. But policy concerns also fail under proper analysis. [*Id*. at 644.]

In sum, while *Bender* concluded that the failure of police officers to inform a suspect of an attorney's attempts to communicate with the suspect invalidates his *Miranda* waiver, there was no agreement as to whether Michigan's Constitution required that rule.

IV. ANALYSIS

The question presently before this Court is whether the rule of *Bender* should be maintained.[9] The first and most consequential inquiry in resolving this question must, of course, pertain to whether *Bender* was correctly decided. We conclude that it was not, concurring with the *Bender* dissent that the lead and majority opinions in that case engaged in an unfounded creation of "constitutional rights," given that the lead opinion failed to undertake a constitutional analysis sufficient to ground rights in our "organic instrument of state government," *Sitz v Dep't of State Police*, 443 Mich 744, 760; 506 NW2d 209 (1993), and the majority opinion failed even to consider that same "organic instrument," instead relying on policy concerns and fears of law enforcement "mischief."

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[9] In Justice MCCORMACK's dissent, she asserts that the instant case does not afford an appropriate vehicle to overrule *Bender* because, unlike defendants in *Bender*, defendant here repeatedly expressed his desire for counsel before ultimately making an incriminating statement to the police. According to the dissent, the rule in *Bender* is "sufficient" to sustain the suppression of defendant's statement, but is not "necessary" in order to do so, because the voluntariness of defendant's statement was implicated, or called into question, by defendant's failed attempts to invoke his right to counsel. However, in defendant's motion to suppress, he acknowledged that his statement to law enforcement was entirely voluntary, and argued only that his *Miranda* waiver had not been undertaken knowingly and intelligently pursuant to *Bender* and *Wright*, on the basis of the police's failure to inform him that an attorney had been appointed on his behalf and had sought to meet with him. Thus, whether defendant's statement was undertaken voluntarily is not an issue that has been raised in this Court. Furthermore, because defendant clearly and explicitly relied on *Bender* in his motion to suppress, and because the trial court also clearly and explicitly relied on *Bender* in granting this motion, the instant case does indeed afford an appropriate vehicle by which to assess the precedential value of *Bender*. Whether defendant's statement should be suppressed on other constitutional grounds can be considered on remand, provided both that such constitutional arguments have not been precluded by defendant's pursuit of the current motion and that counsel offers the appropriate pretrial motions.

A. THE *BENDER* RULE

The *Bender* majority cited no Michigan law to justify its creation of a state constitutional rule different from the United States Supreme Court's federal constitutional rule in *Moran*, ironically citing only several United States Supreme Court decisions at variance with *Moran*. Nonetheless, *Moran* rightly acknowledged, as it must, that its decision did not "disable[] the States from adopting different requirements for the conduct of its employees and officials as a matter of state law." *Moran*, 475 US at 428.[10] However, the *Bender* majority neither analyzed nor compared and contrasted to its federal counterpart the text of Article 1, § 17; cited no Michigan caselaw contrary to *Moran*; and most notably declined to ground its decision upon any interpretation of state constitutional provisions. At the same time nonetheless, the majority clearly sought to characterize its rule as being one of constitutional provenance.[11]

[10] "Under the Supremacy Clause, the courts of this state are obliged to enforce the rights conferred by the United States Supreme Court even if the state constitution does not provide such rights." *Sitz*, 443 Mich at 759 (citation omitted). However, an "organic instrument of state government" need not be "interpreted as conferring the identical right." *Id.* at 760. "It is only where the organic instrument of government purports to *deprive* a citizen of a right granted by the federal constitution that the instrument can be said to violate the constitution." *Id.* at 760-761 (emphasis added). Accordingly, this Court may interpret our Constitution in a manner that confers *greater* protections on a suspect than those mandated by federal law.

[11] For example, the majority acknowledged that "[t]his case rather clearly implicates both the right to counsel and the right against [compulsory] self-incrimination" before concluding that a prophylactic rule was appropriate. *Bender*, 452 Mich at 620-621 (opinion by BRICKLEY, C.J.) (citations omitted). The majority continued that "the right to counsel and the right to be free of compulsory self-incrimination are part of the bedrock of constitutional civil liberties that have been zealously protected and in some cases expanded over the years," and that "[g]iven the focus and protection that these particular constitutional provisions

Indeed, two years after *Bender*, in *People v Sexton*, 458 Mich 43, 70-72; 580 NW2d 404 (1998), then Justice BRICKLEY explained in his dissenting statement that

> [w]hile the *Bender* rule is prophylactic in nature like *Miranda*, that fact does not detract from its constitutional underpinnings. Its very purpose is to protect a suspect's right to counsel and the privilege against self-incrimination. To deny the constitutional import of this rule is to ignore the plain language set forth in *Bender*. [Citation omitted.]

Thus, the majority purported to articulate a state constitutional rule in *Bender*, prophylactic or otherwise, distinct from the federal constitutional rule in *Moran*,[12] while apparently disclaiming all reliance on state constitutional provisions.

B. THE MICHIGAN CONSTITUTION

To determine whether Michigan's Constitution supports *Bender*, we must construe our Constitution. It is "a fundamental principle of constitutional construction that we determine the intent of the framers of the Constitution and of the people adopting it," *Holland v Heavlin*, 299 Mich 465, 470; 300 NW 777 (1941), and we do this principally by examining its language. *Bond v Ann Arbor Sch Dist*, 383 Mich 693, 699-700; 178 NW2d 484 (1970). And we must do this even in the face of existing decisions of this Court pertaining to the same subject because there is no other judicial body, state or

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have received, it is difficult to accept and constitutionally justify a rule of law that accepts that law enforcement investigators, as part of a custodial interrogation, can conceal from suspects that counsel has been made available to them and is at their disposal." *Id.* at 621.

[12] The *Bender* Court had the undeniable authority to articulate a state constitutional rule as long as the individual protections set forth in *Moran* were not contracted.

federal, that possesses the authority to correct misinterpretations of the Michigan Constitution.

"In interpreting our Constitution, we are not bound by the United States Supreme Court's interpretation of the United States Constitution, even where the language is identical." *People v Goldston*, 470 Mich 523, 534; 682 NW2d 479 (2004) (citation omitted). Rather, "[this Court] must determine what law 'the people have made.' " *Id*. (citation omitted). "[W]e may not disregard the guarantees that our constitution confers on Michigan citizens merely because the United States Supreme Court has withdrawn or not extended such protection" under the federal Constitution. *Sitz*, 443 Mich at 759. As explained in *Sitz*:

> [T]he courts of this state should reject unprincipled creation of state constitutional rights that exceed their federal counterparts. On the other hand, our courts are not obligated to accept what we deem to be a major contraction of citizen protections under our constitution simply because the United States Supreme Court has chosen to do so. We are obligated to interpret our own organic instrument of government. [*Id*. at 763.]

While members of this Court take an oath to uphold the United States Constitution, we also take an oath to uphold the Michigan Constitution,[13] which is the enduring expression of the will of "we, the people" of this state.[14] In light of these separate oaths of office, we need

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[13] Const 1963, art 11, § 1 states: "All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office . . . according to the best of my ability." See also US Const, art VI.

[14] Const 1963, art 1, § 1 states: "All political power is inherent in the people. Government is instituted for their equal benefit, security and protection."

not, and cannot, defer to the United States Supreme Court in giving meaning to the latter charter.[15] Instead, it is this Court's obligation to independently examine our state's Constitution to ascertain the intentions of those in whose name our Constitution was "ordain[ed] and establish[ed]."[16] Accordingly, we must examine the

[15] There is a reason why the United States and Michigan Constitutions should be read differently; namely, "we, the people" of the State of Michigan created Michigan's Constitution, and interpretations of this Constitution must reflect that will, and "we the people of the United States" created the United States Constitution, and interpretations of that Constitution must reflect that will. These are distinct constitutions and distinct citizenries, and this Court must independently analyze our state Constitution to ensure that our citizens are receiving the measure of the protections that *they* created, which protections may or may not extend beyond those set forth by the federal Constitution.

[16] While there might well be an informal presumption that a United States Supreme Court interpretation of a federal constitutional provision constitutes the proper interpretation of a similar or identical state constitutional provision, this Court need not apply that presumption, and it need not defer to an interpretation of the United States Supreme Court, unless we are persuaded that such an interpretation is also most faithful to the state constitutional provision. This Court has on occasion seemed to suggest that there is some specific burden on this Court to identify a "compelling reason" or justification for interpreting the words of the Michigan Constitution differently than the words of the United States Constitution. See, e.g., *People v Nash*, 418 Mich 196, 214-215; 341 NW2d 439 (1983) ("We have, on occasion, construed the Michigan Constitution in a manner which results in greater rights than those given by the federal constitution, and where there is compelling reason, we will undoubtedly do so again.") (citations omitted); *People v Collins*, 438 Mich 8, 25; 475 NW2d 684 (1991) ("[A]rt 1, § 11 is to be construed to provide the same protection as that secured by the Fourth Amendment, absent 'compelling reason' to impose a different interpretation.") (citations omitted). However, this cannot precisely describe this Court's relationship with the federal judiciary, even with the United States Supreme Court. While it may almost always be prudent and responsible for this Court to examine federal precedents when they pertain to the same or similar language as in the Michigan Constitution, our responsibility in giving meaning to the Michigan Constitution must invariably focus upon *its* particular language and history, and the specific intentions of *its* ratifiers, and not those of the federal Constitution. Simply put, our

text and history of Article 1, § 17, as well as this Court's precedents pertaining to this provision, in order to ascertain both whether *Bender* was correctly decided and whether there is persuasive force in the United States Supreme Court's decision in *Moran*.[17]

1. CONSTITUTIONAL TEXT

"The primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification." *Wayne Co v Hathcock*, 471 Mich 445, 468; 684 NW2d 765 (2004). "The first rule a court should follow in ascertaining the meaning of words in a constitution is to give effect to the plain meaning of such

exercise of judgment concerning the reasonable meaning of the provisions of our state Constitution cannot, consistently with our oath of office and our structure of constitutional federalism, be delegated to another judicial body.

[17] This Court has referred to various factors that may be relevant in determining whether Michigan's Constitution supports an interpretation that differs from that of the United States Constitution:

> 1) the textual language of the state constitution, 2) significant textual differences between parallel provisions of the two constitutions, 3) state constitutional and common-law history, 4) state law preexisting adoption of the relevant constitutional provision, 5) structural differences between the state and federal constitutions, and 6) matters of peculiar state or local interest. [*Collins*, 438 Mich at 31 n 39, citing *People v Catania*, 427 Mich 447, 466 n 12; 398 NW2d 343 (1986).]

We continue to believe that the application of these factors will often prove helpful to this Court in the interpretation of particular state constitutional provisions. However, we also believe that examination of these factors collectively supports the conclusion that the ultimate task facing this Court in cases requiring interpretation of particular Michigan constitutional provisions is to respectfully consider federal interpretations of identical or similar federal constitutional provisions, but then to undertake by traditional interpretive methods to independently ascertain the meaning of the Michigan Constitution.

words as understood by the people who adopted it." *Bond*, 383 Mich at 699. "In applying this principle of construction, the people are understood to have accepted the words employed in a constitutional provision in the sense most obvious to the common understanding and to have 'ratified the instrument in the belief that that was the sense designed to be conveyed.' " *People v Nutt*, 469 Mich 565, 573-574; 677 NW2d 1 (2004) (citation omitted).

The text of Article 1, § 17 of the Michigan Constitution does not, in our judgment, provide for the rights articulated in *Bender*, when it states in the same words as the Fifth Amendment to the United States Constitution that "no person shall be compelled in any criminal case to be a witness against himself."[18] Ascertaining the "plain meaning" of "compelled" is of critical importance to our textual analysis, as we must determine precisely what type of protection the ratifiers intended to confer. The 1828 edition of *Webster's American Dictionary of the English Language* defined "compel" as "[t]o drive or urge with force, or irresistibly"; "to constrain"; "to oblige"; or "to necessitate, either by physical or moral force." At the time that our 1963 Constitution was ratified, the term "compel" was commonly defined as "to force by physical necessity or

[18] Michigan's Constitution of 1835 did not contain a self-incrimination provision; however, the current provision was incorporated shortly thereafter in 1850. Const 1850, art 6, § 32. This provision remained unchanged in Article 2, § 16 of Michigan's Constitution of 1908 and in Article 1, § 17 of Michigan's Constitution of 1963. In 1963, Article 1, § 17 was amended to add "the right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed," but the self-incrimination part of the provision remained unchanged. Thus, the language of the Michigan Constitution's self-incrimination provision has remained consistent since its incorporation in 1850.

evidential fact"; "to urge irresistibly by moral or social pressure"; "to domineer over so as to force compliance or submission"; or "to obtain by force, violence, or coercion." *Webster's Third New International Dictionary* (1961). Thus, at the time of the ratification of Article 1, § 17, the word "compel" referred to the use of coercion, violence, force, or pressure, all of which are relevant factors in assessing the genuine voluntariness of a confession.

The remainder of the terms contained in Article 1, § 17 require no individual examination, as their plain meanings appear "obvious to the common understanding." Accordingly, applying the definition of "compel" to the remainder of the language of Article 1, § 17, we find that the compelled self-incrimination provision in its entirety can be understood to provide that "no person shall be [coerced, forced, or pressured] in any criminal case to be a witness against himself." Given the provision's focus on a coercive custodial environment, Article 1, § 17 can be reasonably understood to protect a suspect from the use of his *involuntary* incriminating statements as evidence against him in a criminal case. Consequently, the text of Article 1, § 17 does not support *Bender*, which pertains not to the voluntariness of the confession itself, but to whether a suspect's *Miranda* waiver has been made "knowingly." That is, there was no dispute in *Bender* as to the voluntariness of the defendant's confession, only as to whether his *Miranda* waiver could be made "knowingly" absent awareness of an attorney's efforts to contact him; the coercion or pressure contemplated by the text of Article 1, § 17, which relates to the *voluntariness* of a confession, was not implicated.[19]

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[19] We need not decide whether our interpretation of "compel" for purposes of Article 1, § 17 is fully in accord with *Miranda*'s interpretation

2. CONSTITUTIONAL CONVENTION

When interpreting a constitutional provision, "[r]egard must also be given to the circumstances leading to the adoption of the provision and the purpose sought to be accomplished." *People v Nash*, 418 Mich 196, 209; 341 NW2d 439 (1983) (citation omitted). In determining the meaning of particular constitutional provisions to the ratifiers of the Constitution, this Court has noted that "constitutional convention debates and the address to the people, though not controlling, are relevant." *Id*. (citation omitted).[20] The primary focus should be on "any statements [the delegates] may have made that

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of the same term for purposes of the Fifth Amendment, given that *Miranda* has established an irreducible minimum standard for purposes of all custodial interrogations in Michigan, as well as those in every other state. Further, such a comparison would be irrelevant to our assessment of *Bender*, as *Bender*'s interpretation of "compel" goes beyond its meaning as contemplated by either Article 1, § 17 or *Miranda*. Pursuant to *Bender*, a suspect's voluntary *Miranda* waiver, made with full knowledge of his *Miranda* rights, can nonetheless be considered "compelled" for purposes of Article 1, § 17, and therefore invalid, solely because that suspect was not informed of an attorney's efforts to contact the suspect. Accordingly, *Bender* renders incriminating statements or confessions inadmissible by finding "compulsion" when there existed no form of the coercion, violence, force, or pressure contemplated by either the text of Article 1, § 17, or by the United States Supreme Court in its analysis of what it viewed as more subtle and nuanced forms of coercion in *Miranda*.

[20] Indeed, constitutional conventions, as a distinctive form of "super legislative history," deriving from the source of authority of the constitution itself, "we, the people," may be highly valuable in interpreting constitutional provisions:

> "[T]he constitutional convention is a distinctively American contribution to political theory and action . . . . [I]t is the personification of the sovereign people assembled for the discharge of the solemn duty of framing their fundamental law." [Schlam, *State Constitutional Amending, Independent Interpretation, & Political Culture*, 43 DePaul L Rev 269, 320 n 148 (1994), quoting Walker, *Myth & Reality in State Constitutional Development*, in Major Problems in State Constitutional Revision (Graves, ed, 1960), p 15 (alterations in original).]

would have shed light on why they chose to employ the particular terms they used in drafting the provision to aid in discerning what the common understanding of those terms would have been when the provision was ratified by the people." *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 656-657; 698 NW2d 350 (2005) (citation omitted).[21]

However, the records pertaining to Article 1, § 17 provide few such clues. There appears to have been no debate on the provision when it was first incorporated. When the Constitution was ratified in 1908, the Self-Incrimination Clause remained unchanged from the 1850 version, and the accompanying Address to the People in 1908 stated simply, "[n]o change from Sec. 32, Art. VI of the present constitution." Journal of the Constitutional Convention 1907-1908, p 1542. Although Article 1, § 17 was ratified in 1963, the only change was the addition of language that had no bearing on the Self-Incrimination Clause, and it was only the new language that was the subject of any convention debate or explication. 1 Official Record, Constitutional Convention 1961, pp 545-553; 2 Official Record, Constitutional Convention 1961, p 3364. We find nothing in the records of the constitutional conventions to suggest that Article 1, § 17 means anything different from what its text most reasonably expresses.

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[21] For example, in *People v Nash*, this Court concluded that it should interpret Michigan's Constitution differently than the United States Supreme Court's interpretation of the Fourth Amendment, in part because the records of the Michigan Constitutional Convention of 1961 indicated that the addition of an anti-exclusionary-rule provision was made in a particularly aggressive attempt by the delegates to assert state sovereignty in reaction to the United States Supreme Court decision in *Mapp v Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961). *Nash*, 418 Mich at 211-213.

3. CONSTITUTIONAL CASELAW

Although the text of Article 1, § 17 has mirrored its federal counterpart since its incorporation, the conclusion does not follow that this Court has interpreted the provision identically to the United States Supreme Court's interpretation of the Fifth Amendment. Consequently, it is necessary to examine this Court's precedent to determine whether caselaw in any way supports or contradicts *Bender*.

Before *Bender*, this Court had previously addressed the effect of an attorney's attempts to contact a suspect on the admissibility of the suspect's confession in *People v Cavanaugh*, 246 Mich 680; 225 NW 501 (1929), and *People v Wright*, 441 Mich 140; 490 NW2d 351 (1992), the latter cited in *Bender* and both cited by defendant in this case. However, neither opinion provides the foundation for *Bender's* proposition that Michigan courts have historically interpreted Michigan's compulsory self-incrimination provision to provide criminal suspects with greater protections than those afforded by the Fifth Amendment.

In *Cavanaugh*, the juvenile defendant was sentenced to prison for life for committing a rape in light of evidence that the victim identified his voice and given his alleged confession of guilt. The defendant testified at trial that the police had questioned him at night, that he had not been permitted to sleep, and that he asked for and was denied an attorney. An attorney who had been retained by the defendant's father came to the police station, but was refused access to the defendant until the attorney proceeded to the courthouse to obtain a writ of habeas corpus. It is unclear if the defendant was aware of the attorney's presence, but in any event, he admitted to committing the crime. At trial, the defendant repudiated this confession, claiming it had

been extorted by duress, brow-beating, intimidation, and by holding him incommunicado. The lower court sustained the prosecutor's objection to the defendant's proposed testimony regarding the circumstances surrounding his confession and did not permit the defendant to introduce evidence pertaining to his claim that police officers had held him incommunicado.

On appeal, this Court reversed the defendant's conviction and remanded for a new trial, concluding that the "[d]efendant had an undoubted right to lay before the jury his full claim of what the police said to him, and it was for the jury to say whether, under all the circumstances, the confession was voluntary." *Cavanaugh*, 246 Mich at 686. This Court continued:

> [A] confession, extorted by mental disquietude, induced by unlawfully holding an accused incommunicable, is condemned by every principle of fairness, has all the evils of the old-time *letter de cachet*, is forbidden by the constitutional guaranty of due process of law, and inhibited by the right of an accused to have the assistance of counsel . . . . Holding an accused incommunicable to parents and counsel is a *subtle and insidious method of intimidating and cowing*, tends to render a prisoner plastic to police assertiveness and demands, and is a trial of mental endurance under unlawful pressure.
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> The defendant was held incommunicable. He could not send for or employ counsel. His father was refused right to see him. When an attorney, presumably employed by his father, appeared at the jail and asked to see defendant, he was refused the right to do so until the attorney started for the courthouse to get a writ of *habeas corpus*. In this State a parent may not be denied the right to see and have conversation with a child in jail and accused of crime. Neither may police, having custody of one accused of crime,

> deny an attorney, employed by or in behalf of a prisoner, the right to see and advise the accused. [*Id*. at 686, 688 (emphasis added).]

This Court concluded that "[w]hether defendant's call for father, mother, attorney, and priest did not make any difference upon the question of his alleged confession being voluntary was for the jury." *Id*. at 688-689. Consequently, defendant was entitled to a new trial, "at which the most searching examination of all the circumstances surrounding his alleged confession will be permitted." *Id*. at 689.

Although *Cavanaugh*, like *Bender*, addressed the admissibility of a confession in a circumstance in which an attorney had been denied access to a person facing custodial interrogation, *Cavanaugh* is distinguishable from *Bender* in at least three significant ways, and cannot provide its foundation. First, whereas *Bender* pertained to whether the defendants' *waivers* of their *Miranda* rights were made "knowingly," *Cavanaugh* pertained only to whether the defendant's *confession* was made voluntarily, as *Miranda* had not yet introduced into the Fifth Amendment analysis the rule that a defendant cannot be subject to custodial interrogation absent a "voluntary, knowing, and intelligent" waiver of *Miranda* rights.[22] Because there was no dispute in *Bender* regarding the voluntary nature of defendants' incriminating statements, *Cavanaugh*'s analysis concerning voluntariness cannot provide support for *Bender*. Second, *Cavanaugh* appropriately considered multiple factors—only one of which was the police

[22] There are two distinct "voluntariness" inquiries that must be considered in analyzing the admissibility of an incriminating statement or confession. First, the incriminating statement or confession itself must have been made voluntarily. Second, a suspect's *Miranda* waiver must have been made voluntarily. These distinct concepts of "voluntariness" must be borne in mind in assessing both *Bender* and *Moran*.

officer's refusal to allow an attorney access to the defendant—in its "totality of the circumstances" analysis to assess whether the defendant's confession was made voluntarily, an analysis which at that time was the accepted mechanism for determining compliance with constitutional standards. However, *Bender*'s rule, invalidating all "unknowing" *Miranda* waivers, is a per se rule that pertains to just a single factor. *Cavanaugh* cannot possibly support this per se rule, given that *Cavanaugh* provided no indication that this Court had ever determined that just one of its several factors—the police officer's refusal to allow the attorney to see the defendant—gave rise to an independent and per se constitutional right.[23] Third, in *Cavanaugh*, the juvenile defendant requested and was refused an attorney. This Court properly considered the defendant's rejected request for an attorney as one factor in its voluntariness analysis. In contrast, in *Bender*, the defendants

[23] Justice CAVANAGH'S dissent misapprehends this point by stating "the majority argues that *Cavanaugh* cannot support *Bender* because *Cavanaugh* employed a 'totality of the circumstances' rule rather than the per se rule applied in *Bender*. The fact that *Cavanaugh* and *Bender* differed on what *test* should result from police interference with counsel's efforts to speak to a suspect does not lessen the fact that both *Cavanaugh* and *Bender* agreed that such police conduct is *unconstitutional* under the Michigan Constitution." *Post* at 267-268. However, our point is not that *Cavanaugh*'s application of a totality of the circumstances test instead of a per se rule is fatal to *Bender*, but is instead that by concluding that the police's refusal to allow the attorney to see the defendant was only one factor among many that might have rendered the defendant's confession involuntary, *Cavanaugh* nowhere concluded that such failure alone would render a confession inadmissible. In other words, because this Court concluded that the jury should hear a host of factors to determine whether the defendant's confession was voluntary, a single factor—that counsel's requests to speak to the defendant were refused—cannot be identified and cited for the proposition that *Cavanaugh* established as a matter of constitutional principle that a defendant must be informed of an attorney's attempts to contact him in order for his subsequent confession to be admissible.

never requested an attorney before waiving their *Miranda* rights and providing incriminating statements.[24] Accordingly, the defendants perceived no rejected request that could act to create a coercive atmosphere and potentially call into question the voluntariness of their statements. Given these significant differences, *Cavanaugh* lends no support, we believe, to the notion that Michigan's Constitution supports the per se rule of *Bender*.[25]

In *Wright*, the defendant was arrested for murder, taken to the police station at around 5:00 a.m., and informed of his *Miranda* rights. The defendant ultimately offered an incriminating statement to police officers after being deprived of food, water, and a place to sleep for a total of eleven hours while awaiting questioning. Before the defendant made his statement, his family retained an attorney who made at least two trips to the police station, requesting to speak with the defendant. Police officers refused the attorney's request both times. The defendant ultimately gave a statement to the police without being informed of the attorney's efforts to reach him. Before trial, the defendant filed a motion to suppress his statement. At the suppression hearing, the trial court denied the defendant's motion, concluding that the defendant had never expressly asked for an attorney. The trial court relied on *Moran*, reasoning that "although the police conduct was repre-

[24] Similarly, in the case at hand, defendant failed to request an attorney after reinitiating contact with police and before waiving his *Miranda* rights and making an incriminating statement, despite the fact that defendant knew he could request an attorney, as he had done so the day before.

[25] It should be noted that, were the circumstances in *Cavanaugh* to arise today, the confession would be inadmissible, as the officers ignored the defendant's assertion of his right to counsel and continued to interrogate him, contrary to *Miranda*, 384 US at 473-474.

hensible, the law did not require the suppression of defendant's statements." *Wright*, 441 Mich at 145-146 (opinion by MALLETT, J.). The Court of Appeals affirmed, declining to impose more stringent standards on police conduct than the United States Supreme Court imposed in *Moran*. The defendant then appealed in this Court, and we granted leave to appeal to consider "whether a defendant has a right to know of his attorney's efforts to contact him" and "whether the failure by police to provide a defendant with proper food, water, or opportunity to sleep, renders a defendant's statements involuntary." *Id*. at 146.

In an opinion by Justice MALLETT, joined by Justice LEVIN, and separate opinions by Chief Justice CAVANAGH and Justice BRICKLEY, this Court suppressed the defendant's statements. The fragmented decision resulted in no binding precedent. In the lead opinion, Justice MALLET concluded that the confession had to be suppressed because a suspect must be informed of an attorney's in-person attempts to contact him, as Michigan's Constitution provides for such a right. *Id*. at 154-155. This opinion stated as follows:

> [U]nder our state's laws, we conclude that [defendant] did not make a knowing, voluntary, and intelligent waiver of his rights when the police, before he made a statement, refused to inform him that retained counsel tried or was currently trying to contact him. Without this knowledge, [the defendant] could not make a truly voluntary waiver of his essential rights. Given the opportunity to speak to a specific, retained and available attorney, [defendant's] decision may have been different.
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> Under Const 1963, art 1, § 17, a criminal suspect is given the right against self-incrimination, a right similar to that provided in the Fifth Amendment of the United States

> Constitution. This Court has held that the interpretation of our constitutional privilege against self-incrimination and that of the Fifth Amendment are the same. *In re Moser*, 138 Mich 302, 305; 101 NW 588 (1904). However, as the United States Supreme Court concluded in *Moran*, states are free to adopt more protective standards under state law. Because we believe that it was necessary, in order to allow [defendant] to make a knowing and fully voluntary waiver of his Fifth Amendment rights, we extend the rights afforded under Const 1963, art 1, § 17, to include information of retained counsel's in-person efforts to contact a suspect. [*Id*. at 153-154 (citations omitted.]

In his separate concurrence, Chief Justice CAVANAGH agreed with Justice MALLETT's conclusion that the defendant's statement had to be suppressed and with Justice MALLETT's analysis in interpreting Michigan's constitutional privilege against self-incrimination "more broadly" than the Fifth Amendment. Chief Justice CAVANAGH wrote separately to emphasize that the "conclusion is even more clearly supported on the ground that the police conduct in this case violated defendant's right to counsel under Const 1963, art 1, § 20." *Id*. at 155-156 (CAVANAGH, C.J., concurring). In a separate concurring opinion, Justice BRICKLEY agreed that suppression of the defendant's statement was necessary, but based his decision on his conclusion that the defendant's *Miranda* waiver was made involuntarily, citing the "eleven-hour incommunicado interrogation during which [the defendant] was deprived of food, sleep, and contact with friendly outsiders, combined with the fact that he was not informed of available retained counsel." *Id*. at 172 (BRICKLEY, J., concurring). Justice RILEY dissented, joined by Justices BOYLE and GRIFFIN, concluding that defendant had knowingly waived his right to consult with an attorney before making his statement, and that the "objectionable" police conduct did not amount to a constitutional viola-

tion. *Id*. at 179-180 (RILEY, J., dissenting). The dissent noted that "[t]here is nothing conspicuous in the language of the Michigan Constitution that would distinguish it from the rights guaranteed by the federal constitution." *Id*. at 177.

Wright cannot provide the foundation for *Bender*, because it produced no consensus that Article 1, § 17 of Michigan's Constitution imposes greater requirements for a valid waiver of the rights to remain silent and to counsel than those imposed by the federal Constitution,[26] and its lead opinion, much like *Bender*'s majority opinion, suffered from scant analysis. The lack of analysis in both opinions is accounted for by the simple fact that there is no basis in the Michigan Constitution for the decisions reached in those opinions. That is, it is not the failure of analyses in these opinions that militates against their extension of *Miranda*; it is the absence of any language in the Michigan Constitution that would sustain such an analysis, and that is why each of these opinions is so barren of constitutional exegesis. Only Justice MALLETT's lead opinion in *Wright* explicitly "extend[ed] the rights afforded under Const 1963, art 1, § 17" to provide greater protection than those afforded by the Fifth Amendment. *Wright*, 441 Mich at 154 (opinion by MALLETT, J.). Justice LEVIN concurred, and Justice CAVANAGH agreed with Justice MALLETT's analysis, but no other member of this Court accepted the lead opinion's proposition, and Justice RILEY, joined by Justices BOYLE and GRIFFIN, explicitly rejected such a conclusion in her dissent. In any event, the lead opinion cannot provide a foundation for *Bender*, as it peremp-

[26] Despite this, *Bender*'s lead opinion stated that "[i]n *Wright*, this Court held that the Michigan Constitution imposes a stricter requirement for a valid waiver of the rights to remain silent and to counsel than imposed by the federal constitution." *Bender*, 452 Mich at 611 (opinion by CAVANAGH, J.).

torily concluded that the "accusatorial" nature of our criminal justice system warranted an "exten[sion of] the rights afforded under Const 1963, art 1, § 17," without anywhere confronting the language of this provision or assessing in any way the intentions of the ratifiers.

Instead, in opining that Article 1, § 17 requires police to inform suspects of an attorney's efforts to contact a suspect in order that a *Miranda* waiver be valid, the lead opinion acknowledged that it "disagree[d]" with the Supreme Court's conclusion to the contrary in *Moran*, and noted that "states are free to afford their citizens greater protection than that granted by the federal government." *Wright*, 441 Mich at 148 (opinion by MALLETT, J.). Doubtless this is true, but such authority on our part does not relieve us from the obligation to ground our actions within our own Constitution. The lead opinion opined further, "[o]ther states have considered [*Moran*'s] question and have concluded that it is necessary for a suspect to be informed of an attorney's attempted contacts," and proceeded to summarize the decisions of the highest state courts of Connecticut, Delaware, and Oregon. *Id*. at 148-153. Such an observation, while also entirely appropriate as a prelude to extending *Miranda*, also does not relieve us of the obligation to "determine what law 'the people [of Michigan] have made.' " *Sitz*, 443 Mich at 759. This obligation is best accomplished by some effort to examine the language of our Constitution that purportedly supplies the basis for the newly discovered constitutional right, *Bond*, 383 Mich at 699-700, in this instance, Article 1, § 17. However, without engaging in any such analysis, the lead opinion turned to the facts of *Wright*, and offered the following:

> As Justice Stevens so eloquently stated, "[t]he recognition that ours is an accusatorial, and not an inquisitorial system nevertheless requires that the government's actions, even in responding to this brutal crime, respect those liberties and rights that distinguish this society from most others." *Moran*, [475 US] at 436 (Stevens, J., dissenting). Accordingly, under our state's laws, we conclude that Mr. Wright did not make a knowing, voluntary, and intelligent waiver of his rights when the police, before he made a statement, refused to inform him that retained counsel tried or was currently trying to contact him. Without this knowledge, Mr. Wright could not make a truly voluntary waiver of his essential rights. Given the opportunity to speak to a specific, retained and available attorney, Mr. Wright's decision may have been different. [*Wright*, 441 Mich at 153 (opinion by MALLETT, J.).]

The lead opinion concluded that while "this Court has held that the interpretation of our constitutional privilege against self-incrimination and that of the Fifth Amendment are the same," it was nevertheless appropriate to "extend the rights afforded by Const 1963, art 1, § 17, to include information of retained counsel's in-person efforts to contact a suspect." *Id*. at 154. The opinion was correct that this Court may interpret our constitution to afford greater protections than those afforded by the Fifth Amendment. However, the opinion did not perform the constitutional analysis necessary to "determine the intent of the framers and of the people adopting it," *Holland*, 299 Mich at 470. Consequently, *Wright*'s "exten[sion of] the rights afforded under Const 1963, art 1, § 17," cannot provide *Bender*'s foundation, because that extension was not supported by a majority of this Court, and it was not based on any semblance of the constitutional analysis necessary to ground new rights in the Michigan Constitution, an analysis that would seem to be of particular prudence in distinguishing an interpretation of a provision of the

Michigan Constitution from a United States Supreme Court interpretation of the United States Constitution. Cf. *Nash*, 418 Mich at 209.

While this analysis indicates that there is no precedent specifically undergirding *Bender*,[27] it is also relevant to examine this Court's caselaw pertaining to Article 1, § 17, as well as to the admissibility of confessions in general, to inquire whether there is any other historical support from this Court for *Bender*. Specifically, we examine whether there is any precedent that foreshadowed *Bender* by suggesting either that (a) this Court has interpreted the self-incrimination provision of Article 1, § 17 to extend beyond the protections afforded by the Fifth Amendment; or (b) this Court has

[27] Justice CAVANAGH's dissent alleges that *Cavanaugh* provided specific support for *Bender*, as the justices in support of *Bender* "necessarily relied on *Cavanaugh* (as evidenced by the *Bender* opinion's citations to the *Wright* opinions, which cited *Cavanaugh*) as the primary source for the broader interpretation of the right against self-incrimination under the Michigan Constitution." *Post* at 274. However, *Bender* did not once cite *Cavanaugh*, and although several opinions in *Wright* did cite *Cavanaugh*, none cited it for the proposition that Michigan's right against compulsory self-incrimination affords greater protections than those afforded by the Fifth Amendment. In *Wright*, Justice MALLETT did not cite *Cavanaugh* in the lead opinion; Justice CAVANAGH cited *Cavanaugh* in his concurrence in support of his belief that the police conduct in *Wright* violated defendant's right to counsel under Article 1, § 20 and the *due process* provision now contained in Article 1, § 17, *Wright*, 441 Mich at 156-157 (opinion by CAVANAGH, J.); Justice BRICKLEY cited *Cavanaugh* in his concurrence for the proposition that incommunicado interrogation affects the *voluntariness* of a *Miranda* waiver, *id.* at 168-169 (opinion by BRICKLEY, J.); and Justice RILEY cited *Cavanaugh* in her dissent to rebut the argument that Michigan's Constitution requires officers to inform a defendant of an attorney's presence for that defendant's waiver to be made voluntarily and knowingly, *id.* at 178-180 (opinion by RILEY, J.). Thus, this Court did not rely on *Cavanaugh* for the proposition that the compulsory self-incrimination provision contained in Article 1, § 17 provides protections that extend beyond those afforded by the Fifth Amendment.

interpreted the self-incrimination provision of Article 1, § 17 as focused on something other than the voluntariness of a confession.

Concerning the first matter of exploration, there is no precedent that serves as a precursor to *Bender* by affording protections under Article 1, § 17 greater than those afforded under the Fifth Amendment. To the contrary, on at least two occasions, this Court had discussed the meaning of Michigan's Self-Incrimination Clause in comparison to the Fifth Amendment and indicated that Michigan's Self-Incrimination Clause is identical to its federal counterpart. In *In re Moser*, 138 Mich 302, 305; 101 NW 588 (1904), we noted that "[u]nder the Constitutions of Michigan and of the United States, no witness can be compelled to give testimony which might tend to criminate himself or expose him to a criminal prosecution. The provision in each Constitution is the same." Eighty years later, in *Paramount Pictures Corp v Miskinis*, 418 Mich 708, 726; 344 NW2d 788 (1984), we cited *Moser* and stated that "[h]aving examined prior decisions of this Court, we find nothing which requires an interpretation of our constitutional privilege against self-incrimination different from that of the United States Constitution." *Moser* and *Paramount* are instructive in that they provide insight concerning the legal environment at the time *Bender* was decided. Until that point, our interpretations of Article 1, § 17 provided no indication that this Court was prepared to extend the protections of Article 1, § 17 to exceed those of the Fifth Amendment.[28]

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[28] As we have indicated, we do not understand the assertions in *Moser* and *Paramount* as communicating that this Court, in carrying out its obligation to interpret Article 1, § 17, will forever adhere to all future interpretations of the Fifth Amendment by the United States Supreme Court, but merely that, in our judgment, the framers of these constitu-

Concerning the second matter of exploration, while *Bender* implicates the "knowing" prong of a *Miranda* waiver, this Court's precedents indicate that Article 1, § 17 pertains solely to the *voluntariness* of a confession. "Under Michigan law, initially the admissibility of confessions was governed solely by common law, which adhered to the rule that involuntary confessions were inadmissible." *People v Conte*, 421 Mich 704, 721; 365 NW2d 648 (1984) (citations omitted). Subsequently, this Court recognized a constitutional basis for this rule, acknowledging that both the Due Process Clause, *Cavanaugh*, 246 Mich at 686, and the right against self-incrimination, *People v Louzon*, 338 Mich 146; 61 NW2d 52 (1953), provide alternate bases for holding involuntary confessions inadmissible. Before *Miranda*, few cases analyzed the admissibility of a confession in light of the Self-Incrimination Clause, but this Court did so in *People v Louzon*:

> We recognize the rule that confessions are inadmissible when secured by inflicting physical force or its equivalent by means of harsh or cruel treatment or false promises. The confession must be voluntary, but this does not mean that it must be volunteered. *No one may be forced to be a witness against himself*. [*Louzon*, 338 Mich 153-154 (emphasis added).]

Thus, this Court's use of the Self-Incrimination Clause to analyze the admissibility of a confession focused entirely on the voluntariness of the confession, referring to the type of force or coercion that is contemplated in part by the text of Article 1, § 17. Sometime after *Louzon*, *Miranda* transformed the inquiry pertaining to the admissibility of confessions, introducing the concept

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tional provisions possessed similar intentions with regard to their purposes, and possibly also that until that time, judicial understandings of Article 1, § 17 and the Fifth Amendment were in general accord.

of a "voluntary, knowing, and intelligent" waiver of a suspect's *Miranda* rights. Before *Miranda* under Michigan law, voluntariness constituted the sole criteria for a confession to be admissible, under either the Due Process Clause, or Michigan's Self-Incrimination Clause, providing no support for *Bender*'s proposition that Article 1, § 17 pertains in any way to whether a *Miranda* waiver is made "knowingly."

In his dissent, Justice CAVANAGH disagrees with this conclusion, and instead asserts that *Cavanaugh* foreshadowed *Miranda*'s "knowing and intelligent" requirement by holding that defendant's confession was obtained in violation of what is now Article 1, § 17, due to the "incommunicable" nature of the defendant's interrogation. According to the dissent, "incommunicado interrogation was at the center of the United States Supreme Court's explanation of the 'knowing and intelligent' requirement in *Miranda*," and "[b]ecause *Cavanaugh*'s explanation of the impropriety of the incommunicado interrogation methods used to extract the defendant's confession is strikingly similar to the impermissible interrogation methods that *Miranda* discussed, *Cavanaugh* is . . . more properly classified as consistent with *Miranda*'s 'knowing and intelligent' standard." *Post* at 264.

However, as previously noted, *Cavanaugh* explicitly pertained only to the voluntariness of a confession, and the "incommunicable" nature of defendant's interrogation was only one factor among many that persuaded this Court to remand for a determination whether defendant's confession was voluntary.[29] Although *Ca-*

[29] In his dissent, Justice CAVANAGH asserts that our "hyper-textualist" definition of "compulsion" is inconsistent with *Cavanaugh*'s understanding of the term, as *Cavanaugh* recognized that "incommunicable" interrogation may render a confession involuntary, and such "incommu-

vanaugh in no way transformed this Court's traditional voluntariness analysis, even assuming arguendo that *Cavanaugh* recognized that more subtle forms of coercion might render a confession involuntary, there is simply no indication that *Cavanaugh* contemplated the "knowing and intelligent" requirement set forth almost four decades later in *Miranda*, as *Cavanaugh* nowhere hinted that a defendant must have some idea of his or her "rights" and the consequences of waiving those rights in order for his or her confession to be admissible. As *Miranda* had not yet introduced the concept of a waiver made "knowingly and intelligently," it is highly unlikely that *Cavanaugh* contemplated such a requirement, or that the ratifiers of the 1963 Constitution perceived *Cavanaugh* as setting forth such a requirement, particularly in view of the fact that *Cavanaugh* performed the traditional totality of the circumstances voluntary analysis that was routinely undertaken in determining the admissibility of a confession at that time.[30] As even Justice CAVANAGH's dissent acknowl-

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nicable" interrogation is not the type of "coercion, violence, force, or pressure" contemplated by our definition. However, *Cavanaugh* did not hold that a confession made in an "incommunicable" environment is involuntary, which is what the dissent would seem to suggest. *Cavanaugh* instead acknowledged only that the incommunicable nature of a confession might be *one* factor, combined with a host of others—including sleep deprivation, duress, and "brow-beating," all factors that were traditionally considered in a voluntary analysis—that might potentially render a confession involuntary. This Court should not isolate a single factor from *Cavanaugh* in order to establish the meaning of "compulsion" or "voluntariness" in Michigan, in disregard of what Article 1, § 17, and the body of caselaw both preceding and succeeding *Cavanaugh*, would otherwise suggest.

[30] Notably, even Justice BRICKLEY, writing for the majority in *People v Hill*, 429 Mich 382, 392-393; 415 NW2d 193 (1987), acknowledged that "[a]t the time of the drafting of our 1963 Constitution (pre-*Miranda*), the self-incrimination provision of the Fifth Amendment was only implicated when an extrajudicial statement was found to have been elicited involuntarily."

edges, "when interpreting the Michigan Constitution, we must recognize the law as it existed in Michigan *at the time* the relevant constitutional provision was adopted, and 'it must be presumed that a constitutional provision has been framed and adopted mindful of prior and existing law and with reference to them.' *People v Kirby*, 440 Mich 485, 492; 487 NW2d 404 (1992)." *Post* at 258-259 (emphasis added). The trajectory of our constitutional development under our equivalent of the Fifth Amendment, as well as this Court's consistent emphasis on the voluntariness of a confession, *including* in *Cavanaugh*, indicated no anticipation of *Miranda*, a notion as to which defense counsel himself agreed at oral argument.[31] Furthermore, *Cavanaugh* was decided under the Due Process Clause, and not the Self-Incrimination Clause, further suggesting that the ratifiers of the 1963 Constitution would not have perceived *Cavanaugh* as establishing that Michigan's provision against compulsory self-incrimination provided any greater protections than those afforded by the Fifth Amendment. Accordingly, neither *Cavanaugh*, nor any other precedent of this Court, supports the dissent's assertion that Article 1, § 17 was ratified in contemplation of the "knowing" requirement later set forth in *Miranda*.[32]

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[31] At oral argument, defense counsel acknowledged that *Cavanaugh* established a right to counsel as a condition of *voluntariness*, and that the Court could not have been contemplating a "knowing and intelligent" standard at that time. Specifically, he stated, "I don't think really the courts had entertained as much beyond the voluntariness as came later on with *Miranda*—where it talks about voluntary, knowing, and intelligent. So as the law progressed, I think they weren't really addressing knowing and intelligent." Moreover, defendant has cited no caselaw apart from *Cavanaugh* that hints at either a "knowing" requirement, or a different "voluntariness" definition, than the one contemplated by Article 1, § 17.

[32] Going one step further, even assuming arguendo that *Cavanaugh* in some way did contemplate *Miranda*'s "knowing" prong, there is certainly

Moreover, this Court's precedent provides no support for the proposition that this Court has placed extra emphasis on the "knowing" prong of a *Miranda* waiver in the period since *Miranda*. Before and after *Miranda*, "[w]here conditions did not overbear a defendant's will, statements have been held admissible." *Wright*, 441 Mich at 167, citing *People v Brannan*, 406 Mich 104; 276 NW2d 14 (1979); *People v Farmer*, 380 Mich 198; 156 NW2d 504 (1968); *People v Boyce*, 314 Mich 608; 23 NW2d 99 (1946). Even after *Miranda* and *Bender*, this Court has referred to *Moran* for the appropriate "knowing and intelligent" waiver standard, and stated that "[t]o knowingly waive *Miranda* rights, a suspect need not understand the ramifications and consequences of choosing to waive or exercise the rights that the police have properly explained to him" and "[l]ack of foresight is insufficient to render an otherwise proper waiver invalid." *People v Cheatham*, 453 Mich 1, 28-29; 551 NW2d 355 (1996) (citations omitted). Thus, *Bender*'s heightened requirement for a *Miranda* waiver to be made "knowingly" is inconsistent with this Court's previous treatment of the requirement.

This Court's precedents did not foreshadow, or otherwise provide support, for *Bender*. Nor do this Court's precedents support a finding that Article 1, § 17 requires a greater showing that a *Miranda* waiver was made "knowingly" than is required by the Fifth Amendment, given that this Court's interpretation of Article 1, § 17 has indicated that it pertains solely to the voluntariness of a confession itself, not to whether a confession is made with full knowledge of its consequences.[33]

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no indication that *Cavanaugh* further contemplated the additional and specific protections placed on this prong by *Bender*.

[33] Justice CAVANAGH's dissent alleges that the right to counsel articulated in Article 1, § 20 of Michigan's Constitution, which states that, "[i]n every criminal prosecution, the accused shall have the right . . . to have

4. *BENDER* vs. *MORAN*

This Court's independent constitutional analysis of Article 1, § 17 leads us to the conclusion that *Moran*, not *Bender*, best analyzes the issue presented in this case. Our analysis indicates that Article 1, § 17 protects a suspect only from the use of confessions or incriminating statements obtained by coercion, violence, force, or pressure. However, *Bender*'s rule renders confessions and incriminating statements inadmissible that were in no way influenced by the type of coercive or compelling atmosphere contemplated by the provision.

Miranda was initially intended by the United States Supreme Court (at least until its later decision in *Dickerson*)[34] to serve as "one possible formula" by which

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the assistance of counsel for his or her defense," lends additional support for *Bender*. See *post* at 275-278. However, in *Kirby v Illinois*, 406 US 682, 688; 92 S Ct 1877; 32 L ED 2d 411 (1972), the United States Supreme Court held that the right to counsel attaches "only at or after the time that adversary judicial proceedings have been initiated against him." Although this Court initially recognized that there may be instances in which the right to counsel attaches prior to formal charging in *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), and *People v Jackson*, 391 Mich 323, 338; 217 NW2d 22 (1974), we expressly overruled *Anderson* and its progeny, including *Jackson*, to the extent they "go[] beyond the constitutional text and extend[] the right to counsel to a time before the initiation of adversarial criminal proceedings" in *People v Hickman*, 470 Mich 602, 603-604, 608-609; 684 NW2d 267 (2004), and reaffirmed that the right to counsel attaches at or after the initiation of adversarial judicial criminal proceedings. In both *Bender*, and the instant case, defendants waived their *Miranda* rights and made incriminating statements before charges were issued, and therefore before the initiation of adversarial judicial criminal proceedings, signifying that the right to counsel had not yet attached. While the dissent articulates its own belief that *Anderson* and *Jackson* were overruled in error, and that *Kirby*'s restriction is "arbitrary," the majority of this Court did not agree and current law clearly indicates that the right to counsel had not yet attached at the time of defendant Bender and defendant Tanner's *Miranda* waivers. Therefore, Article 1, § 20 also does not support *Bender*.

[34] See note 5 of this opinion.

to dispel the coercive atmosphere implicit in custodial interrogation; its purpose was to alleviate what it viewed as the increasingly subtle and nuanced forms of coercion that sometimes typified the custodial interrogation process and undermined the genuine voluntariness of statements produced by this process. In fact, the United States Supreme Court has explained that "*Miranda* protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment; it goes no further than that." *Colorado v Connelly*, 479 US 157, 170; 107 S Ct 515; 93 L Ed 2d 473 (1986). However, the situation in *Bender* falls considerably outside the scope of the custodial interrogation process that defined the constitutional rationale for *Miranda*. That is, *Bender*'s rule renders inadmissible even statements and confessions made following an indisputably voluntary and informed *Miranda* waiver absent even the slightest hint of the subtle or nuanced forms of coercion that served as the justification for *Miranda*. *Miranda*'s treatment of such forms of coercion at least sought to remain faithful to the Fifth Amendment's traditional voluntariness standard.[35]

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[35] The United States Supreme Court has determined that, despite its initial "prophylactic" character, *Miranda* is now a "constitutional rule." *Dickerson*, 530 US at 438-440, 444. However, this does not necessarily mean that *Bender*'s "prophylactic" rule is also constitutional in character. Although *Miranda* affords protections that seem to exceed the textual boundaries of the Fifth Amendment, the United States Supreme Court has emphasized that the point of *Miranda* is to protect against the coercive nature of the custodial interrogation environment, which clearly does implicate the Fifth Amendment. However, because *Bender* is implicated even when a confession is altogether voluntary and non-coercive, and because *Bender* pertains to whether the *Miranda* waiver was knowing, and not to the voluntariness of the confession, it is hardly self-evident that *Bender* is "prophylactic" in the same way in upholding the Constitution as was *Miranda*. Because *Bender* invalidates confessions made absent any evidence of the type of coercive custodial interrogation

Our independent examination of Article 1, § 17 supports *Moran*'s conclusion that "full comprehension of [the *Miranda* rights] are sufficient to dispel whatever coercion is inherent in the interrogation process," *Moran*, 464 US at 427, because the warnings provide a suspect with the necessary information both to apprehend these rights and to make an intelligent and knowing waiver of the rights if he chooses. The waiver of rights cannot logically be affected by events that are unknown and unperceived, such as the fact that an attorney is somewhere present to offer assistance. As explained by one scholar:

> If there is any police misconduct, the suspect is unaware of such events because it is directed toward the attorney. Facts and events unknown to the suspect cannot have a coercive effect on the suspect. Therefore, the attorney's efforts and/or presence is irrelevant to the suspect's ability to make a voluntary, knowing, and intelligent waiver of his *Miranda* rights. Moreover, as the suspect is still read his *Miranda* rights, such events do not operate to deprive the suspect of the knowledge of his rights.
>
> To argue or conclude that a defendant, who by the good fortune of a family member hiring an attorney, must be told of the attorney's attempts to make contact in order to make a knowing and intelligent waiver of *Miranda* rights is illogical and nonsensical. In fact, for the majority's reasoning to make sense, the majority would have to conclude that persons who are capable of retaining an attorney, or have family or friends who are capable of hiring a retained attorney, are not capable of making a knowing and intelli-

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environment that motivated *Miranda*, *Bender* does not further *Miranda*'s purpose of dissipating the impact of this environment, or at the very least does so in a far more indirect and attenuated manner by, in the words of the *Bender* dissent, "creat[ing] prophylactic rules to protect prophylactic rights." *Bender*, 452 Mich at 644. Contrary to Justice CAVANAGH's dissent, we do not conclude that it is *Bender*'s "prophylactic" character that "deprives the [*Bender*] rule of constitutional status," *post* at 269, but rather the nature of the rule itself.

> gent waiver of *Miranda* rights even when the attorney is not present. As is evident by the admissibility of a suspect's *Miranda* waiver in the ordinary custodial interrogation situation, the majority would not so conclude. [Carroll, *A Look at People v Bender: What Happens when the Michigan Supreme Court Oversteps Its Power to Achieve A Results-Oriented Decision*, 74 U Det Mercy L Rev 211, 236-237 (1997) (citations omitted).]

We therefore agree with *Moran* that an outside and unperceived development, such as an attorney's presence and initiation of contact with police, "can have no bearing on [a suspect's] capacity to comprehend and knowingly relinquish a constitutional right." *Moran*, 475 US at 422.[36] Instead, as noted by the United States Supreme Court in *Colorado v Spring*, 479 US 564, 577; 107 S Ct 851; 93 L Ed 2d 954 (1987), "the additional information could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary and knowing nature." It might not be in a suspect's best interest to make a statement, but this Court need not concern itself with the wisdom of a suspect's confession. To the contrary, voluntary but "foolish" confessions should be welcomed, as a suspect's perhaps unwise but purely voluntary urge to tell the truth is vital in assisting the fact-finder in ultimately ascertaining the truth of what occurred.[37]

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[36] The fact that counsel in this case was appointed, whereas counsel in *Bender* was retained, makes no difference to our analysis, or to *Bender* itself as far as we can see. In neither instance can an attorney's unsuccessful efforts to contact a defendant affect the defendant's ability to apprehend and voluntarily waive his *Miranda* rights.

[37] This case illustrates the problems with *Bender*. Defense counsel concedes that defendant's waiver was made voluntarily, and there are no allegations that defendant did not understand the *Miranda* rights that he waived. Because defendant did not invoke his right to counsel after reinitiating discussion with the police and being advised of his *Miranda* rights a second time, and because the adversarial proceedings had not yet

In sum, independent examination of Article 1, § 17 persuades us that the United States Supreme Court correctly interpreted this issue in *Moran*. This examination further supports *Moran*'s conclusions that "[e]vents occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right," that the " 'deliberate or reckless' withholding of information . . . is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them," and that the *Miranda* warnings alone "are sufficient to dispel whatever coercion is inherent in the interrogation process." *Moran*, 475 US at 422-424, 427. Because our constitutional analysis demonstrates that Article 1, § 17 does not confer the protections set forth in *Bender*, but instead supports *Moran*'s analysis and conclusion, we conclude that *Bender* was wrongly decided. We conclude, as did the United States Supreme Court in *Moran*, that the failure of police to inform a suspect of an attorney's efforts to contact him does not invalidate an otherwise "voluntary, knowing, and intelligent" *Miranda* waiver.

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begun, the prosecutor was not required to contact the court, and the court was not required to appoint an attorney for defendant. Had the prosecutor and court not been proactive in effecting the appointment of an attorney, *Bender* never would have been implicated, because there would have been no attorney of whose presence defendant needed to be informed. Instead, the prosecutor, on behalf of the people, was effectively sanctioned by the suppression of defendant's voluntary statements for having taken the precaution of seeking out counsel in the event that defendant requested counsel before or during his interrogation.) Consequently, *Bender* has the effect of discouraging the type of initiative shown by the prosecutor, because police officers and prosecutors will almost certainly be more reluctant to facilitate counsel before one is legally required if the consequence is the suppression of evidence.

C. STARE DECISIS

When this Court determines that a case has been wrongly decided, as we do here with regard to *Bender*, it must next determine whether it should overrule that precedent, a decision that should never be undertaken lightly. The application of stare decisis is "generally 'the preferred course, because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' " *Robinson v Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000), quoting *Hohn v United States*, 524 US 236, 251; 118 S Ct 1969; 141 L Ed 2d 242 (1998). However, "stare decisis is a 'principle of policy' rather than 'an inexorable command,' and . . . the Court is not constrained to follow precedent when governing decisions are unworkable or are badly reasoned." *Robinson*, 462 Mich at 464 (citations omitted). This Court has discussed the proper circumstances under which it will overrule prior case law:

> This Court has stated on many occasions that "[u]nder the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed." . . . [.] "Before this court overrules a decision deliberately made, it should be convinced not merely that the case was wrongly decided, but also that less injury will result from overruling than from following it." When it becomes apparent that the reasoning of an opinion is erroneous, and that less mischief will result from overruling the case rather than following it, it becomes the duty of the court to correct it. [*People v Graves*, 458 Mich 476, 480-481; 581 NW2d 229 (1998) (citations omitted) (alteration in original).]

When performing a stare decisis analysis, this Court should review *inter alia* "whether the decision at issue defies 'practical workability,' whether reliance interests would work an undue hardship, and whether changes in

the law or facts no longer justify the questioned decision." *Robinson*, 462 Mich at 464 (citation omitted). As for the reliance interest, "the Court must ask whether the previous decision has become so embedded, so accepted, so fundamental to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Id*. at 466.

When questions before this Court implicate the Constitution, this Court arguably has an even greater obligation to overrule erroneous precedent. "[A] judicial tribunal is most strongly justified in reversal of its precedent when adherence to such precedent would perpetuate a plainly incorrect interpretation of the language of a constitutional provision or statute." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 181; 615 NW2d 702 (2000), citing *Robinson*, 462 Mich at 463-468. This is because "the policy of stare decisis 'is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.' " *Kyser v Kasson Twp*, 486 Mich 514, 534, n 15; 786 NW2d 543 (2010), quoting *Agostini v Felton*, 521 US 203, 235; 117 S Ct 1997; 138 L Ed 2d 391 (1997). Thus, it is "our duty to reexamine a precedent where its reasoning or understanding of the Constitution is fairly called into question." *Robinson*, 462 Mich at 464, quoting *Mitchell v W T Grant Co*, 416 US 600, 627-628; 94 S Ct 1895; 40 L Ed 2d 406 (1974) (Powell, J., concurring). Although *Bender* disclaimed reliance on Michigan's Constitution, it nonetheless vaguely referred to its provisions in enacting its "prophylactic" rule, suggesting that this Court has a duty to review this decision under less deferential standards of stare decisis in light of our role as the final judicial arbiter of this Constitution.[38]

[38] Justice CAVANAGH's dissent emphasizes that a stare decisis analysis should begin with the presumption that upholding precedent is the

We conclude that overruling *Bender* would not produce "practical real-world dislocations," primarily because *Bender* obviously cannot be said to have caused suspects to "alter their conduct in any way." See *People v Petit*, 466 Mich 624, 635; 648 NW2d 193 (2002). As *Moran* noted, "[e]vents occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right." *Moran*, 475 US at 422. It seems highly unlikely that a suspect being interrogated, after a day earlier having expressly refused to waive his right to counsel and then reconsidering that decision by affirmatively seeking to speak with police and then expressly waiving his right to counsel, would thereafter rely on *Bender* in determining that he need not ask for an attorney because the officers have a legal duty to inform him that an attorney has initiated contact with them. Although a suspect might later come to have second thoughts and prefer that he had not waived his right to counsel, "[s]uch after-the-fact awareness does not rise to the level of a reliance interest because to have reliance the knowledge must be of the sort that causes a person or entity to attempt to conform his conduct to a certain norm before the triggering event." *Robinson*, 462 Mich at 466-467. Consequently, *Bender* has not become so "fundamental to everyone's expectations" that to overrule it

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preferred course of action and that "when our caselaw concludes that the Michigan Constitution provides greater protection to our citizens than that provided by the federal Constitution, . . . 'this Court should be required to show a compelling reason to depart from [that] past precedent.' " *Post* at 279 (alteration in original) (citation omitted). We agree that precedent should not be lightly overruled, and that a presumption should generally obtain in favor of upholding precedent, although we do not understand why particular precedents that have interpreted our Constitution in a manner different than similar language in the federal constitution should give rise to any special rule of stare decisis.

would result in "real-world dislocations." *Id*. at 466. Further, that *Bender* can fairly be considered to be "workable," in the sense that the police may clearly understand their legal obligations to a defendant and his attorney, does not render "practically unworkable" a regime in which a defendant's rights are just as clearly understood.

Contrary to *Bender*, we do not believe that increased "mischief" will result from this Court's failure to maintain the rule expounded in that case as the constitutional law of this state. As already noted, we agree with *Moran* that the constitutional "voluntariness" of a confession or incriminating statement is not implicated by the failure of police to inform the defendant of the presence of an attorney before proceeding with a custodial interrogation after *Miranda* warnings have been given and *Miranda* rights waived. Whether a defendant does or does not possess knowledge of an attorney's outside presence cannot affect whether that defendant understands the rights that he or she is waiving, and neither the United States Supreme Court nor this Court has ever accepted the proposition that an attorney must be present in order that a *Miranda* waiver be characterized as "voluntary, knowing, and intelligent."

Moran accurately highlighted the competing policies informing both *Miranda* and its progeny, including *Moran* itself:

> Custodial interrogations implicate two competing concerns. On the one hand, "the need for police questioning as a tool for effective enforcement of criminal laws" cannot be doubted. Admissions of guilt are more than merely "desirable," they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law. On the other hand, the Court has recognized that the interrogation process is "inherently coercive" and that, as a consequence, there exists a substantial risk that the

> police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion. *Miranda* attempted to reconcile these opposing concerns by giving the defendant the power to exert some control over the course of the interrogation. . . . Police questioning, often an essential part of the investigatory process, could continue in its traditional form, the Court held, but only if the suspect clearly understood that, at any time, he could bring the proceeding to a halt or, short of that, call in an attorney to give advice and monitor the conduct of his interrogators.
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> The position urged by [defendant] would upset this carefully drawn approach in a manner that is both unnecessary for the protection of the Fifth Amendment privilege and injurious to legitimate law enforcement. Because, as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process, a rule requiring the police to inform the suspect of an attorney's efforts to contact him would contribute to the protection of the Fifth Amendment privilege only incidentally, if at all. This minimal benefit, however, would come at a substantial cost to society's legitimate and substantial interest in securing admissions of guilt. [*Moran*, 475 US at 426-427 (citations omitted).]

The *Moran* Court's concern that further protections against self-incrimination, such as those set forth in *Bender*, would impinge on the effectiveness of law enforcement are entirely valid, in our judgment. Neither the Fifth Amendment nor Article 1, § 17 is hostile to custodial interrogations—only to those in which there is some coercive environment. Similarly, neither the Fifth Amendment nor Article 1, § 17 is hostile to confessions and self-incrimination—only to those which are "compelled." Indeed, confessions and incriminating statements constitute perhaps the most compelling and important evidence available to fact-finders in the justice system's search for truth. Suppression of such

evidence as the result of a *Bender* violation deprives these fact-finders of evidence allowing them to distinguish truth from falsity and innocence from guilt, while avoiding the conviction of innocent persons and the exoneration of guilty persons, all in pursuit of a principle that has never since the founding of our republic or state been viewed as a constitutional violation.[39]

Although overruling *Bender* will undeniably result in some unknown number of confessions and incriminating statements that might otherwise not have been provided, such evidence will have been voluntarily offered and have been preceded by "voluntary, knowing, and intelligent" waivers of *Miranda* rights. This evidence is to be welcomed, not repudiated, by any rational and effective criminal justice system. It is hard to comprehend a societal interest that is furthered by protecting persons who have engaged in serious criminal activities from the consequences of their own voluntary and intelligent decisions. While Justice CAVANAGH's dissent claims that "this statement entirely ignores the overriding principle of our criminal justice system: that a suspect is presumed innocent until proven guilty beyond a reasonable doubt," *post* at 282, we are inclined instead to concur with Justice BOYLE who observed in her *Bender* dissent that, "[i]f properly administered and validly waived,

[39] In his dissent, Justice CAVANAGH disagrees with the conclusion that *Bender* "impinge[s] on the effectiveness of law enforcement," instead noting that "it does not appear that Michigan's law enforcement has suffered from a serious inability to effectively enforce the law in the 18 years since *Bender* was decided." *Post* at 283. However, as the prosecutor explained at oral argument, *Bender* violations frequently arise, and many of the negative effects of *Bender* are not obviously seen, but nonetheless exist, because "[b]y following *Bender*, confessions are never made so there's never the motion to suppress . . . or the case is never solved so charges are never filed . . . . [And] plea bargains are entered into that otherwise should not be, but have to be because of a *Bender* issue."

the *Miranda* warnings ensure protection of a defendant's right against compulsory self-incrimination, while at the same time allowing the police to fulfill their duty in a constitutionally permissible manner." *Bender*, 452 Mich at 626 (BOYLE, J., dissenting).

Because we believe that less, not more, "mischief" will likely result from overruling the case, we are further persuaded of the need to overrule *Bender*. See *Graves*, 458 Mich at 480-481, citing *McEvoy v Sault Ste Marie*, 136 Mich 172, 178; 98 NW 1006 (1904) (stating that in reversing precedent, the Court "should be convinced not merely that the case was wrongly decided, but also that less injury will result from overruling than from following it").

V. CONCLUSION

An examination of Michigan's Constitution and a review of this Court's precedents compel the conclusion that *Bender* was wrongly decided and should now be overruled. In accordance with *Moran*, we hold that "[o]nce it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." *Moran* 475 US at 422-423. Although this Court need not interpret a provision of our Constitution in the same manner as a similar or identical federal constitutional provision, we are persuaded in the present instance, on the basis of our examination of Article 1, § 17, that the United States Supreme Court's interpretation of the Self-Incrimination Clause of the Fifth Amendment in *Moran* constitutes the proper interpretation of Article I, § 17 as well. We reverse the trial court's suppression of

incriminating statements made by defendant during custodial interrogation and remand to that court for further proceedings consistent with this opinion.

YOUNG, C.J., and KELLY, ZAHRA, and VIVIANO, JJ., concurred with MARKMAN, J.

CAVANAGH, J. (*dissenting*). In *People v Bender*, 452 Mich 594, 620; 551 NW2d 71 (1996) (opinion by CAVANAGH, J.); *id*. at 623 (opinion by BRICKLEY, C.J.), we held that police cannot conceal from suspects that counsel has been made available to them.[1] Although that decision has stood for nearly 20 years, today the majority casts *Bender* aside as "wrongly decided." Because I continue to believe that *Bender* correctly announced a rule firmly rooted in the Michigan Constitution, I dissent.

I. INTRODUCTION

The majority explains its decision by first stating that, in *Moran v Burbine*, 475 US 412; 106 S Ct 1135; 89 L Ed 2d 410 (1986), the United States Supreme Court reached the opposite conclusion. However, as the majority acknowledges, the divergent results in *Moran* and *Bender* cannot support the majority's conclusion that *Bender* was wrongly decided. Indeed, according to the United States Supreme Court, "a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards." *Oregon v Hass*, 420 US 714, 719; 95 S Ct 1215; 43 L Ed 2d 570 (1975), citing *Cooper v California*, 386 US 58, 62; 87 S Ct 788; 17 L Ed 2d 730 (1967), and *Sibron v New York*,

[1] This Court also reached the same conclusion in an earlier plurality opinion. See *People v Wright*, 441 Mich 140; 490 NW2d 351 (1992).

392 US 40, 60-61; 88 S Ct 1889; 20 L Ed 2d 917 (1968). Moreover, *Moran* extended this broad premise to the exact issue at hand, stating, "[n]othing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law." *Moran*, 475 US at 428. Finally, we have consistently concluded that we are not bound in our understanding of the Michigan Constitution by any particular interpretation of the United States Constitution. See, e.g., *Harvey v Michigan*, 469 Mich 1, 6 n 3; 664 NW2d 767 (2003).

Given that we are clearly free to interpret our Constitution more broadly than the United States Supreme Court has interpreted the federal Constitution, and the United States Supreme Court has permitted the creation of rules like the one from *Bender*, one must ask what is so wrong about *Bender* that it must be abandoned after nearly two decades of problem-free application in our state? According to the majority, Michigan's Constitution does not support *Bender*'s rule. I disagree.

Although the language of Const 1963, art 1, § 17,[2] is nearly identical to the language in the Fifth Amendment of the United States Constitution,[3] that does not necessarily indicate that we must interpret our Constitution in a manner consistent with the United States Supreme Court's interpretation of the federal Constitution. Rather, when interpreting the Michigan Constitution, we must recognize the law as it existed in Michigan at the time the relevant constitutional provision was adopted, and "it must be presumed that a constitutional provision has been framed and adopted

[2] Const 1963, art 1, § 17 states, in relevant part, "[n]o person shall be compelled in any criminal case to be a witness against himself . . . ."

[3] US Const, Am V, states in part that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself . . . ."

mindful of prior and existing law and with reference to them." *People v Kirby*, 440 Mich 485, 492; 487 NW2d 404 (1992). Accordingly, I will begin with a review of an opinion decided long before the ratifiers adopted the 1963 Constitution and cited for support in *People v Wright*, 441 Mich 140; 490 NW2d 351 (1992), and *Bender*: *People v Cavanaugh*, 246 Mich 680; 225 NW 501 (1929).

II. *PEOPLE v CAVANAUGH*: THE ORIGIN OF *BENDER*'S FOUNDATION IN THE MICHIGAN CONSTITUTION

In support of its conclusion that *Bender* is not rooted in the Michigan Constitution, the majority toils away for page after page of analysis arguing that the Michigan Constitution only protects a suspect from involuntary confessions. Moreover, the majority limits the scope of "involuntary confessions" to only those confessions that satisfy the dictionary definition of "compelled."

The result is that in the majority's view, a confession is inadmissible under art 1, § 17 only if the confession is obtained through "the use of coercion, violence, force, or pressure . . . ." *Ante* at 225. In fact, the majority concludes that our caselaw "focused entirely on the voluntariness of the confession," which only excludes confessions " 'secured by *inflicting physical force* or its equivalent *by means of harsh or cruel treatment* . . . .' " *Ante* at 240 quoting *People v Louzon*, 338 Mich 146, 153-154; 61 NW2d 52 (1953) (emphasis added).[4]

[4] I recognize that the majority acknowledges that "*Miranda* has established an irreducible minimum standard for purposes of all custodial interrogations in Michigan," *ante* at 226 n 19, and thus agrees that a confession may also be inadmissible if a suspect's waiver of rights is not made voluntarily, knowingly, and intelligently. However, by arguing that only "involuntary confessions" are prohibited under the Michigan Constitution and that the other limitations are only the product of *Miranda*'s

The problem with the majority's view is twofold: first it is rooted in a hyper-textualist analysis of the word "compelled" in art 1, § 17, an approach rejected in this area of law by the United States Supreme Court in *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), and throughout *Miranda*'s progeny. See, e.g., *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981) (explaining the protections applicable when an accused invokes the right to have counsel present during custodial interrogation). Second, the majority singularly focuses on pre-*Miranda* caselaw. Not surprisingly, that pre-*Miranda* caselaw does not use the terminology adopted in *Miranda* to explain the "knowing and intelligent" requirements. Thus, by focusing exclusively on the fact that pre-*Miranda* caselaw used the "voluntary confession" terminology, the majority determines that the pre-*Miranda* caselaw only prohibited the use of confessions obtained by "inflicting physical force" or "cruel treatment." However, simply because Michigan's pre-*Miranda* caselaw did not use the terminology adopted in *Miranda* does not necessarily mean that our caselaw did not adopt an understanding of art 1, § 17 that is broader than the hyper-textualist meaning espoused by the majority. Rather, we must consider the actual interrogation circumstances in those pre-*Miranda* opinions to determine whether we have historically interpreted our state Constitution to provide broader protection against self-incrimination than is provided in the federal Constitution.

In 1929, long before adoption of the 1963 Michigan Constitution, we considered a case in which the police

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interpretation of the federal Constitution, the majority erroneously concludes that our state courts never adopted a broader interpretation of the Michigan Constitution pre-*Miranda*, as will be explained later in this opinion.

denied counsel's request to speak with his client, whom the police were interrogating. *Cavanaugh*, 246 Mich at 687. In *Cavanaugh*, we found the police conduct impermissible, stating:

> "[H]olding an accused incommunicable, is condemned by every principle of fairness, . . . is *forbidden by the constitutional guaranty of due process of law*, and inhibited by the right of an accused to have the assistance of counsel. . . . Holding an accused incommunicable to parents and counsel is a subtle and insidious method of intimidating and cowing . . . ." [*Id*. at 686 (emphasis added).]

Cavanaugh also provided, "*In this State* . . . police [may not], having custody of one accused of crime, deny an attorney, employed by or in behalf of a prisoner, the right to see and advise the accused." *Id*. at 688 (emphasis added).

As I explained in *Wright*, "it is clear that *Cavanaugh*, in view of its reference to the law '[*i*]*n this State*,' . . . was not referring to any rights under the federal constitution; rather, it was referring to the rights existing *under our state constitution*." *Wright*, 441 Mich at 158 (opinion by CAVANAGH, C.J.) (emphasis added). Indeed, this Court later concluded that *Cavanaugh* relied on "the Michigan constitutional guarantee of due process," which was then contained in Const 1908, art 2, § 16, and is now found in the constitutional provision at issue—Const 1963, art 1, § 17. *People v Conte*, 421 Mich 704, 722; 365 NW2d 648 (1984).

After understanding that *Cavanaugh* interpreted the Michigan Constitution, the next question is whether *Cavanaugh* interpreted the state constitutional language more broadly than the language of its federal counterpart. As previously noted, *Cavanaugh* concluded that "holding an accused *incommunicable* . . . is forbidden by the constitutional guaranty of due process

of law, and inhibited by the right of an accused to have the assistance of counsel." *Cavanaugh*, 246 Mich at 686 (emphasis added). Holding a suspect "incommunicable" is substantially different from "inflicting physical force" or "cruel treatment," which, according to the majority, is the only type of "compulsion" that the Michigan Constitution prohibited pre-*Miranda*. Nevertheless, *Cavanaugh* concluded that the defendant's confession was obtained in violation of what is now art 1, § 17 of the Michigan Constitution. Thus, the majority's claim—that we have not previously interpreted Michigan's Constitution to provide protection against self-incrimination except with respect to confessions obtained by " 'inflicting physical force' " or " 'by means of harsh or cruel treatment,' " *ante* at 240 (citation omitted)—is inconsistent with *Cavanaugh*.

In order to sidestep this inconsistency, the majority argues that *Cavanaugh* is distinguishable from *Bender* because *Cavanaugh* concluded that the defendant's *confession* was not *voluntary*, whereas *Bender* concluded that the defendant's *waiver* of rights was not made *knowingly*. The majority is correct that *Cavanaugh* did not mention whether the defendant's waiver of rights was made "knowingly" under the Michigan Constitution and instead referred to the "voluntariness" of the confession. However, as previously discussed, that is not surprising, given that *Cavanaugh* was decided 37 years before *Miranda* established the "knowing and intelligent" terminology referred to in *Bender*. Yet, concluding that *Cavanaugh* did not create the foundation for *Bender* on these grounds is, in my opinion, an oversimplification of *Cavanaugh*.

In my view, *Cavanaugh* foreshadowed *Miranda*'s understanding of the nature of the right protected by the constitutional guarantee that a person will not be

"compelled" to be a witness against himself. Because *Cavanaugh* referred to the "voluntariness" of the defendant's confession, the majority insists that *Cavanaugh* is nothing more than a typical "voluntariness" case. As a result, the majority assumes that *Cavanaugh* concluded that the confession was the product of impermissible "compulsion," which the majority defines as "the use of coercion, violence, force, or pressure . . . ." *Ante* at 225. However, by focusing on only the terms used in *Cavanaugh*, the majority overlooks the context in which the terms were used as well as the fact that *Cavanaugh* never mentioned the types of "compulsion" the majority discusses. In fact, a police officer whose testimony described the interrogation in *Cavanaugh* stated that the defendant "was not threatened in any manner by the officers nor was he offered any hope of reward nor any promises held to him for the signing of the statement . . . ." *Cavanaugh*, 246 Mich at 686-687. Rather, *Cavanaugh* only referred to the impermissibility of "holding an accused *incommunicable*." *Id*. at 686 (emphasis added). See, also, *id*. at 688 (noting that "[t]he defendant was held *incommunicable*") (emphasis added).

Critically, incommunicado interrogation was at the center of the United States Supreme Court's explanation of the "knowing and intelligent" requirement in *Miranda*: "The current practice of *incommunicado interrogation* is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself." *Miranda*, 384 US at 457-458 (emphasis added). Moreover, *Miranda* expressly acknowledged that incommunicado interrogation is not like coercion, violence, force, or pressure that the majority in this case discusses. See *id*. at 457 ("To be sure, [incommunicado interrogation] is not physical intimidation . . . ."). Nevertheless, *Miranda* concluded

that incommunicado interrogation "is equally destructive of human dignity," *id*., and, therefore, violates a suspect's privilege against self-incrimination.

Because *Cavanaugh*'s explanation of the impropriety of the incommunicado interrogation methods used to extract the defendant's confession is strikingly similar to the impermissible interrogation methods that *Miranda* discussed, *Cavanaugh* is, in my view, more properly classified as consistent with *Miranda*'s "knowing and intelligent" standard. Stated differently, although *Cavanaugh* did not use the yet-to-be-created *Miranda* terminology, *Cavanaugh* nevertheless is consistent with *Miranda*'s analysis and conclusion concerning knowing and intelligent waivers because *Cavanaugh* did not address coercive police conduct that affected the voluntariness of a suspect's confession.[5] The majority rejects this view and instead concludes that *Cavanaugh* never "hinted that a defendant must have some idea of his or her 'rights' . . . ." *Ante* at 242. I disagree because, in my view, an obvious result of holding a suspect incommunicado is that the suspect will lack knowledge of his or her rights, a conclusion that is even truer when the suspect is unaware that counsel, who could educate the suspect on those rights, is actively seeking to communicate with the suspect. Thus, in my view, *Cavanaugh* evidences that this Court did not interpret the Michigan Constitution to prohibit *only* confessions obtained by "inflicting physical force" or "cruel treatment." When viewed in this light, *Cavanaugh* supports *Bender*'s conclusion that denying

[5] The fact that defense counsel did not adopt this view at oral argument is of no moment: "this Court is not bound by the [parties'] interpretation of the case and may consider and analyze the facts and issues independent of such concession." *Camaj v S S Kresge Co*, 426 Mich 281, 290 n 6; 393 NW2d 875 (1986), citing *Sibron v New York*, 392 US 40, 58-59; 88 S Ct 1889; 20 L Ed 2d 917 (1968).

counsel's request to communicate with a suspect amounts to impermissible incommunicado interrogation in violation of Const 1963, art 1, § 17.[6]

The majority also attempts to distinguish *Cavanaugh* from *Bender* by arguing that *Miranda* protects only against police *coercion* and *Bender* therefore "falls considerably outside the scope of the custodial interrogation process which defined the constitutional rationale for *Miranda*." *Ante* at 246, citing *Colorado v Connelly*, 479 US 157, 170; 107 S Ct 515; 93 L Ed 2d 473 (1986). Accordingly, the majority appears to argue that there is no material difference between the pre-*Miranda* test to determine whether a suspect's confession was *voluntary* and the post-*Miranda* test to determine whether a suspect's waiver was "knowing and intelligent." However, that approach ignores that *Miranda* requires analysis of two distinct prongs—the voluntariness prong and the knowing and intelligent prong. Thus, the majority makes the

> fallacious assumption of a complete unity between the determinative factors of the pre-*Miranda* Fourteenth Amendment due process analysis (which was concerned solely with coercive police conduct that affected the voluntariness of a suspect's confession) and the post-*Miranda* waiver analysis (which requires analysis of two distinct

[6] The majority cites *In re Moser*, 138 Mich 302; 101 NW 588 (1904), and *Paramount Pictures Corp v Miskinis*, 418 Mich 708; 344 NW2d 788 (1984), in support of its conclusion that the Michigan Constitution has not been interpreted to provide more protection regarding self-incrimination than the federal Constitution. However, *Moser* pre-dates *Cavanaugh*. Because *Cavanaugh* granted the protection under the *state* Constitution, and the framers of the 1963 Michigan Constitution are presumed to have been aware of *Cavanaugh*, I do not believe that *Moser* supports the majority's conclusion. Regarding *Paramount Pictures*, that opinion did not cite *Cavanaugh* and thus provides no insight regarding *Cavanaugh*'s impact on our pre-*Miranda* interpretation of the Michigan Constitution.

prongs, only one of which—i.e., voluntariness—is logically, or in any other respect, related to coercive police practices). [*People v Cheatham*, 453 Mich 1, 52-53; 551 NW2d 355 (1996) (CAVANAGH, J., concurring in part).]

Connelly does not, however, support the majority's conclusion that *Miranda* protects only against police *coercion*. Rather, *Connelly* simply held that "coercive police activity is a necessary predicate to the finding that a confession is not '*voluntary*' within the meaning of the Due Process Clause of the Fourteenth Amendment," and determined that "[t]here is obviously no reason to require more in the way of a '*voluntariness*' inquiry in the *Miranda* waiver context than in the Fourteenth Amendment confession context." *Connelly*, 479 US 167, at 169-170 (emphasis added). Thus, although it is unmistakable that coercive police conduct is as necessary to a finding of *involuntariness* under *Miranda* as it is under the substantive protection of the Fourteenth Amendment Due Process Clause, "[i]t is only with respect to the completely distinct 'knowing and intelligent' prong of a *Miranda* waiver analysis . . . that coercive police conduct is not required, either by logic or by law." *Cheatham*, 453 Mich at 54 (CAVANAGH, J., concurring in part).

That is not to say that courts should ignore police conduct when applying the knowing-and-intelligent prong of a *Miranda* analysis. Police conduct may still be relevant to the knowing-and-intelligent prong because "any police conduct that could have an effect on a suspect's requisite level of comprehension must be factored into the analysis[,]" which was clear before *Connelly*. *Id*. at 55. In fact, *Moran*, the very opinion the majority follows today, recognized that "the 'deliberate or reckless' withholding of information is objectionable as a matter of ethics," but concluded that "such conduct is only relevant to the *constitutional validity of a waiver*

if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." *Moran*, 475 US at 423-424 (emphasis added). Accordingly, because *Miranda* protects suspects against more than just police coercion, *Bender* is not "outside the scope" of *Miranda*.

The majority also argues that *Cavanaugh* is irrelevant because, in *Cavanaugh*, the police denied the *suspect's* request for counsel, whereas *Bender* addressed denial of *counsel's* request to communicate with a suspect. However, *Cavanaugh* clearly encompassed police refusal to honor *counsel's* requests to speak to the suspect. Specifically, *Cavanaugh* quoted police testimony establishing that the police denied a request by the suspect's father and a request by the suspect's counsel to speak to the suspect. *Cavanaugh*, 246 Mich at 686-687. Citing those facts, *Cavanaugh* condemned the police conduct, stating:

> In this State a parent may not be denied the right to see and have conversation with a child in jail and accused of crime. *Neither may police, having custody of one accused of crime, deny an attorney, employed by or in behalf of a prisoner, the right to see and advise the accused*. [*Id*. at 688 (emphasis added).]

Thus, *Cavanaugh* is applicable not only to situations in which the suspect's request for an attorney is denied, but to situations in which counsel's request to speak to a suspect is denied, as well.

Finally, the majority argues that *Cavanaugh* cannot support *Bender* because *Cavanaugh* employed a "totality of the circumstances" rule rather than the per se rule applied in *Bender*. The fact that *Cavanaugh* and *Bender* differed on what *test* should result from police interference with counsel's efforts to speak to a suspect does not lessen the fact that *Cavanaugh* and *Bender*

agreed that such police conduct is *unconstitutional* under the Michigan Constitution. Indeed, the police also ignored the defendant's express request for counsel in *Cavanaugh*, but *Cavanaugh* nevertheless applied a totality of the circumstances rule. As the majority recognizes, were those circumstances to occur today, the subsequent confession would be per se inadmissible under *Miranda*, 384 US at 474. However, *Cavanaugh*'s conclusion that ignoring the defendant's request for counsel was unconstitutional is no less correct today simply because *Cavanaugh* applied a totality of the circumstances rule rather than the *Miranda* per se rule. Similarly, *Cavanaugh*'s conclusion that ignoring counsel's request to communicate with the suspect was unconstitutional is no less correct today simply because *Cavanaugh* applied a totality of the circumstances rule rather than the *Bender* per se rule.

Moreover, as I explained in *Bender*, " 'a purported waiver [of *Miranda*] can never satisfy a totality of the circumstances analysis when police do not even inform a suspect that his attorney seeks to render legal advice.' " *Bender*, 452 Mich at 616 (opinion by CAVANAGH, J.), quoting *Bryan v State*, 571 A2d 170, 176 (Del, 1990) (emphasis omitted). " 'When the opportunity to consult counsel is in fact frustrated, there is no room for speculation what defendant might or might not have chosen to do after he had that opportunity.' " *Bender*, 452 Mich at 617 (opinion by CAVANAGH, J.), quoting *State v Haynes*, 288 Or 59, 75; 602 P2d 272 (1979). In fact, " 'police deception of a suspect through omission of information regarding attorney communications greatly exacerbates the inherent problems of incommunicado interrogation and requires a clear principle to safeguard the presumption against the waiver of constitutional rights.' " *Bender*, 452 Mich at 617 n 23 (opinion by CAVANAGH, J.), quoting *Moran*, 475 US at

452 (Stevens, J., dissenting). Accordingly, I continue to believe that the nature of "incommunicado interrogation requires a per se rule that can be implemented with ease and practicality to protect a suspect's rights to remain silent and to counsel." *Bender*, 452 Mich at 617 (opinion by CAVANAGH, J.).

Once it is understood that *Cavanaugh* prohibited police interference with counsel's efforts to communicate with a suspect based on the same state constitutional language that was applied in *Bender*, the next question is whether *Bender* merely continued to apply *Cavanaugh*'s previously created rule or, as the majority argues, created a rule that did not exist before *Bender*. Therefore, I will review *Bender* and the plurality opinions from *Wright*, 441 Mich 140, *Bender*'s predecessor.

III. *PEOPLE v WRIGHT* AND *PEOPLE v BENDER*

As the majority explains, *Bender* resulted in multiple opinions, and only Chief Justice BRICKLEY's opinion garnered four votes. In addition, as the majority states, Chief Justice BRICKLEY's opinion labeled the result of its holding a "prophylactic rule." *Bender*, 452 Mich at 621 (opinion by BRICKLEY, C.J.). However, I disagree with the majority that the arguably "prophylactic" character of the *Bender* rule deprives the rule of constitutional status. Rather, considering Chief Justice BRICKLEY's opinion in its entirety, it is clear that he viewed *Bender*'s "prophylactic" rule in the same mold as *Miranda*'s "prophylactic" rule. See *id*. at 620-621 (expressing a preference to "approach the law enforcement practices that are at the core of this case in the same manner as the United States Supreme Court approached the constitutional interpretation task in [*Miranda*]; namely, by announcing a prophylactic rule"). And, notably, the United States Supreme Court has since explained that

although *Miranda* is labeled a "prophylactic" rule, it is nevertheless a constitutional rule. See *Dickerson v United States*, 530 US 428, 438-440, 444; 120 S Ct 2326; 147 L Ed 2d 405 (2000).

Moreover, Chief Justice BRICKLEY's *Bender* opinion indisputably recognized the constitutional underpinnings of its analysis. For example, Chief Justice BRICKLEY noted that the case "rather clearly implicates both the right to counsel (Const 1963, art 1, § 20) and the right against self-incrimination (Const 1963, art 1, § 17)," which are "part of the bedrock of *constitutional* civil liberties . . . ." *Bender*, 452 Mich at 620, 621 (opinion by BRICKLEY, C.J.) (emphasis added). Additionally, Chief Justice BRICKLEY determined that "it is difficult to accept and *constitutionally justify* a rule of law that accepts that law enforcement investigators, as part of a custodial interrogation, can conceal from suspects that counsel has been made available to them and is at their disposal." *Id*. at 621 (emphasis added). Thus, Chief Justice BRICKLEY concluded that any other rule would be "insufficient to guarantee a suspect's *constitutional rights*." *Id*. at 623 (emphasis added).

We also have the benefit of then Justice BRICKLEY's further explanation of his *Bender* opinion by way of his dissent in *People v Sexton*, 458 Mich 43; 580 NW2d 404 (1998). In *Sexton*, a majority of this Court concluded that *Bender* did not apply retroactively and implied that *Bender* lacks a constitutional basis, as the majority concludes today. However, Justice BRICKLEY explained that *Bender*'s "very purpose is to protect a suspect's right to counsel and the privilege against self-incrimination"; therefore, "[t]o deny the *constitutional* import of [*Bender*] is to ignore the plain language" of the *Bender* opinion. *Id*. at 70 (BRICKLEY, J., dissenting) (emphasis added). Accordingly, Justice BRICKLEY flatly

concluded that "the majority's conclusion that *Bender* does not implicate a defendant's constitutional rights [is] wrong and without any viable legal support." *Id*. at 72.

Regardless of whether Chief Justice BRICKLEY's *Bender* opinion definitively rooted its analysis in the Michigan Constitution, I nevertheless retain my belief that the *Bender* rule is a product of our Constitution, because art 1, § 17 "requires the police to inform the suspect that a retained attorney is immediately available to consult with him, and failure to so inform him before he confesses per se precludes a knowing and intelligent waiver of his right to remain silent and to counsel." *Bender*, 452 Mich at 597 (opinion by CAVANAGH, J.).

As I did in *Bender*, I continue to recognize that "[u]nder federal law, a waiver is knowingly and intentionally made where no police coercion was involved and where the defendant understands that he has the right to remain silent and that the state intends to use what he says to secure a conviction." *Id*. at 612, citing *Moran*, 475 US at 422-423. However, it is also my opinion that "in Michigan, more is required before the trial court may find a knowing and intelligent waiver." *Bender*, 452 Mich at 612 (opinion by CAVANAGH, J.). Specifically, "in order for a defendant to fully comprehend the nature of the right being abandoned and the consequences of his decision to abandon it, he must first be informed that counsel, who could explain the consequences of a waiver decision, has been retained to represent him." *Id*. at 612-613. This is true because

> "[w]hen that information is withheld, the suspect's waiver of the right to counsel and to remain silent is more abstract than real, becoming, in effect, a waiver of a theoretical right that is uninformed by the material knowledge that

> retained counsel, present and available to assist the suspect in the full exercise of his or her rights, is just outside the door." [*Id*. at 612 n 16, quoting *State v Reed*, 133 NJ 237, 274; 627 A2d 630 (1993).]

Stated differently, I am

> "unwilling . . . to dismiss counsel's effort to communicate as constitutionally insignificant to the capacity of the suspect to make a knowing and intelligent choice whether he or she will invoke the right to counsel. *Miranda* warnings refer only to an abstract right to counsel. That a suspect validly waives the presence of counsel only means that for the moment the suspect is foregoing the exercise of that conceptual privilege. Faced with a concrete offer of assistance, however, a suspect may well decide to reclaim his or her continuing right to legal assistance. To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available to provide at least initial assistance and advice, whatever might be arranged in the long run. A suspect indifferent to the first offer may well react quite differently to the second. We cannot therefore conclude that a decision to forego the abstract offer contained in *Miranda* embodies an implied rejection of a specific opportunity to confer with a known lawyer." [*Bender*, 452 Mich at 612 n 16 (opinion by CAVANAGH, J.), quoting *State v Stoddard*, 206 Conn 157, 168; 537 A2d 446 (1988) (quotation marks omitted).]

Finally, in response to today's majority, I reiterate my response to the *Bender* dissent's assertion that the Michigan Constitution's privilege against self-incrimination provides no greater protection than the Fifth Amendment: "when interpreting art 1, § 17, there is an absence of a direct link to federal interpretation of the Fifth Amendment. Thus, it does not logically follow that in interpreting art 1, § 17, we must find compelling reasons to interpret our constitution more liberally than the federal constitution."

Bender, 452 Mich at 613 n 17 (opinion by CAVANAGH, J.). Rather, this Court must conduct a searching examination to discover what law the people of this state have made. *Id*.

I also note that Justice BRICKLEY's dissent in *Sexton*, 458 Mich at 69-70 (BRICKLEY, J., dissenting), and my opinion in *Bender*, 452 Mich at 611-612 (opinion by CAVANAGH, J.), cited the plurality opinions in *Wright*. Thus, although no opinion in *Wright* garnered majority support, *Wright* provides further insight into the constitutional basis for the *Bender* rule.

In *Wright*, Justice MALLETT, joined by Justice LEVIN, explained that "[u]nder Const 1963, art 1, § 17, a criminal suspect is given the right against self-incrimination, a right *similar* to that provided in the Fifth Amendment of the United States Constitution." *Wright*, 441 Mich at 154 (opinion by MALLETT, J.) (emphasis added). Thus, Justice MALLETT recognized that the right against self-incrimination under the Michigan Constitution is not necessarily exactly the same as the "similar" right under the federal Constitution merely because the language of the two Constitutions is nearly the same. Rather, the state right may be broader. Indeed, Justice MALLETT concluded just that when he explained that the defendant's "confession, made without [knowledge of his attorney's efforts to speak to him], violated the rights afforded *under the Michigan Constitution*." *Id*. at 155 (emphasis added).

I concurred with Justice MALLETT's conclusion that the privilege against self-incrimination under the Michigan Constitution is broader than the privilege under the United States Supreme Court's interpretation of the Fifth Amendment. *Wright*, 441 Mich at 155-156 (opinion by CAVANAGH, C.J.). I provided further support for that conclusion by noting that, as far back as 1929, this Court had determined that the privilege

against self-incrimination under the state Constitution made it unlawful for police to deny an attorney access to his client. *Id*. at 157-158, citing *Cavanaugh*, 246 Mich 680. Finally, Justice BRICKLEY also authored a concurring opinion in *Wright*, emphasizing the holding in *Cavanaugh* in support of the conclusion that the Michigan Constitution provides a broader privilege against self-incrimination than the federal Constitution. *Wright*, 441 Mich at 168 (opinion by BRICKLEY, J.), citing *Cavanaugh*, 246 Mich 680.

Therefore, after tracing the rule prohibiting the police from denying an attorney access to a client undergoing police interrogation from *Bender* back to *Wright*, it is clear that although there has not always been majority support for a single view, the justices in support of the *Bender* rule rooted their analysis in the Michigan Constitution. Moreover, those justices necessarily relied on *Cavanaugh* (as evidenced by the *Bender* opinions' citations of the *Wright* opinions, which cited *Cavanaugh*) as the primary source for the broader interpretation of the right against self-incrimination under the Michigan Constitution.[7]

By rejecting *Bender* on the grounds that it lacks moorings in the Michigan Constitution, the majority erroneously adopts a "literal application" of Const 1963 art 1, § 17, and "ignore[s] the jurisprudential

[7] The majority rejects this conclusion, positing that "this Court did not rely on *Cavanaugh* for the proposition that the compulsory self-incrimination provision contained in Article 1, § 17 provides protections that extend beyond those afforded by the Fifth Amendment." However, in the same breath, the majority concedes that my opinion in *Wright* cited *Cavanaugh* for the premise that a violation of the protections that are now contained in art 1, § 17 occurs when the police conceal from a suspect that counsel has been made available to him. See *Wright*, 441 Mich at 157-158 (opinion by CAVANAGH, C.J.). Moreover, *Bender* cited *Wright* for support. See, e.g., *Bender*, 452 Mich at 611-612 (opinion by CAVANAGH, J.). Accordingly, the majority is misguided in its interpretation of *Cavanaugh*'s effect on the analysis in *Wright* and *Bender*.

history of this Court" embodied in *Cavanaugh* and continued in *Wright* and *Bender* "in favor of the analysis of the United States Supreme Court . . . ." *Sitz v Dep't of State Police*, 443 Mich 744, 758; 506 NW2d 209 (1993). In doing so, the majority "disregard[s] the guarantees that our constitution confers on Michigan citizens merely because the United States Supreme Court has . . . not extended such protection." *Id*. at 759.

IV. ADDITIONAL AND INDEPENDENT SUPPORT FOR *BENDER* IN THE MICHIGAN CONSTITUTION

Although I believe that art 1, § 17 of our Constitution fully supports *Bender*, as I explained in *Wright*, 441 Mich at 156-157 (opinion by CAVANAGH, C.J.), a rule prohibiting police efforts to deprive a suspect of the knowledge that his lawyer is attempting to contact him is also alternatively supported by art 1, § 20.[8] See, also, *Bender*, 452 Mich at 611 n 14 (opinion by CAVANAGH, J.) (citing *Wright* for the conclusion that "Const 1963, art 1, § 20 . . . supported suppression of the defendant's statement").

"There is some overlap between the privilege against self-incrimination . . . and the right to counsel;" however, " 'the right to counsel cases are concerned with the integrity of the adversarial process.' " *Wright*, 441 Mich at 156 n 2 (opinion by CAVANAGH, C.J.), quoting Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 Mich L Rev 907, 928 (1989). As I stated in *Wright*, 441 Mich at 156 n 2 (opinion by CAVANAGH, C.J.), I believe that permitting

[8] Const 1963, art 1, § 20 states, in relevant part, "[i]n every criminal prosecution, the accused shall have the right to . . . have the assistance of counsel for his or her defense . . . ."

police to frustrate counsel's efforts to communicate with a suspect "threatens the adversarial system by allowing the police to manipulate the interrogation process," which is particularly problematic in Michigan, given that under the decision of a majority of this Court in *People v Cipriano*, 431 Mich 315; 429 NW2d 781 (1988), police can purposely delay a suspect's arraignment. In my view, the majority today exacerbates the errors in *Cipriano* by sanctioning police efforts during that prearraignment period to obstruct a lawyer's attempts to contact and advise his client, and to keep the suspect in the dark about the lawyer's attempts.

Kirby v Illinois, 406 US 682, 688; 92 S Ct 1877; 32 L Ed 2d 411 (1972), established the federal limitation on when the right to counsel attaches: the right attaches "only at or after the time that adversary judicial proceedings have been initiated against him." *Kirby* further stated that, as an example, the right attaches "at the time of arraignment . . . ." *Id*. However, in Michigan, the federal limitation was at least partially rejected in *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), and *People v Jackson*, 391 Mich 323, 338; 217 NW2d 22 (1974) (stating that "independent of any Federal constitutional mandate, . . . both before and after commencement of the judicial phase of a prosecution, a suspect is entitled to be represented by counsel at a corporeal identification or a photographic identification").[9] Therefore, "[a]lthough *Jackson* and *Anderson* were not explicitly premised on either the Sixth Amendment or Const 1963, art 1, § 20, they support the view

[9] I recognize that, in *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004), a majority of this Court overruled *Anderson* and its progeny, including *Jackson*. However, I continue to believe that this Court erred when it overruled *Anderson* for the reasons stated in Justice MARILYN KELLY's dissent in *Hickman*. *Id*. at 611-621 (MARILYN KELLY, J., dissenting).

that prearraignment events can trigger our state constitutional right to counsel." *Wright*, 441 Mich at 159-160 (opinion by CAVANAGH, C.J.).

I continue to believe that *Jackson*'s and *Anderson*'s rejection of the *Kirby* restriction is proper because the *Kirby* restriction is arbitrary. Specifically, as explained in *Patterson v Illinois*, 487 US 285, 290 n 3; 108 S Ct 2389, 101 L Ed 2d 261 (1988), post-indictment *Miranda* waivers are sufficient only until an actual attorney-client relationship is established and nothing changes at the time of formal charging if there was no attorney-client relationship yet established. Thus, "[t]he converse must also hold true: If an attorney-client relationship exists before arraignment, nothing will change at the time of arraignment to cause the right to counsel to suddenly blossom where none existed before." *Wright*, 441 Mich at 160 (opinion by CAVANAGH, C.J.). Accordingly, *Anderson* and *Jackson* correctly recognized that there are "critical stages" in prosecution that can occur before formal charging. I continue to believe that "custodial interrogation of an accused who is represented by counsel is just such a situation." *Id*. at 160-161. Moreover, in my view, "the police can be held accountable for knowing that the accused is represented by counsel 'to the extent that the attorney or the suspect informs the police of the representation.' " *Id*. at 161, quoting *Moran*, 475 US at 460 n 46 (Stevens, J., dissenting).

Accordingly, because I believe that a suspect "faced with custodial interrogation has the *specific* right, as part of his overall right to counsel, to be informed of his attorney's attempts to contact him," I would hold that "a waiver of that right cannot be valid when the police merely inform the suspect, in generalized terms, that he has the right to a lawyer if he wishes." *Wright*, 441 Mich at 161 n 5 (opinion by CAVANAGH, C.J.). Simply stated,

"[a] defendant cannot knowingly and intelligently waive his *specific* right to speak with an attorney who is immediately available and trying to contact him when he is unaware that the attorney *is* available and trying to contact him." *Id*. Instead, in my view, "the waiver can only be valid if the suspect is timely and accurately informed of his attorney's immediate availability and attempts to contact him, and *then* knowingly, intelligently, and voluntarily waives the right to see the attorney." *Id*.

In summary, contrary to the majority's conclusion that *Bender* lacks any connection to the Michigan Constitution, our caselaw establishes that *Bender* is firmly rooted in art 1, § 17. Accordingly, *Bender* was properly decided and should not be overruled. Moreover, in my view, *Bender* is also supported by the right to counsel under art 1, § 20.a,

V. STARE DECISIS

In light of the preceding analysis, it is clear that *Bender* is founded on the Michigan Constitution and is consistent with this Court's prior precedent. *Bender* was correctly decided and no further stare decisis consideration is needed. However, even accepting the majority's faulty conclusion that *Bender* was wrongly decided, I do not agree that its decision to overrule *Bender* is supported by stare decisis principles.

The United States Supreme Court has explained that the doctrine of stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v Tennessee*, 501 US 808, 827; 111 S Ct 2597; 115 L Ed 2d 720 (1991). Our longstanding doctrine of stare decisis provides that "principles of law

deliberately examined and decided by a court of competent jurisdiction should not be lightly departed." *Brown v Manistee Co Rd Comm*, 452 Mich 354, 365; 550 NW2d 215 (1996) (quotation marks and citations omitted), overruled in part on other grounds by *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007). As a result, "a stare decisis analysis should always begin with the presumption that upholding the precedent involved is the preferred course of action." *Petersen v Magna Corp*, 484 Mich 300, 317; 773 NW2d 564 (2009) (opinion by MARILYN KELLY, C.J.). Thus, "overturning precedent requires more than a mere belief that a case was wrongly decided," *McCormick v Carrier*, 487 Mich 180, 211; 795 NW2d 517 (2010), and the presumption in favor of upholding precedent "should be retained until effectively rebutted by the conclusion that a compelling justification exists to overturn the precedent." *Petersen*, 484 Mich at 317 (opinion by MARILYN KELLY, C.J.).

Moreover, when our caselaw concludes that the Michigan Constitution provides greater protection to our citizens than that provided by the federal Constitution, I believe "this Court should be required to show a compelling reason to depart from [that] past precedent." *Goldston*, 470 Mich at 559 (CAVANAGH, J., dissenting), citing *People v Collins*, 438 Mich 8, 50; 475 NW2d 684 (1991) (CAVANAGH, C.J., dissenting).

Several of the criteria discussed in *Petersen*[10] weigh in favor of upholding *Bender* rather than overruling

[10] In *Petersen*, Chief Justice MARILYN KELLY provided a nonexhaustive list of criteria for consideration when a court engages in a stare decisis analysis, but no single criterion is determinative, and a given criterion need only be evaluated if relevant. *Petersen*, 484 Mich at 320 (opinion by MARILYN KELLY, C.J.). By expanding on the test from *Robinson v Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000), which the majority applies, *Petersen*'s test is also more respectful of precedent than *Robinson*.

it: (1) *Bender* provides a practical and workable rule; (2) facts and circumstances have not changed, or come to be seen so differently, as to have robbed *Bender* of significant application or justification; (3) other jurisdictions have adopted rules similar to *Bender* that are more protective of the privilege against self-incrimination than the federal rule; and (4) overruling *Bender* is likely to result in serious detriment prejudicial to public interests. See *Petersen*, 484 Mich at 320 (opinion by MARILYN KELLY, C.J.).

Bender's per se rule prohibiting police interference with counsel's efforts to communicate with a suspect is easily understood by the police and creates little, if any, uncertainty regarding what is required: the police must inform a suspect that counsel has been retained for him and is attempting to contact him. *Bender*, 452 Mich at 620 (opinion by CAVANAGH, J.). See, also, *Wright*, 441 Mich at 163-164 (opinion by CAVANAGH, C.J.) (stating that "if an attorney takes diligent steps to inform the police that he represents and wishes to contact a suspect held in custody, the police must take prompt and diligent steps to inform the suspect of that fact"). Accordingly, as even the majority admits, *Bender* provides a practical and workable rule. See *ante* at 253. This factor therefore weighs heavily in favor of upholding *Bender*.

Nevertheless, the majority inexplicably applies an approach that merely pays lip service to the obvious practical workability of *Bender* while primarily considering whether a regime other than the *Bender* rule might be equally workable. A stare decisis analysis focuses on the *established rule's* workability; not whether some other rule may or may not be applied as easily as the established rule. See *Petersen*, 484 Mich at 320 (opinion of MARILYN KELLY, C.J.) (considering

"whether *the rule* has proven to be intolerable because it defies practical workability") (emphasis added); and *Robinson*, 462 Mich at 464 (considering "whether *the decision at issue* [i.e., the established rule] defies 'practical workability' ") (emphasis added). That focus on the established rule is consistent with the understanding that upholding the precedent involved is "the preferred course, because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Hohn v United States*, 524 US 236, 251; 118 S Ct 1969; 141 L Ed 2d 242 (1998) (citation and quotation marks omitted). See, also, *Petersen*, 484 Mich at 317 (opinion by MARILYN KELLY, C.J.). The majority's faulty stare decisis analysis features its attempt to manipulate this factor with an approach that lacks any support in caselaw and all but ignores the practical workability of the existing rule.

Further supporting the conclusion that *Bender* should not be overruled is the fact that circumstances have not come to be seen so differently as to have robbed *Bender* of significant justification. Indeed, protection of a citizen's constitutional rights within the custodial-interrogation setting remains as important today as it was when *Bender* was decided 18 years ago, as evidenced by this Court's and the United States Supreme Court's repeated consideration of the issue.

Moreover, many states have, as Michigan did in *Bender*, recognized that *Moran* merely establishes a minimum requirement and have determined that their citizens enjoy greater state constitutional protection than afforded by *Moran*.[11] As a result, *Bender* is far

[11] See, e.g., *Stoddard*, 206 Conn at 164-167 (declining to follow *Moran* based on state precedent interpreting the state constitution); *Bryan v*

from unique in concluding that state law provides greater constitutional protections than the federal Constitution regarding the privilege against self-incrimination. Although I recognize that some states have adopted *Moran* as consistent with the protections provided by their state Constitutions, the fact that the states are divided on the issue at most renders this factor neutral.

Finally, in my view, the most significant factor in favor of upholding *Bender* is that the majority's contrary decision is likely to result in serious detriment prejudicial to public interests. The majority disagrees, claiming that "[i]t is hard to comprehend a societal interest that is furthered by protecting persons who have engaged in serious criminal activities from the consequences of their own voluntary and intelligent decisions." *Ante* at 255. To begin with, this statement entirely ignores the overriding principle of our criminal justice system: that a suspect is presumed innocent until proven guilty beyond a reasonable doubt. Thus, whether there is a "societal interest" in protecting any particular conduct of a person who has "engaged in serious criminal activities" is entirely irrelevant. However, in my view, the "societal interest" in

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State, 571 A2d 170, 176-177 (Del, 1990) (same); *Commonwealth v Mavredakis*, 430 Mass 848, 858-860; 725 NE2d 169 (2000) (same); *State v Roache*, 148 NH 45, 49-51; 803 A2d 572 (2002) (same); *People v McCauley*, 163 Ill 2d 414, 423-425; 206 Ill Dec 671; 645 NE2d 923 (1994) (same); *State v Simonsen*, 319 Or 510, 514-518; 878 P2d 409 (1994) (same); *Roeder v State*, 768 SW2d 745, 753-754 (Tex App Ct, 1988) (same); *Reed*, 133 NJ at 250 (declining to follow *Moran* in light of state statutory and common law); *Haliburton v State*, 514 So 2d 1088, 1090 (Fla, 1987) (declining to follow *Moran* and finding a violation of the Due Process Clause of the Florida Constitution); and *West v Commonwealth*, 887 SW2d 338, 342-343 (Ky, 1994) (declining to follow *Moran* because the Kentucky Constitution provides greater protection than the federal Constitution and a state criminal rule providing access to counsel predating *Moran* remained applicable). See, also, *Reed*, 133 NJ at 265 (noting that "[p]rior to *Moran*, a majority of states followed a rule similar to" *Bender*).

protecting the ability of those *merely accused* of a crime to make a truly "knowing and intelligent" waiver of their constitutional rights is of the highest order. Moreover, "if law enforcement officers adhere to [*Bender*], there will be no reversal of convictions on the basis of failure by officers to inform the suspect that his counsel wished to speak with him before he made a confession." *Bender*, 452 Mich at 597 n 1 (opinion by CAVANAGH, J.). Therefore, if a *Bender* violation occurs, "it will be a government agent, and not this Court, that is responsible for thwarting and hampering cases of urgent social concern . . . ." *Id*.

Moreover, I disagree with the majority's subjective and unsupported conclusion that *Bender* "impinge[s] on the effectiveness of law enforcement . . . ." *Ante* at 254. For starters, it does not appear that Michigan's law enforcement has suffered from a serious inability to effectively enforce the law in the 18 years since *Bender* was decided.[12] Apparently, the many other states that have declined to follow *Moran* have likewise managed to avoid becoming lawless wastelands of crime, despite the majority's concern. See, also, *Moran*, 475 US at 460 (Stevens, J., dissenting) (stating that an argument similar to the majority's "is not supported by any reference to the experience in the states that have adopted" a rule similar to *Bender*), and *Goldston*, 470 Mich at 568-569 (CAVANAGH, J., dissenting) (considering the similar concern of the majority in that case "that the high cost of the exclusionary rule exacts too

[12] The majority disagrees, arguing, "the negative effects of *Bender* are not obviously seen . . . ." *Ante* at 255 n 39. In my view, *Bender* protects our citizen's constitutional rights; accordingly, I cannot agree with the majority's conclusion that *Bender*'s effects are "negative." Likewise, the majority's recitation of the prosecution's protestations against *Bender* could apply with equal force to other constitutional protections afforded to criminal suspects. Nevertheless, we uphold these constitutional protections. We should do the same with *Bender* because the goal is justice through proper application of constitutional principles, not convictions at any cost.

great a toll on our justice system" and noting that "our state has managed to exist for decades with the exclusionary rule and our streets have yet to become teeming with criminals").

Although I think that the majority's concern that *Bender* unduly interferes with law enforcement is exaggerated, I am nevertheless aware that the *Bender* rule "may decrease the likelihood that interrogating officers will secure a confession." *Bender*, 452 Mich at 618 (opinion by CAVANAGH, J.). However, that cost must be balanced against the result of the majority's favored rule. "[P]olice deception of a suspect through omission of information regarding attorney communications greatly exacerbates the inherent problems of incommunicado interrogation . . . ." *Moran*, 475 US at 452 (Stevens, J., dissenting). Accordingly, while confessions "are not only a valid, but also an essential part of law enforcement," *Bender*, 452 Mich at 597 n 1 (opinion by CAVANAGH, J.), " '[t]he quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law.' " *Miranda*, 384 US at 480, quoting Schaefer, *Federalism and State Criminal Procedure*, 70 Harv L Rev 1, 26 (1956).

> No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, [his rights to remain silent and to counsel]. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system. [*Escobedo v Illinois*, 378 US 478, 490; 84 S Ct 1758; 12 L Ed 2d 977 (1964).]

VI. CONCLUSION

Bender has stood undisturbed for nearly 20 years and has foundations as far back as 1929. See *Ca-*

vanaugh, 246 Mich 680. Moreover, *Bender* correctly determined that art 1, § 17 of the Michigan Constitution provides Michigan's citizens greater protection than its federal counterpart. That conclusion, in my view, is further supported by the Court's interpretation of art 1, § 20 of our Constitution. Finally, the doctrine of stare decisis weighs against overruling *Bender*. Accordingly, I dissent.

MCCORMACK, J. (*dissenting*). I respectfully dissent from the majority's decision to use this case as a vehicle for overruling *People v Bender*, 452 Mich 594; 551 NW2d 71 (1996). While I agree with the majority that "stare decisis is a principle of policy rather than an inexorable command," I do not find adequate reason to depart from the "preferred course" of leaving *Bender*'s settled precedent intact. *Robinson v Detroit*, 462 Mich 439, 463-464; 613 NW2d 307 (2000) (internal quotation marks omitted). First, I do not share the majority's confidence that the rule recognized in *Bender* lacks a constitutional basis. Rather, I agree with Justice CAVANAGH that this rule is well moored in Article 1, § 17 of the Michigan Constitution, with its jurisprudential roots set in *People v Cavanaugh*, 246 Mich 680; 225 NW 501 (1929). I appreciate and, in certain respects, share the majority's dissatisfaction with *Bender*'s fractured treatment of this issue; none of the shortcomings I see in the opinion, however, are sufficient to undermine the substantive integrity of its conclusion or render it "wrongly decided."

Nor, in my mind, would any other consideration favor disruption of that precedent.[1] As Justice CAVANAGH

[1] Justice CAVANAGH applies *Petersen v Magna Corp*, 484 Mich 300, 317-320; 773 NW2d 564 (2009) (opinion by MARILYN KELLY, C.J.), to reach this same conclusion. While I do not likewise rely on that case or framework, I find that much of the substance of his reasoning applies with equal force under the governing standard set forth in *Robinson*. See *Robinson*, 462 Mich at 464 (explaining that, before this Court overrules

aptly explains, in the nearly twenty years since *Bender* was decided, there has been no indication that its straightforward rule has defied practical workability in any respect, or has produced the "mischief" and harm of which the prosecution and majority warn.[2] Rather, by now removing this simple and settled rule, the majority works an undue detriment upon the constitutional protection long recognized by this Court and relied upon by the people of Michigan: that should they find themselves detained as suspects of a crime, they will not be held incommunicado from those who have been retained or appointed to advise them. And I see no changes in the law or facts that render *Bender*'s recognition and implementation of this principle no longer justified. To the contrary, our current debate over the propriety of that rule simply echoes the one taken up by the *Bender* Court years ago; its contours have remained the same, as have the arguments and authority offered by each side in support. The Justices involved have changed (for the most part), but of course that does not warrant disturbance of our precedent.

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a precedent it deems "wrongly decided," it "should also review whether the decision at issue defies 'practical workability,' whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision").

[2] Indeed, I, like Justice CAVANAGH, have difficulty seeing how a rule requiring police to inform suspects of their counsel's availability might produce any sort of detriment with which our society should be duly concerned. I have even more difficulty with the majority's suggestion that such a rule might harm those suspects themselves, because "police officers and prosecutors will almost certainly be more reluctant to facilitate counsel before one is legally required if the consequence is the suppression of evidence." *Ante* at 249 n 37. It is, of course, the deliberate concealment of counsel, not the facilitation of it, that merits suppression under *Bender*. *Bender*'s rule would thus only discourage the police and prosecution from assisting in the procurement of counsel if they planned to withhold that counsel from the suspect—which would be a peculiar form of "facilitation" from the suspect's perspective, to say the least, and one not likely to be missed.

I do, however, see one meaningful difference between the instant case and *Bender*, and it too counsels against the majority's chosen course. As the majority stresses, there was no dispute in *Bender* that the defendants made their incriminating statements to the police without requesting or even expressing interest in securing the representation of counsel beforehand. Nonetheless, those statements were suppressed because the police did not inform the defendants of the counsel that their parents had unilaterally decided to retain for them. This fact animated the *Bender* dissent's chief objections to that decision's per se rule, shared by the majority here: that it permits suppression of confessions based strictly on circumstances beyond the cognizance and apparent concern of the suspect, the individual to whom the constitutional rights at issue belong. *See Bender*, 452 Mich at 649-650, 656 (BOYLE, J., dissenting).

The instant case, however, is not *Bender*, and these concerns are not implicated. For, unlike the defendants in *Bender*, the defendant's incriminating statements in this case only came after he repeatedly expressed his desire for counsel but to no avail. The first request came when the defendant was initially taken into custody on the morning of October 17, 2011. Upon being read his rights, the defendant indicated that he would not waive them and requested that counsel be provided to him. The interrogating detectives acknowledged the request but nonetheless continued to press him into talking; the defendant, however, again asserted his right to counsel, reiterating, "I would like a lawyer for consultation." The defendant was then returned to lock-up, and heard nothing further regarding his requests. His next request came the following day, when the jail administrator came to see the defendant in response to his statement to a mental health worker that he "had some things he wanted to get off of his chest." When the administrator asked if the defendant

"want[ed] to talk to somebody," the defendant said yes, and asked, "[C]an you get me an attorney?" After telling the defendant that procuring an attorney was not his job, the administrator offered to get the detectives instead—the same ones from whom the defendant had already requested counsel. The defendant acquiesced. The defendant's interest in the assistance of counsel was sufficiently clear at this time that the jail administrator and police contacted the county prosecutor, who arranged for counsel to be appointed and sent to the jail. Nonetheless, at no point during his custody was the defendant given any indication that his rightful requests for counsel would ever, in fact, be honored, regardless of whom or how often he asked—let alone that such counsel had been appointed and was readily available to assist him.

It was under these circumstances that the defendant's waiver of rights and incriminating statements were made. The defendant stressed these circumstances in arguing for suppression,[3] and they, in turn, drove the trial court's determination to that effect:

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[3] The majority notes that defense counsel conceded before the trial court that the defendant's eventual waiver of his *Miranda* rights was "made voluntarily." It is entirely clear, however, that counsel did not intend this concession to suggest that the defendant's unrequited requests for counsel bore no improper influence over his subsequent waiver and confession; rather, counsel consistently emphasized these requests and how they made suppression all the more warranted here than in *Bender*—a proposition, as discussed below, with which the trial court appeared to agree. See Defendant's Brief in Support of Motion to Suppress Statement (explaining that, unlike in *Bender*, the defendant here invoked his right to counsel, "mak[ing] the police officers['] actions of not informing the Defendant that an attorney had been appointed to represent him and was present at the jail when they gave him *Miranda* rights, all the more curious"); Evidentiary Hearing Closing Argument by Defense Counsel (stressing at the outset of his closing argument in favor of suppression that "once [the defendant] invoked his right to an attorney he never really received a benefit from it"; arguing further that the defendant's "case is even stronger than" *Bender* because, *inter alia*, when the prosecutor was contacted, resulting in appointment of counsel, "it's

> Given these facts, the attorney was there, the police knew it, he was not permitted to go back and see his client. . . . [The defendant], who had once invoked his right to remain silent and had indicated at least on the 18th with knowledge to the police officials that he might possibly be interested in an attorney, was not told that one was there waiting for him. Based upon that, I will grant the motion of the Defendant to suppress [his] confession . . . . [4]

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uncontested that there was a request for a lawyer"; and questioning the prosecution's suggestion that appointed counsel "was only on standby," to be made available only "if [the defendant] guessed after asking for a lawyer twice that somehow one would be there for him").

[4] Accordingly, I cannot agree with the majority's characterization of the trial court's ruling as simply that the "defendant's statement required suppression under *Bender*, because the police officers had failed to inform him that an attorney was present at the jail and had established contact with the officers." *Ante* at 206. While this failure was certainly enough in itself to warrant suppression under *Bender*, it is apparent that the trial court also found significant that this failure came in the face of the defendant's repeated requests for counsel. Similarly, the majority states that the trial court ruled that the defendant "affirmatively reinitiated contact with police officers on October 18, 2011, without reasserting his right to counsel." *Ante* at 206. While the majority may be comfortable with that conclusion, I see no determination by the trial court to that effect. Rather, the court recognized, as described above, that the jail administrator came to speak with the defendant upon hearing of his desire to "get something off [his] chest"; "the first thing that [the defendant] brings up is he asked if [he] could get an attorney"; the administrator declined and offered to get the detectives instead; and the defendant "seemed to understand that and was agreeable for him to get the detectives." Nor, given these circumstances, did the trial court put much stock in the prosecution's "no good deed goes unpunished" lament—echoed by the majority here—that counsel's appointment was simply a precautionary measure, voluntarily undertaken and wholly conditional upon whether the defendant (yet again) asked for it. Instead, the court stressed that, although the detective, "and I'm not picking on him, . . . talks about [the attorney] being there only if needed," there was no confusion among the detectives and the jail administrator that the attorney had been sent for the defendant, and the attorney, while perhaps unsure of the defendant's name at that time, "knew he was there to talk to somebody and represent them regarding possible charges of murder or homicide that would be filed . . . against them."

Both the defendant and the trial court focused on *Bender* as the legal basis for this conclusion, and fairly so, as its settled and straightforward rule plainly sweeps these circumstances within its scope. The defendant's frustrated attempts to invoke his right to counsel, however, just as plainly implicate *Cavanaugh*, which sits at the core of *Bender*'s rule and persists wholly intact without it. Taking *Bender* off the books thus does little to resolve the actual evidentiary question at issue in this case: whether the defendant's statements should be suppressed on constitutional grounds.[5] *Bender*'s rule, while certainly sufficient to sustain this relief, is not necessary to it. The majority may disapprove of that rule, but *Bender* is not the case before us, and I fail to see how the instant case invites or enables the majority to act on that disapproval as they have. Accordingly, I cannot join in the majority's decision to reach beyond the facts of this case to overrule *Bender*'s settled and sound precedent.

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[5] Despite their prominence in both the defendant's arguments and the trial court's ruling, the majority pays little mind to the defendant's requests for counsel, summarily suggesting that they were constitutionally meaningless and left the defendant here no differently situated than the defendants in *Bender*. The majority even holds this case out as emblematic of "the problems with *Bender*," as "the prosecutor, on behalf of the people, was effectively sanctioned by the suppression of defendant's voluntary statements for having taken the precaution of seeking out counsel in the event that defendant requested counsel before or during his interrogation." *Ante* at 249 n 37. I, like the trial court, cannot so easily disregard the defendant's requests for counsel. The record here paints a substantially different and more complicated picture than the one now offered by the majority—one in which counsel was procured because, indeed, the defendant affirmatively desired and repeatedly asked for it, and in which the prosecution and police have been "sanctioned" not for acknowledging those requests, but for failing to duly honor them. The trial court saw significance in these complications; in light of its due reliance on *Bender*, however, it was not required to take up the full range of their constitutional import. With *Bender* now gone, I would leave that assessment to the trial court in the first instance, if and when the defendant again seeks suppression of his statements on a constitutional basis, state or federal, that demands it.

In re MORROW

Docket No. 146802. Argued March 5, 2014 (Calendar No. 1). Decided June 23, 2014.

The Judicial Tenure Commission (JTC) filed a formal complaint against Wayne Circuit Court Judge Bruce U. Morrow, alleging 10 counts of judicial misconduct that arose out of criminal cases over which he had presided. Before the formal complaint was filed, respondent and the examiner had entered into a settlement agreement in which respondent would have been publicly censured for his conduct in four criminal cases. The JTC agreed that the stipulated facts established judicial misconduct and recommended that the Supreme Court impose the agreed-upon public censure; however, the Supreme Court rejected the proposed public censure as too lenient in light of the facts presented and remanded for further proceedings. 493 Mich 878 (2012). After the parties were unable to reach a new settlement agreement, the Supreme Court entered a confidential order stating that a 90-day suspension was an appropriate order of discipline and that such a sanction would enter unless respondent objected by withdrawing his consent to be disciplined. Respondent then withdrew his consent, and the JTC filed the formal complaint at issue. The alleged misconduct included improperly closing the courtroom during a hearing and ordering the court reporter not to prepare a transcript; failing to sentence defendants in accordance with the law; refusing to remand a defendant convicted of sexually assaulting a minor to jail as required by MCL 770.9b(1); improperly dismissing cases sua sponte; failing to place a sidebar conference on the record, rule on the defendant's request for a curative instruction, and follow instructions from the Court of Appeals to hold an evidentiary hearing on a contested legal issue, then issuing a ruling on remand that was not supported by the trial record; leaving the bench at the beginning of a trial to shake hands with the defendant and give a package of documents to defense counsel; subpoenaing a defendant's medical records sua sponte without the parties' knowledge or consent; and personally retrieving an inmate from lockup, escorting him to the courtroom, and sentencing him without restraints or security personnel present. The appointed master, retired Oakland Circuit Court Judge Edward

Sosnik, found that a preponderance of the evidence established the factual basis for each of the allegations in the formal complaint, but concluded that the facts constituted judicial misconduct in two counts only. After hearing argument on objections to the master's report, a majority of the JTC concluded that the evidence established judicial misconduct in eight of the ten allegations and recommended that respondent be suspended for 90 days without pay under the standards set forth in *In re Brown*, 461 Mich 1291 (2000).

In an opinion per curiam signed by Justices MARKMAN, KELLY, ZAHRA, MCCORMACK, and VIVIANO, the Supreme Court *held*:

The record established that respondent committed the acts of judicial misconduct as set forth by the JTC majority, and the JTC's conclusions of law were formally adopted. However, a downward deviation from the JTC's recommended sanction of a 90-day suspension without pay was warranted in light of the fact that respondent did not seek to personally benefit from his misconduct and that much of the misconduct was too unrelated to constitute a meaningful pattern.

1. Respondent failed to adhere to the high standards of professional conduct that the Michigan Constitution, court rules, and canons of judicial conduct require of judicial officers. The totality of the evidence painted a portrait of a judicial officer who was unable to separate the authority of the judicial office he held from his personal convictions. Respondent's closing of his courtroom without complying with the governing court rule impeded the proper administration of justice. His refusal to follow mandatory statutory language after it was brought to his attention evinced a willful failure to observe the law, which eroded the public's confidence in a fair and impartial judiciary, as did his disregard of a superior court order directing him to hold a hearing. His recasting of a previous order dismissing a case without prejudice to justify his sua sponte dismissal of the case after it was reissued, despite the defendant's intention to plead guilty, degraded the integrity of the judicial process and the judiciary itself. Respondent failed to recognize the limits of his adjudicative role when he subpoenaed a defendant's medical records without the parties' knowledge or consent at a point when the case could have gone to trial with him possibly as the trier of fact. Respondent recklessly placed himself and others in his courtroom at risk of serious harm by personally bringing a defendant convicted of several violent crimes from lockup and sentencing him without restraints or courtroom security present. Finally, respondent showed poor judgment by coming down from the bench at the start of a trial to

shake hands with a criminal defendant and deliver papers to his counsel, which, at a minimum, created the appearance of impropriety.

2. A downward deviation from the JTC's recommended sanction of a 90-day suspension without pay was warranted. This Court's overriding duty in the area of judicial discipline proceedings is to treat equivalent cases in an equivalent manner and unequivalent cases in a proportionate manner. The fact that respondent did not seek to personally benefit from his misconduct was a relevant mitigating factor. Further, while some of the counts showed a pattern of willful disregard of controlling legal authority, the remaining counts of misconduct shared nothing in common except for the fact that they constituted judicial misconduct, and were too unrelated to constitute a meaningful pattern for purposes of the first *Brown* factor, which states that misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct. While many of respondent's acts of misconduct, taken alone, would probably have warranted no more than a public censure and the more serious instances of misconduct, taken alone, would likely have merited a short suspension, when the allegations were aggregated and the body of misconduct was considered as a whole, a greater sanction was necessary to protect the integrity of the judiciary as an institution. When a judge commits a series of legal errors for which there can be no colorable good-faith excuse, a 60-day suspension is a sufficiently severe sanction to protect the integrity of the judiciary while also maintaining fidelity to the principle that equivalent conduct be treated equivalently.

Sixty-day suspension imposed.

Chief Justice YOUNG, concurring in part and dissenting in part, would have imposed the 90-day suspension recommended by the JTC because it most appropriately addressed the extent of respondent's documented misconduct, considering that the misconduct occurred in respondent's official capacity as a judge, it affected the administration of justice, and was part of a pattern. He would have held that when the record reflects that a judge has demonstrated a pattern of lawlessness in the discharge of his or her judicial duties that did not involve mere mistakes in applying the law, the sanction should presumptively be no less than a 90-day suspension without pay. He joined the majority's demand that the JTC undertake the task to create standards by which to assess judicial discipline in a manner that is consistent with the rule of law.

Justice CAVANAGH, dissenting, would have concluded that public censure was an appropriate sanction for respondent's misconduct in light of the JTC's findings, conclusions, and initial recommendation; the settlement agreement between respondent and the JTC, the standards set forth in *Brown*; and the deference generally afforded to the JTC's recommendations.

Paul J. Fischer and *Glenn J. Page* for the Judicial Tenure Commission.

Collins Einhorn Farrell, PC (by *Donald Campbell*, *Melissa E. Graves*, and *Trent B. Collier*), for respondent.

PER CURIAM. This case comes to the Court on the recommendation of the Judicial Tenure Commission (JTC) that Judge Bruce U. Morrow (respondent) be suspended from office for 90 days without pay. Respondent has filed a petition requesting that this Court reject or modify that recommendation. After review of the entire record and due consideration of the parties' arguments, we agree with the JTC's conclusion that respondent committed judicial misconduct, but we are not persuaded that the recommended sanction is appropriate in this case. Instead, we hold that a 60-day suspension without pay is proportionate to the body of judicial misconduct established by the record.

I. FACTS

Respondent is a judge on the 3rd Circuit Court in Wayne County, Michigan. He is therefore subject to all the duties and responsibilities imposed on him by the canons of judicial conduct and the standards for discipline set forth in MCR 9.104 and MCR 9.205.

Before the formal complaint was filed in this case, respondent and the examiner entered into a settlement

agreement whereby the parties stipulated to a set of facts involving respondent's conduct in four criminal cases in which respondent was the presiding judge. As part of the agreement, respondent consented to be publicly censured. The JTC agreed that the stipulated facts established judicial misconduct and, over a two-member dissent, recommended that this Court impose the agreed-upon public censure. The dissenting JTC members would have recommended a 60- to 90-day suspension. This Court rejected the proposed public censure as too lenient in light of the facts presented and remanded for further proceedings while retaining jurisdiction.[1] Thereafter, the JTC reported that the parties were unable to reach a new settlement agreement. In response, this Court entered a confidential order stating that a 90-day suspension was an appropriate order of discipline and that such a sanction would enter unless respondent objected by withdrawing his consent to be disciplined.

Respondent withdrew his consent, and on March 7, 2013, the JTC filed Formal Complaint No. 92 against respondent. The complaint alleges 10 counts of judicial misconduct, all arising out of criminal cases in which respondent was the presiding judge. The facts of each count can be summarized as follows:

> Count 1: In *People v Orlewicz*, Case No. 07-23972, respondent closed the courtroom to the public and the victim's family during a postconviction hearing without specifically stating the reasons for the closure or entering a written order as required by MCR 8.116(D). Respondent subsequently ordered his court reporter not to prepare transcripts of the hearing.
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> Count 2: In *People v Fletcher*, Case No. 08-10018, respondent failed to sentence a defendant convicted of

[1] *In re Morrow*, 493 Mich 878 (2012).

operating a motor vehicle while intoxicated, third offense, MCL 257.625, in accordance with the mandatory minimum of 30 days in jail as prescribed by MCL 257.625(9)(c)(*ii*), despite the prosecutor's bringing the relevant statute to his attention. Respondent later discharged the defendant from probation without the defendant's having served the mandatory 30 days in jail.

Count 3: In *People v Slone*, Case No. 09-29628, respondent sentenced the defendant to a prison term 18 months below the sentencing guidelines range.

Count 4: In *People v McGee*, Case No. 05-8641, respondent refused the prosecutor's request to remand the defendant convicted of first-degree criminal sexual conduct with a person under the age of 13 to jail awaiting sentencing as required by MCL 770.9b(1).

Count 5: In *People v Wilder*, Case No. 09-3577, following the defendant's guilty plea, respondent dismissed the case *sua sponte* on the basis that a previous dismissal order was with prejudice. When the prosecutor informed him that his justification was contradicted by the record—in fact, the prior dismissal was without prejudice—respondent stated that the dismissal was "conditional with prejudice."

Count 6: In *People v Jones*, Case No. 08-13361, respondent *sua sponte* dismissed the case on the basis of unreliable information in a search warrant affidavit after directing the prosecution to produce all its search warrant records involving a particular confidential informant and was subsequently disqualified from the case by the Court of Appeals.

Count 7: In *People v Boismier*, Case No. 08-12562, respondent failed to place a sidebar conference on the record, failed to rule on the defendant's request for a curative instruction, and failed to follow instructions from the Court of Appeals to hold an evidentiary hearing on a contested legal issue, and his ruling on remand was not supported by the trial record.

Count 8: In *People v Redding*, Case No. 07-3989, at the beginning of a trial over which he was to preside, respon-

dent left the bench, shook hands with the defendant, and gave a package of documents to defense counsel.

Count 9: In *People v Moore*, Case No. 06-3221, respondent *sua sponte* subpoenaed medical records of the defendant without the parties' knowledge or consent.

Count 10: In *People v Hill*, Case No. 09-18342-02, respondent personally retrieved an inmate from lockup, escorted him to his courtroom, and sentenced him without restraints or courtroom security personnel present.

On March 15, 2013, this Court appointed the Honorable Edward Sosnik as master. In his report, the master found that a preponderance of the evidence established the factual basis for each of the allegations in the formal complaint. However, the master concluded that the facts constituted judicial misconduct in only two counts—Count 4 and Count 10.[2] After hearing argument on objections to the master's report, the JTC issued its decision and recommendation on December 9, 2013. A majority of the JTC disagreed in large part with the master's conclusions of law, concluding that the evidence established judicial misconduct in eight of the ten allegations.[3] On the basis of the disciplinary factors established in *In re Brown*,[4] the JTC recommended that respondent be suspended for 90 days without pay.[5]

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[2] According to the master, "[T]here is a pattern in . . . these cases, but not necessarily as described by the Examiner. Respondent's 'pattern' of judging is to proactively prevent legally wrongful results. Though his methods are sometimes unorthodox, 'his heart is in the right place' ensuring in his mind, that justice prevails in the criminal justice system."

[3] The JTC made no mention of two of the alleged instances of misconduct, Counts 3 and 6, evidently agreeing that these counts did not establish judicial misconduct. Our review of the record in those cases leads us to the same conclusion. Accordingly, we need not address these allegations further.

[4] *In re Brown*, 461 Mich 1291 (2000).

[5] One JTC member, 3rd Circuit Court Judge Michael Hathaway, concurred in part and dissented in part. He would have concluded that

II. ANALYSIS

A. STANDARD OF REVIEW

Judicial tenure cases come to this Court on recommendation of the JTC, but the authority to discipline judicial officers rests solely in the Michigan Supreme Court.[6] Accordingly, we review de novo the JTC's findings of fact, conclusions of law, and recommendation for discipline.[7] The examiner has the burden to prove allegations of judicial misconduct by a preponderance of the evidence.[8]

B. FACTUAL FINDINGS AND CONCLUSIONS OF LAW

After careful review of the factual record in this case, we agree with the master and the JTC that a preponderance of the evidence establishes the factual basis of the allegations in the formal complaint. We further agree that the record establishes that respondent committed the acts of judicial misconduct as set forth by the JTC majority, and we formally adopt its conclusions of law.[9] In our view, the totality of the evidence in this case

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respondent's handling of the *Orlewicz*, *Wilder*, and *Boismier* cases (Counts 1, 5, and 7) did not constitute judicial misconduct. However, he concurred in the recommendation for a 90-day suspension.

[6] Const 1963, art 6, § 30.

[7] *In re James*, 492 Mich 553, 560; 821 NW2d 144 (2012).

[8] MCR 9.211(A).

[9] In particular, we agree with the JTC that respondent committed the following acts in violation of the corresponding canons and court rules governing judicial conduct: misconduct in office, Const 1963, art 6, § 30(2) and MCR 9.205; conduct prejudicial to the administration of justice, Const 1963, art 6, § 30(2), MCR 9.205(B), and MCR 9.104(1); failure to establish, maintain, enforce, and personally observe high standards of conduct "so that the integrity and independence of the judiciary may be preserved," Canon 1; irresponsible or improper conduct that erodes public confidence in the judiciary, Canon 2A; conduct involving impropriety and the appearance of impropriety, Canon 2A; failure to

paints a portrait of a judicial officer who was unable to "separate the authority of the judicial office he holds from his personal convictions[.]"[10]

In *Orlewicz*, respondent's perfunctory ruling closing the courtroom to the public and the victim's family without complying with the governing court rule impeded the proper administration of justice. And, in *Fletcher* and *McGee*, respondent's refusal to follow mandatory statutory language after the controlling authority was brought to his attention evinced a willful failure to observe the law, eroding the public's confidence in a fair and impartial judiciary. Similarly corrosive of the public's faith in our judicial system was respondent's disregard of a superior court order directing him to hold a hearing in *Boismier*.

In *Wilder*, respondent's recasting of a previous order dismissing a case without prejudice to somehow justify his *sua sponte* dismissal of the case after it was reissued, despite the defendant's intention to plead guilty, degraded the integrity of the judicial process and the judiciary itself.

In *Moore*, respondent failed to recognize the limits of his adjudicative role when he subpoenaed the defendant's medical records without the parties' knowledge or consent at a point when the case could have gone to trial with him possibly as the trier of fact.

In *Hill*, respondent recklessly placed himself and others in his courtroom at risk of serious harm by personally bringing a defendant convicted of several

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respect and observe the law, Canon 2B; failure to conduct oneself in a manner that promotes public confidence in the integrity and impartiality of the judiciary, Canon 2B; failure to be faithful to the law, Canon 3A(1); and conduct that exposes the legal profession and the courts to obloquy, contempt, censure, or reproach, MCR 9.104(2).

[10] *In re Hague*, 412 Mich 532, 562; 315 NW2d 524 (1982).

violent crimes from lockup and sentencing him without restraints or courtroom security present.

Finally, in *Redding*, respondent showed poor judgment by coming down from the bench at the start of trial to shake hands with a criminal defendant and deliver papers to his counsel. At a minimum, respondent's unexplained delivery of documents and peculiar greeting of a litigant under these circumstances created the appearance of impropriety.

In sum, we agree with the JTC that respondent failed to adhere to the high standards of professional conduct that our Constitution, court rules, and canons of judicial conduct require of judicial officers.

Respondent claims his conduct should be immune from action by the JTC because he acted "in good faith and with due diligence[.]"[11] Respondent misapprehends the meaning of "good faith." Acting in disregard of the law and the established limits of the judicial role to pursue a perceived notion of the higher good, as respondent did in this case, is not "good faith."[12] We do not share respondent's concern that our decision today spells the end of judicial independence. Rather, it reinforces the principle that, although judicial officers should strive to do justice, they must do so *under the law* and within the confines of their adjudicative role.

C. PROPORTIONALITY OF RECOMMENDED SANCTION

The JTC recommends that this Court suspend respondent for 90 days without pay. The JTC arrived at this recommendation after finding that six of the seven

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[11] MCR 9.203(B).

[12] See *Hague*, 412 Mich at 552-554 (concluding that the respondent's willful disregard of gun-control and prostitution laws was properly subject to sanctions by the JTC).

Brown factors militated in favor of a more serious sanction.[13] According to the JTC, the evidence revealed "a pattern of willfully disregarding the law and proper legal procedures in the handling of cases." Not only did the conduct occur on the bench, but "[m]uch of Respondent's misconduct was prejudicial to the actual administration of justice." When his conduct did not implicate the actual administration of justice, respondent at least created the appearance of impropriety. The JTC further determined that respondent's conduct was deliberate, rather than spontaneous, and that "[a] judge [who] fails to follow the law necessarily undermines the ability of the justice system to reach just results." However, the

[13] The seven factors, as set forth in *Brown*, are:

> (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
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> (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. [*Brown*, 461 Mich at 1292-1293.]

JTC concluded that none of respondent's conduct involved the unequal application of justice.

This Court gives considerable deference to the JTC's recommendations for sanctions, but our deference is not "a matter of blind faith[.]"[14] Instead, it "is a function of the JTC adequately articulating the bases for its findings and demonstrating that there is a reasonable relationship between such findings and the recommended discipline."[15] Several considerations in this case persuade us to deviate downward from the JTC's recommended sanction.

This Court's overriding duty in the area of judicial discipline proceedings is to treat "equivalent cases in an equivalent manner and . . . unequivalent cases in a proportionate manner."[16] This duty necessarily requires this Court to make qualitative assessments of the nature of the misconduct at issue. In an attempt to fulfill our duty to treat JTC respondents equitably while maintaining predictability and consistency in our judicial discipline decisions, this Court articulated a set of disciplinary factors in *In re Brown*.[17] But the *Brown* factors are intentionally nonexhaustive.[18] Thus, other relevant considerations not expressly accounted for by the *Brown* factors may properly inform the disciplinary analysis.[19] One principle that has guided this Court's disciplinary analysis, but which is not expressly ac-

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[14] *Id*. at 1292.

[15] *Id*.

[16] *Id*.

[17] *Id*. at 1292-1293.

[18] See *id*. at 1293 ("The JTC should consider these *and other appropriate standards* that it may develop in its expertise, when it offers its recommendations.") (emphasis added).

[19] Despite our exhortation in *Brown*, the JTC has not formally adopted additional standards for determining the appropriate sanction for par-

counted for by the *Brown* factors, is the principle that dishonest or selfish conduct warrants greater discipline than conduct lacking such characteristics. Generally speaking, we have imposed greater discipline for conduct involving exploitation of judicial office for personal gain.[20] This principle has also been long recognized in the related area of attorney discipline proceedings.[21]

As established above, respondent's actions in the eight cases constitutes judicial misconduct subject to discipline by this Court, regardless of whether, as the master put it, "his heart [was] in the right place." However, the fact that he did not seek to personally benefit from his misconduct is a relevant mitigating factor in determining the appropriate discipline.[22] In

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ticular misconduct. We take this opportunity to again encourage the JTC to develop such standards so they may be applied in future judicial discipline proceedings.

[20] See, e.g., *In re McCree*, 495 Mich 51; 845 NW2d 458 (2014) (the respondent judge used his position to violate court security policies and engage in numerous ex parte communications with the complaining witness in a case before him in order to pursue a sexual relationship with her); *In re James*, 492 Mich 553; 821 NW2d 144 (2012) (the respondent judge misappropriated funds for her personal benefit); *In re Justin*, 490 Mich 394; 809 NW2d 126 (2012) (the respondent judge "fixed" traffic tickets for himself, his wife, and his staff).

[21] American Bar Association Standards for Imposing Lawyer Sanctions (ABA Standards), Standard 9.22(b), available at [http://perma.cc/P9WG-U39T], accessed June 16, 2014 (listing "dishonest or selfish motive" as an aggravating factor in deciding the appropriate sanction to impose).

[22] See, e.g., ABA Standard 9.32(b) (listing "absence of a dishonest or selfish motive" as a mitigating factor in deciding the appropriate sanction to impose). The record in this case reveals some confusion regarding this principle, so we take this opportunity to clarify the appropriate role of a respondent's motive in judicial disciplinary proceedings. The master concluded that respondent's actions in eight of the ten allegations were not misconduct because " 'his heart [was] in the right place' " In rejecting the master's approach, the JTC stated that judicial misconduct must be reviewed under an objective, rather

this respect, this case contrasts with two cases involving 90-day suspensions in which the respondents' misconduct included, among other things, use of their judicial office for personal gain.[23] In a disciplinary scheme that seeks to treat equivalent conduct equivalently and dissimilar conduct proportionately, the fact that we have imposed 90-day suspensions in cases involving conduct that typically warrants greater discipline is a relevant consideration in determining the appropriate sanction in this case.[24]

A second consideration persuading us to deviate from the recommended 90-day suspension is our assessment

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than subjective, standard. We agree with the JTC that the standard for determining whether something constitutes judicial misconduct in the first place is an objective one. See *In re Ferrara*, 458 Mich 350, 362; 582 NW2d 817 (1998). However, when determining the appropriate sanction for particular misconduct, the JTC (and this Court) may properly consider a respondent's subjective intent along with other mitigating and aggravating factors. See, e.g., *In re Tschirhart*, 422 Mich 1207, 1209-1210 (1985) (recognizing that the respondent's subjective intent "properly receive[s] consideration"); see also *Brown*, 461 Mich at 1293 (stating that "misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion" warrants a more severe sanction). It does not appear that the JTC took respondent's motive into account when fashioning its recommended sanction.

[23] See *In re Thompson*, 470 Mich 1347 (2004); *In re Trudel*, 465 Mich 1314 (2002).

[24] For this same reason, we decline to equate this case to previous cases in which this Court imposed a 90-day suspension for the commission of a crime. See *In re Nebel*, 485 Mich 1049 (2010) (operating a motor vehicle while visibly impaired in violation of MCL 257.625(3)); *In re Steenland*, 482 Mich 1230 (2008) (same); *In re Halloran*, 466 Mich 1219 (2002) (exposing genitals to undercover police officer, the facts of which constitute a violation of the indecent exposure statute, MCL 750.335a). Needless to say, violation of the criminal law necessarily undermines a judge's ability to sit in judgment of others, which explains why this Court has consistently imposed at least a 90-day suspension for the perpetration of even a single crime. The same cannot necessarily be said of the types of misconduct present in this case.

of the JTC's analysis of the first *Brown* factor.[25] Under the first *Brown* factor, the JTC determined that respondent engaged in "a pattern of willfully disregarding the law and proper legal procedures in the handling of cases." Although we agree that some of the counts show a pattern of willful disregard of controlling legal authority, we believe the JTC overstated the pattern in this case.

Our review of the record reveals a pattern in *Orlewicz*, *Fletcher*, *McGee*, and *Boismier*—disregard of controlling authority, be it mandatory statutes or a superior court order. In each of these cases, respondent's decisions were controlled by unambiguous mandatory language, and in each case respondent defied the controlling authority. The rest of the cases, however, do not fit this pattern. Insofar as the remaining counts showed a "disregard[for] . . . proper legal procedures," this "pattern" is so general that it could conceivably describe every instance of judicial misconduct on the bench, in which case the first *Brown* factor would be rendered meaningless. In cases like this, when the examiner alleges a collection of isolated incidents of misconduct, a more nuanced analysis is necessary to ensure that we treat "equivalent cases in an equivalent manner and . . . unequivalent cases in a proportionate manner."[26]

The remaining counts of misconduct—*Wilder*, *Redding*, *Moore*, and *Hill*—share nothing in common except for the fact that they constitute judicial misconduct. Although the number of instances of misconduct is an important consideration in determining

[25] The first *Brown* factors provides that "misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct[.]" *Brown*, 461 Mich at 1292.

[26] *Id*.

the appropriate sanction in judicial discipline cases, the first *Brown* factor focuses specifically on whether the respondent continued to engage in the same type of judicial misconduct, thereby signifying judicial conduct more harmful to the integrity of the judicial system. In none of the remaining counts did respondent repeat the same type of misconduct. The remaining counts are too unrelated—occurring in separate cases and involving different types of misconduct—to constitute a meaningful pattern for purposes of the first *Brown* factor. In sum, the JTC overstated the extent to which the first *Brown* factor weighed in favor of a harsher sanction.

In determining the appropriate sanction in this case, we recognize that respondent's case is unlike any other case we have dealt with in recent years, which naturally makes it harder to identify an appropriate baseline on which to apply the *Brown* factors.[27] Many of respondent's acts of misconduct, taken alone, would probably warrant no more than a public censure. The other more serious instances of misconduct, taken alone, would likely merit a short suspension. However, when the allegations are aggregated

[27] The Chief Justice is correct that our judicial discipline jurisprudence lacks a formal framework for determining the appropriate level of discipline in a particular case, and this Court has begun taking steps to address this deficiency through our administrative process. But simply labeling the misconduct as "lawlessness" provides no substantive tools to assist the JTC and this Court in the yeoman's work of qualitatively assessing the facts of future JTC cases in light of this and other JTC decisions. Because the JTC provided no meaningful explanation for why a 90-day suspension is proportionate to respondent's misconduct, it is incumbent upon this Court to independently assess the misconduct in the context of our prior decisions and legal principles to determine a sanction proportionate to respondent's misconduct. By doing so, we have answered the Chief Justice's call "to work to establish consistent and transparent standards for establishing levels of sanctions."

and the body of misconduct is considered as a whole, a greater sanction is necessary to protect the integrity of the judiciary as an institution.[28] Mindful that the *Brown* factors weigh in favor of a more serious sanction—though not as heavily as the JTC's analysis implies—we conclude that a 60-day suspension is proper. In concluding that a deviation is warranted in this case, we acknowledge that at a prior stage in these proceedings, this Court stated that a 90-day suspension was appropriate on the facts presented at the time. However, after careful study of the record subsequently developed in this case, and in light of our previous judicial discipline decisions, we conclude that when a judge commits a series of legal errors for which there can be no colorable good-faith excuse, a 60-day suspension is a sufficiently severe sanction to protect the integrity of the judiciary while also maintaining fidelity to the overarching principle that equivalent conduct be treated equivalently.[29]

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[28] See *In re Moore*, 464 Mich 98, 118; 626 NW2d 374 (2001).

[29] We thus take no issue with the Chief Justice's conclusion that respondent's misconduct requires a significant sanction. Unlike the dissent, however, we believe a suspension of any length is a serious matter. We further believe that a 60-day sanction will make it clear to respondent, the bench, and the public that misconduct of this type will not be tolerated. We caution, however, that our decision today should not be read as setting the upper limit for this type of misconduct should future cases present additional aggravating circumstances or lack the mitigating circumstance presented here. In the absence of predetermined sanction guidelines, this Court must qualitatively assess respondent's misconduct in the context of prior JTC cases to determine where the misconduct falls on the spectrum. Although the dissent would equate respondent's misconduct to criminal behavior like indecent exposure, this Court is persuaded that violation of the criminal law and using one's judicial office for personal gain are qualitatively more serious than the set of disparate incidents of misconduct in this case, many of which, taken alone, would probably warrant no more than a public censure.

III. CONCLUSION

Respondent's judicial misconduct requires that he be suspended in order to restore the public's faith and confidence in the judiciary. However, for the reasons stated above, we find that the recommended 90-day suspension is disproportionate to the judicial misconduct established on this record. We therefore modify the JTC's recommendation and order that Honorable Bruce U. Morrow, Judge of the 3rd Circuit Court, be suspended without pay from the performance of his judicial duties for a period of 60 days, effective 21 days from the issuance of this opinion. Pursuant to MCR 7.317(C)(3), the Clerk is directed to issue the judgment order forthwith.

MARKMAN, KELLY, ZAHRA, MCCORMACK, and VIVIANO, JJ., concurred.

YOUNG, C.J. (*concurring in part and dissenting in part*). It is apparent that the majority believes the 90-day suspension recommended by the Judicial Tenure Commission (JTC) is too harsh. The question I believe the majority opinion does not answer well is why the majority's 60-day suspension is *more* consistent with the nature of the judicial misconduct found in this case than the recommended sanction. More important, the majority opinion does not provide a sanctioning rationale that will aid the JTC and this Court to understand how this case can or should be applied in the next case.[1] Because I believe that the 90-day suspension recom-

[1] I believe the majority has made a serious effort to select an appropriate sanction in this case. My concern is not with the seriousness or the sincerity of that effort but with the absence of a universalizable rationale that permits one to apply the rationale of this case to the next. This, unfortunately, has become an increasingly obvious failing of our JTC

mended by the JTC most appropriately addresses the extent of Judge Morrow's documented misconduct, I respectfully dissent.

The majority opinion correctly credits and accepts the factual findings of the JTC, and also correctly holds that respondent committed judicial misconduct in eight cases, consistent with the JTC's conclusions of law.[2] However, the majority unjustifiably, in my view, departs from the JTC's recommendation for a 90-day suspension, no doubt in part because both this Court and the JTC have not been as diligent as we should have been in setting forth a coherent theory of discipline. In the absence of such a theory, all involved—this Court, the JTC, and our judiciary—are left with no more guidance in any given case than some unarticulated sense of "rough justice" by which to set a sanction.

In *In re Brown*,[3] this Court expressed concern that, in the absence of principles to evaluate the severity of judicial misconduct, our judicial disciplinary system was not adequately faithful to the rule of law.[4] To remedy this problem, we announced a series of standards to aid the JTC and this Court when evaluating judicial misconduct.[5] These principles have subsequently guided this Court's evaluation of judicial misconduct.

While *Brown* provides a rubric for evaluating the misconduct itself, it does not provide the same guidance

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sanctioning jurisprudence—a shortcoming the majority opinion does little to address other than to acknowledge that we must do better—in a future case.

[2] I join the majority in accepting the JTC's findings of fact and conclusions of law.

[3] *In re Brown*, 461 Mich 1291 (2000).

[4] *Id*. at 1292.

[5] See *id*. at 1292-1293.

for the *amount of discipline* warranted in individual cases. Since *Brown*, we simply have not done an adequate job of making transparent a coherent theory of how much sanction to apply in cases where judicial misconduct has been determined. Similarly, despite our clear direction that it do so, the JTC has not developed standards to supplement the *Brown* factors.[6] Other than the line we have drawn in cases where a judge has lied under oath,[7] principled consistency in our disciplinary decisions is hard to find. The consequences of these failures are apparent in the majority opinion in this case, which picks an alternate amount of sanctioning time than that recommended by the JTC but cannot explain why it has determined that 60 days *is* appropriate, while 90 days is not.

The JTC, as an expert agency, is accorded deference with respect to both "its findings of fact and its recommendations of sanction."[8] In this case, as is justified by the record, the Court rightfully deferred to the JTC's findings of fact. However, I believe the Court has not

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[6] See *id*. at 1292 ("[I]t is the burden of the JTC to persuade this Court that it is responding to equivalent cases in an equivalent manner . . . . This burden can best be satisfied by the promulgation of standards by the JTC."); *id*. at 1293 ("The JTC should consider [the *Brown* factors] and other appropriate standards that it may develop in its expertise, when it offers its recommendations.").

I am pleased that the majority has reaffirmed that the JTC must establish such additional standards. It is my hope that now the JTC will finally act.

[7] See *In re Adams*, 494 Mich 162; 833 NW2d 897 (2013); *In re James*, 492 Mich 553; 821 NW2d 144 (2012); *In re Justin*, 490 Mich 394, 424; 809 NW2d 126 (2012) ("When a judge lies under oath, he or she has failed to internalize one of the central standards of justice and becomes unfit to sit in judgment of others.") (citation, quotation marks, and emphasis omitted); *In re Nettles-Nickerson*, 481 Mich 321; 750 NW2d 560 (2008); *In re Noecker*, 472 Mich 1; 691 NW2d 440 (2005).

[8] *Brown*, 461 Mich at 1292.

adequately justified its downward "deviation" from the JTC's recommended sanction of a 90-day suspension. The opinion picks two out of the five post-*Brown* decisions involving 90-day suspensions to establish a paradigm from which this case supposedly departs. The majority opinion claims that a chosen distinguishing characteristic that exists in those two cases, but not this one, is that the misconduct was for personal gain.[9] Since the misconduct in this case was not for personal gain, the majority opinion finds it appropriate to deviate downward to account for the lack of this aggravating factor.

The first problem with this approach is that the two cases from which the opinion extracts this claimed aggravating factor bear no factual resemblance whatsoever to this case; extracting from the ether general principles from disparate cases does not lend credence to our guiding principle that, under the rule of law, "equivalent misconduct should be treated equivalently."[10] It may be that, when a judge acts for personal gain in his judicial capacity, a 90-day suspension is warranted. Such a principle does nothing to explain why other kinds of misconduct do not also warrant a 90-day suspension, as this Court has obviously previously concluded.[11] And this is the missing link in the majority's explanation of why it has chosen a 60-day suspension in preference to the recommended 90-day suspension.

Another difficulty with the opinion is that it simply fails to explain the significance of the three other post-*Brown* cases in which this Court has issued a

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[9] See *In re Thompson*, 470 Mich 1347, 1348-1349 (2004); *In re Trudel*, 465 Mich 1314, 1317 (2002).

[10] *Brown*, 461 Mich at 1292.

[11] See notes 12 and 13 of this opinion.

90-day suspension, two of which involved operating a motor vehicle while impaired,[12] and a third that involved a judge exposing himself to an undercover police officer while in a public restroom.[13] While in each of these five cases the Court meted out a 90-day suspension, that is the only thing they share in common. Contrary to the majority's selective reliance on them, I submit there is no archetypal "90-day suspension" principle that can be extracted from any of these five prior disparate instances. Our prior 90-day suspensions simply have resulted from a wide array of judicial misconduct. The sanctions imposed in these cases are not linked by any unifying theory of sanctioning. Thus, looking at the sanctions imposed constitutes no more than examining a scatterplot. The majority errs in selectively picking among these disparate cases and providing a post hoc rationale to develop a unifying theme to justify its rejection of the JTC recommendation. In imposing a 60-day sanction, the majority says little more than: "This case is not like the others." This is surely an accurate observation but not one that explains why that difference dictates a particular sanction. In short, I cannot see even a loose pattern linking together *any* of our previous 90-day suspension cases from which it can be said with candor that the judicial misconduct in *this case* warrants a lesser sanction or a "departure" from our other 90-day cases.

Moreover, the majority does not justify why it picked a 30-day downward deviation, as opposed to some other departure from the recommended sanction. In doing so, the majority fails to explain why a 60-day suspension is a *justified* sanction for the misconduct it has found

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[12] See *In re Nebel*, 485 Mich 1049 (2010); *In re Steenland*, 482 Mich 1230 (2008).

[13] See *In re Halloran*, 466 Mich 1219 (2002).

Judge Morrow to have committed. Thus, this case will provide as much Delphic guidance on sanctioning standards in future cases as have our previous cases. To be candid, the majority has provided nothing of value that this Court and the JTC can look to in the future as sanction guidance. That is a significant failure in its opinion, but the majority has the candor to acknowledge that it is offering no more than a "one-off" decision here.

TOWARD A THEORY OF SANCTIONING APPLICABLE IN LATER CASES

The *Brown* factors generally indicate that *judicial* misconduct—that performed in one's official capacity as a judge rather than misconduct performed by one who happens to be a judge—is worthy of more significant sanction.[14] Further, judicial acts that affect the administration of justice are deemed far more invidious.[15] Finally, when such misconduct is part of a pattern, *Brown* counsels that greater sanctions are warranted.[16] All of these factors are implicated in Judge Morrow's misconduct here and weigh heavily in my calculation about the proper sanction that should be applied to him.

The Master benignly characterized Judge Morrow's repeated refusal to follow the law, concluding that Morrow refused to follow what he knew to be the law but that his "heart was in the right place." There is a simple name for this kind of conduct: lawlessness. When citizens break the law—even for good-hearted reasons—we still call them criminals. When judges do so—and do so repeatedly—they fundamentally under-

[14] See *Brown*, 461 Mich at 1292-1293.

[15] *Id*. at 1293.

[16] *Id*. at 1292.

mine confidence in our judicial system and, most significantly, give lie to the oath of office they swore to uphold. What can be worse to say of a judge than: "He refuses to follow the law"?[17]

I believe that the majority opinion fails to give sufficient weight to the fact that Judge Morrow has emphatically demonstrated on *eight separate occasions* that he believed himself to be above the law and was unwilling to be constrained by the law when he disagreed with it. We do not permit our citizens to be lawless and we cannot tolerate a judge, who has taken an oath to *uphold* the law, to disrespect the law as he applies it to those who come before him. Few things are less acceptable than a judicial system that tolerates legal rogues who wear black robes—even good-hearted ones. Such a thing is incompatible with any notion of the rule of law.

Accordingly, unlike the majority, I am prepared to lay down a marker to guide future judicial sanctions in like cases:

> **When the record reflects that a judge has demonstrated a pattern of lawlessness in the discharge of his judicial duties (not mere mistakes in the application of the law), the sanction should presumptively be *no less than* a 90-day suspension without pay.**

This period—three months—is, in my mind, sufficiently long to forcefully bring to the attention of a judge, who

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[17] The majority opinion shies from making such a frank assessment of Judge Morrow's conduct. Why is not entirely clear to me. But where, as here, in the discharge of his official judicial duties, Judge Morrow repeatedly refused to apply what he *knew* to be the law, I think no euphemism is appropriate. That is the *definition* of lawlessness, and we should not sugarcoat this simple fact when it is a judge engaged in disobeying the law rather than when a "mere" citizen does so.

has failed to appreciate the significance of his oath of office, why he holds the privilege of this high office *and* the import of his oath.[18] Three months without pay is unquestionably a *serious* sanction that cannot be ignored or rationalized by a misbehaving judge. A sanction of three months without pay also sends a *far stronger* signal to the misbehaving judge and to the public that their Supreme Court understands that judges of Michigan are not held to a lesser standard than the very citizens who appear before such judges. Consequently, I would reserve a lesser sanction for cases that do not involve a repetitive pattern of judicial misconduct in the courtroom.

For these reasons, on this record, I believe that the JTC's 90-day sanction recommendation was entirely justified. I do not believe that the majority opinion has articulated a justification why eight separate acts of judicial lawlessness affecting the administration of justice warrant only a 60-day suspension. Obviously, to the majority, a "mere" eight acts of judicial lawlessness is not sufficient to justify a three-month suspension. One wonders how many acts of in-courtroom misconduct the majority would tolerate before considering a more exacting sanction. In the next case, we will be sure to hear the defense in support of an even lesser sanction than the majority metes out here: "But my client only willfully refused to apply the law five times!" What will be our response then?

While the cases of misconduct are obviously dissimilar, our varied sanctioning responses reveal that even our use of the *Brown* factors has not led to principled and consistent results or results that can be made to appear congruent case to case. To further illustrate the

[18] Note, by contrast, judges are permitted vacation time approaching that of the sanction the majority opinion imposes.

majority's problem with congruence, compare this case to *In re Halloran*, in which a judge exposed himself to an undercover police officer in a public restroom.

Judge Halloran received a 90-day suspension.[19] In this case, Judge Morrow committed misconduct *on the bench* no less than eight times, each time adversely affecting litigants in his court. For this misconduct, Judge Morrow receives a 60-day suspension. As stated, *Brown* instructs us that misconduct that is part of a pattern is more serious than isolated incidents, that misconduct on the bench is more serious than similar misconduct off the bench, and that conduct implicating the actual administration of justice or an appearance of impropriety is more serious than that which does not.[20]

Judge Halloran broke the law. His conduct, as reprehensible as it might be, did not involve his *judicial* duties.[21] Judge Morrow's conduct, however, affected *eight* sets of litigants in the cases over which he presided. No crime committed by a judge is acceptable, but when the judge's misconduct occurs *in the courtroom* and adversely affects litigants, *that* conduct undermines the very foundation of the judiciary. It is for that reason that I believe that Judge Morrow ought to be sanctioned at least equivalently to judges who break the law. I submit that I have provided a rationale, consistent with *Brown*, that will provide a clear rule for future cases in which there is a pattern of misconduct

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[19] *Halloran*, 466 Mich at 1219.

[20] 461 Mich at 1292-1293.

[21] The other two post-*Brown* 90-day cases in which the judges broke the law outside the courtroom, *In re Nebel*, 485 Mich 1049 (2010), and *In re Steenland*, 482 Mich 1230 (2008), involved drunken driving. It's hard to understand why a 90-day sanction for these out of court crimes is more worthy of a larger sanction than Judge Morrow's *repeated* misconduct *in the courtroom*. I offer a theory to rationalize our misconduct cases so that they can be used in the future. The majority does not.

affecting the administration of justice. The majority ought to provide a similar rationale for its preferred sanction.

Finally, the majority's result is particularly odd because the JTC actually recommended what this Court *unanimously* determined in a prior order: that a 90-day suspension would be an *appropriate* sanction. The JTC initially recommended public censure on the basis of four instances of misconduct.[22] In a confidential order entered on February 8, 2013, this Court concluded that the proposed public censure was insufficient for those four counts and determined that a 90-day suspension *was* appropriate.[23] Thereafter, the JTC discovered *four more* instances of misconduct and issued a new recommendation of a 90-day suspension, which is exactly what this Court stated was appropriate and which the majority has now rejected.[24]

If I were a member of the JTC, I certainly would be at a loss as to how to recommend an appropriate level of discipline after this Court simply changed its mind without explaining its reasons for doing so. Not only did the JTC's new findings *double* the number of cases of misconduct, I would submit that the newly discovered misconduct is, on balance, *more* troubling than the initial four cases that were subject to the censure

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[22] The four cases involving misconduct at this stage were *People v Orlewicz*, *People v Fletcher*, *People v Moore*, and *People v Hill*.

[23] We stated: "Given the facts stated in the stipulation, the proposed discipline is insufficient. The Court has determined that a suspension, without pay, for a period of 90 days, is an appropriate order of discipline."

[24] Again, I respectfully ask, why? What exactly is the majority's justification for delinking judicial "law violations" in determining that those unrelated to judicial duties are more worthy of sanction than those committed in the courtroom? I think the unspoken answer is that the majority does not believe that a judge's repeated willful refusal to obey and apply the law is really "breaking the law". Such conduct may not be criminal but it is inimical to the rule of law.

agreement we rejected in our confidential order.[25] The JTC should be mystified that this Court gave conflicting signs *in the same case*. I am.

I fully recognize the numerous and various forms judicial misconduct can take, and that comparing them is a difficult task. But this is no reason to avoid striving to standardize our system of judicial discipline. Recognizing that the universe of possible misconduct is broad calls this Court to work to establish consistent and transparent standards for establishing levels of sanctions. Without such guidance, this Court has failed to provide light and the JTC must act in the dark. No one wants to be sanctioned by criteria not announced in advance; the rule of law requires more.

Because the majority opinion provides unsatisfactory reasons to depart from the JTC's recommendation—and this Court's prior conclusion that a 90-day suspension was appropriate for only half the misconduct now before us—I respectfully dissent from this portion of the opinion. However, I join the majority's demand that the JTC actually undertake the task to create standards by which to assess judicial discipline in a manner consistent with the rule of law. I only wish this Court were more willing to give the JTC an assist today.

CAVANAGH, J. (*dissenting*). Today, we must decide the proper sanction for respondent's judicial misconduct. However, this is not the first time we have considered

[25] The subsequently-uncovered misconduct included a second instance of ignoring plain statutory language and allowing a person convicted of first-degree criminal sexual conduct to remain out on bail pending sentence, see *People v McGee*; failing to hold a hearing with the parties present contrary to a Court of Appeals order, see *People v Boismier*; *sua sponte* dismissing a case despite a defendant's intention to plead guilty, see *People v Wilder*; and handing then-unidentified documents to a defendant whose trial he was about to preside over, *People v Redding*.

this issue. In 2012, the Judicial Tenure Commission (JTC) and respondent entered a settlement agreement, and the JTC recommended that public censure was an appropriate sanction for respondent's misconduct. Despite the fact that this Court typically affords "considerable deference" to the JTC's recommendation, *In re Brown*, 461 Mich 1291, 1293 (2000), a majority of this Court rejected the JTC's recommendation of public censure and remanded to the JTC, *In re Morrow*, 493 Mich 878 (2012).

In contrast, after reviewing the JTC's first recommendation, the settlement agreement, the standards set forth in *In re Brown*, 461 Mich at 1292-1293, and the JTC's findings and conclusions, I concluded that public censure was appropriate. Accordingly, consistent with the deference we generally afford to the JTC's recommendations, I would have previously entered an order of public censure. *In re Morrow*, 493 Mich at 878 (CAVANAGH, J., dissenting). I continue to disagree with this Court's prior decision to reject the JTC's first recommendation and, consistent with my past position, I dissent from the majority's decision to suspend respondent. Instead, I would publicly censure respondent.

In re BAIL BOND FORFEITURE

Docket No. 146033. Argued October 8, 2013 (Calendar No. 1). Decided June 25, 2014.

Corey Deshawn Gaston was released from jail on a $50,000 bond posted by You Walk Bail Bond Agency, Inc. He thereafter failed to appear at a February 7, 2008 pretrial conference and at his February 11, 2008 trial in the Wayne Circuit Court. The court, Deborah A. Thomas, J., ordered Gaston to be rearrested and remanded to jail and that his bond be forfeited. However, the court did not give the surety notice of Gaston's failure to appear until three years later. The surety moved to set aside the forfeiture on the ground that the court had failed to timely provide the surety notice of Gaston's failure to appear as required by MCL 765.28(1). The court, Michael M. Hathaway, J., denied the motion in reliance on *In re Bail Bond Forfeiture (People v Moore)*, 276 Mich App 482 (2007), which held that a court's failure to comply with the seven-day notice provision of MCL 765.28(1) does not bar forfeiture of a bail bond posted by a surety, and entered a judgment against Gaston for $150,000 and against the surety for $50,000. The surety appealed. The Court of Appeals, FORT HOOD, P.J., and METER and MURRAY, JJ., affirmed in an unpublished opinion per curiam on the basis of *Moore*. The Supreme Court granted the surety's application for leave to appeal. 493 Mich 936 (2013).

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

A court's failure to comply with the seven-day notice provision of MCL 765.28(1) bars forfeiture of a bail bond posted by a surety. When a statute provides that a public officer shall undertake some action within a specified period of time, and that period is provided to safeguard another's rights or the public interest, it is mandatory that the action be undertaken within that period, and noncompliant public officers are prohibited from proceeding as if they had complied with the statute. The Court of Appeals judgment was reversed, the trial court's orders were vacated to the extent that they forfeited the bail bond posted by the surety, and *Moore* was overruled.

1. MCL 765.28(1) provides that after a default is entered for an accused who was released on bail, the court "shall" give each surety immediate notice not to exceed seven days after the date of the failure to appear. *Moore*'s holding that failure to provide the required notice does not bar forfeiture of the bail bond was based on the general rule set forth in Sutherland's treatise on statutory construction that if a provision of a statute states a time for performance of an official duty, without any language denying performance after a specified time, it is directory, not mandatory. However, *Moore* failed to recognize the consequence of the fact that when the Legislature amended MCL 765.28(1) in 2002, it changed "may" to "shall," as a result of which the statute became mandatory. In addition, *Moore* failed to recognize the rule set forth in *Agent of State Prison v Lathrop*, 1 Mich 438, 444 (1850), that whenever the act to be done under a statute is to be done by a public officer, and concerns the public interest or the rights of third persons, which require the performance of the act, then it becomes the duty of the officer to do it. *Moore* also failed to recognize the exception to Sutherland's general rule, which states that when the time period is provided to safeguard someone's rights, it must be construed as mandatory. The *Lathrop* rule and Sutherland's exception applied to MCL 765.28(1) because the seven-day period provides three such safeguards: the surety's right to an effective opportunity to secure the defendant before having its bond forfeited, the interests of the public in being protected from individuals who have been charged with crimes, and the public's interest in justice under law by ensuring that absconders who have been charged with crimes timely face those charges in court. Accordingly, *Moore* was overruled.

2. The remedy for a public entity's failure to follow a mandatory time period is that the public entity cannot perform its official duty after the time requirement has passed. A public entity's power only arises from the performance of the acts required to be done by law. Therefore, when a public entity does not perform its statutory obligations in a timely manner and fails to respect the statutory preconditions to its exercise of authority, it lacks the authority to proceed as if it had. Accordingly, in this case, the court could not require the surety to pay the surety bond because the court had failed to provide the surety notice within seven days of defendant's failure to appear, as MCL 765.28(1) required. Any other interpretation of the statute would have rendered the seven-day-notice requirement nugatory.

Court of Appeals' judgment reversed; trial court orders vacated to the extent they forfeited the bail bond and ordered the surety to pay $50,000.

Chief Justice YOUNG, concurring, fully joined the majority opinion but wrote separately to emphasize that the exception to the general rule that courts must refrain from creating remedies for violations of statutory mandates when the Legislature has not seen fit to do so is a narrow one that restrains the performance of official action. This exception is not a basis for courts to fashion additional extrastatutory remedies that permit official action.

Justice VIVIANO, joined by Justices CAVANAGH and MARKMAN, concurring, agreed that, absent compliance with the notice provision in MCL 765.28(1), a trial court may not order a surety to forfeit its bond; however, he would also have held that because the notice provision is mandatory, a court's noncompliance with it mandates discharge of the bond.

1. BAIL — SURETY BONDS — FORFEITURE — NOTICE.

A court's failure to notify a bail bond surety within seven days that a defendant has defaulted by failing to appear, as required by MCL 765.28(1), bars forfeiture of the bail bond.

2. STATUTES — PUBLIC OFFICERS — MANDATORY ACTIONS — TIME LIMITS.

When a statute provides that a public officer shall undertake some action within a specified period of time, and that period is provided to safeguard another's rights or the public interest, the action must be undertaken within that period, and noncompliant public officers are prohibited from proceeding as if they had complied with the statute.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Jason W. Williams*, Assistant Prosecuting Attorney, for the people.

James J. Makowski for You Walk Bail Bond Agency, Inc.

Amicus Curiae:

Miller, Canfield, Paddock and Stone, PLLC (by *Clifford W. Taylor* and *Larry J. Saylor*), for the American Bail Coalition.

MARKMAN, J. This Court granted leave to appeal to address whether the trial court's failure to provide the appellant-surety notice within seven days of defendant's failure to appear, as is required by MCL 765.28, bars forfeiture of the bail bond posted by the surety. Relying on *In re Forfeiture of Bail Bond (People v Moore)*, 276 Mich App 482; 740 NW2d 734 (2007), the Court of Appeals held that a court's failure to comply with the seven-day notice provision of MCL 765.28(1) does not bar forfeiture of a bail bond posted by a surety. Because we conclude that *Moore* was wrongly decided, we hold that a court's failure to comply with the seven-day notice provision of MCL 765.28(1) does bar forfeiture of a bail bond posted by a surety. When a statute provides that a public officer "shall" undertake some action within a specified period of time, and that period of time is provided to safeguard another's rights or the public interest, as with the statute at issue here, it is mandatory that such action be undertaken within the specified period of time, and noncompliant public officers are prohibited from proceeding as if they had complied with the statute. Accordingly, we reverse the judgment of the Court of Appeals and vacate the trial court's orders to the extent that the orders forfeited the bail bond posted by the surety and ordered the surety to pay $50,000.

I. FACTS AND HISTORY

Defendant Corey Deshawn Gaston was charged with one count of first-degree home invasion, MCL 750.110a(2); two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) and (2)(b); one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); and one count of kidnapping,

MCL 750.350. Appellant-surety posted a $50,000 bond to obtain defendant's release from jail. On February 7, 2008, defendant failed to appear at a scheduled conference, and on February 11, 2008, defendant failed to appear for trial. The trial court ordered that defendant be rearrested and remanded to jail and that his bond be forfeited. Three years later, on February 8, 2011, the trial court sent notice to the surety to appear to show cause why judgment should not enter for forfeiture of the full amount of the bond. In response, the surety filed a motion to set aside the forfeiture based on the trial court's failure to timely provide notice of defendant's failure to appear, as is required by MCL 765.28(1). Relying on *Moore*, the trial court denied the motion and entered a judgment against defendant in the amount of $150,000 and against the surety in the amount of $50,000.

The surety appealed in the Court of Appeals, arguing that the trial court's failure to provide it notice of defendant's failure to appear within seven days, as is required by MCL 765.28(1), should have barred the forfeiture of the surety's bond. The Court of Appeals, also relying on *Moore*, affirmed the trial court and held that the trial court's failure to provide the surety notice of defendant's failure to appear within seven days did not foreclose the court from entering judgment on the forfeited bond. *In re Forfeiture of Bail Bond (People v Gaston)*, unpublished opinion per curiam of the Court of Appeals, issued September 13, 2012 (Docket No. 305004).

The surety then appealed in this Court, presenting the same argument that it had before the trial court and the Court of Appeals. This Court granted leave to appeal to address

> (1) whether a court's failure to comply with the 7-day notice provision of MCL 765.28 bars forfeiture of a bail bond posted by a surety and (2) whether *In re Forfeiture of Bail Bond (People v Moore)*, 276 Mich App 482 (2007), holding that the 7-day notice provision is directory rather than mandatory, was correctly decided. [*In re Forfeiture of Bail Bond (People v Gaston)*, 493 Mich 936 (2013).]

Defendant is still at large and is currently identified as one of the United States Marshals' fifteen most wanted fugitives.[1]

II. STANDARD OF REVIEW

Questions of statutory interpretation are questions of law that are reviewed de novo. *Martin v Beldean*, 469 Mich 541, 546; 677 NW2d 312 (2004). Questions relating to the proper interpretation of court rules are also questions of law that are reviewed de novo. *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013).

III. ANALYSIS

MCL 765.28(1) provides in pertinent part:

> If default is made in any recognizance in a court of record, the default shall be entered on the record by the clerk of the court. After the default is entered, *the court shall give each surety immediate notice not to exceed 7 days after the date of the failure to appear*. The notice shall be served upon each surety in person or left at the surety's last known business address. Each surety shall be given an opportunity to appear before the court on a day certain and show cause why judgment should not be entered against the surety for the full amount of the bail or surety bond. If good cause is not shown for the defendant's failure to

[1] See U.S. Marshals, *Fugitive Investigations - 15 Most Wanted*, <http://www.usmarshals.gov/investigations/most_wanted/index.html> (accessed June 10, 2014) [http://perma.cc/Z992-2ZMQ].

> appear, the court shall enter judgment against the surety on the recognizance for an amount determined appropriate by the court but not more than the full amount of the bail, or if a surety bond has been posted the full amount of the surety bond. If the amount of a forfeited surety bond is less than the full amount of the bail, the defendant shall continue to be liable to the court for the difference, unless otherwise ordered by the court. [Emphasis added.]

MCR 6.106(I)(2) provides in pertinent part:

> If the defendant has failed to comply with the conditions of release, the court may issue a warrant for the arrest of the defendant and enter an order revoking the release order and declaring the bail money deposited or the surety bond, if any, forfeited.
>
> (a) *The court must mail notice* of any revocation order *immediately* to the defendant at the defendant's last known address and, if forfeiture of bail or bond has been ordered, *to anyone who posted bail or bond*. [Emphasis added.]

In this case, there is no question that the trial court failed to provide the surety notice within seven days after the date of defendant's failure to appear, as is required by MCL 765.28(1), or provide the surety notice of the revocation order "immediately," as is required by MCR 6.106(I)(2). The question at issue is whether this failure to provide the required notice bars forfeiture of the bail bond posted by the surety. Both the trial court and the Court of Appeals relied on *Moore*, 276 Mich App at 495, in concluding that the failure to provide notice does not bar such a forfeiture.

In *Moore*, the trial court entered a judgment against the surety even though the trial court had not timely notified the surety, and the Court of Appeals denied leave to appeal. This Court remanded to the Court of Appeals for consideration as on leave granted. *In re Forfeiture of Bail Bond (People v Moore)*, 474 Mich 919

(2005). On remand, the Court of Appeals affirmed the trial court and held that " ' "[t]he general rule is that if a provision of a statute states a time for performance of an official duty, without any language denying performance after a specified time, it is directory." ' " *Moore*, 276 Mich App at 494-495, quoting *People v Smith*, 200 Mich App 237, 242; 504 NW2d 21 (1993), quoting 3 Sutherland, Statutory Construction (5th ed), § 57:19, pp 47-48. Relying on this "general rule," the Court of Appeals held that "the seven-day notice provision of MCL 765.28(1) is directory, not mandatory" and therefore concluded that "[d]espite the trial court's six-month delay in notifying [the surety] of [defendant's] failure to appear, . . . the statute did not prevent the trial court from entering judgment against [the surety] on the forfeited surety bond." *Moore*, 276 Mich App at 495.

The Court of Appeals' decision in *Moore* was not appealed in this Court, and therefore this is the first opportunity for this Court to consider whether *Moore* was correctly decided. For the reasons that follow, we conclude that it was not. To begin with, *Moore* gave only passing consideration to the "general rule" that " '[s]hall' is a mandatory term, not a permissive one." *People v Francisco*, 474 Mich 82, 87; 711 NW2d 44 (2006); see also *Fradco, Inc v Dep't of Treasury*, 495 Mich 104, 114; 845 NW2d 81 (2014) ("The Legislature's use of the word 'shall' . . . indicates a mandatory and imperative directive."); 3 Sutherland, Statutory Construction (7th ed), § 57:19, pp 75-76 ("Generally, when the word 'shall' is used in referring to a time provision, it should be construed to be mandatory.").

Along similar lines, *Moore* failed to recognize the consequence of the fact that the Legislature amended MCL 765.28(1) in 2002, changing "may" to "shall." See

Fay v Wood, 65 Mich 390, 397; 32 NW 614 (1887) (recognizing that the significance of a statutory amendment changing "should" to "shall" is that the statute becomes "mandatory"). Prior to 2002, MCL 765.28(1) provided that the court "*may* give the surety or sureties twenty days' notice." (Emphasis added.) In 2002, the Legislature amended MCL 765.28(1) to provide that the court "*shall* give each surety immediate notice not to exceed 7 days after the date of the failure to appear." 2002 PA 659 (emphasis added). While the term "may" is permissive, not mandatory, *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982), the term "shall," as discussed, is a "mandatory term, not a permissive one," *Francisco*, 474 Mich at 87. Therefore, in 2002, the Legislature changed the notice provision of MCL 765.28(1) from being permissive to being mandatory. Yet, despite this change, *Moore* continued to interpret the notice provision of MCL 765.28(1) as being permissive rather than mandatory. *Moore* construed the statute as if it still read "may," thereby rendering the 2002 amendment of the statute nugatory even though it is well established that " '[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.' " *People v Couzens*, 480 Mich 240, 249; 747 NW2d 849 (2008) (citation omitted).

Moore also failed to recognize that this Court has long held that " 'whenever the act to be done under a statute is to be done by a public officer, and concerns the public interest or the rights of third persons, which require the performance of the act, then it becomes the duty of the officer to do it.' "*Agent of State Prison v Lathrop*, 1 Mich 438, 444 (1850) (citation omitted). In *Lathrop*, this Court concluded that because the applicable statutory notice provision—which provided that it "*shall* be the duty of the agent to give at least twenty

days' notice," *id*. at 439 (emphasis added)—"was intended for the benefit of the state as well as those who may contract with it," "compliance with the duties set forth [were] necessary to carry into effect the object of the law . . . ." *Id*. at 444. In other words, because the statutory notice provision was designed to protect the public interest, as well as the rights of third persons, it must be construed as a mandatory provision. Cf. *Fay*, 65 Mich at 401 ("Statutes fixing a time for the doing of an act are considered as only directory, where the time is not fixed for the purpose of giving a party a hearing, or for some other purpose important to him."); *Hooker v Bond*, 118 Mich 255, 257; 76 NW 404 (1898), quoting Cooley, Taxation (2d ed), p 289 (" 'The fixing of an exact time for the doing of an act is only directory, where it is not fixed for the purpose of giving the party a hearing, or for any other purpose important to him.' "). Because " '[t]his Court [must] presume that the Legislature of this state is familiar with the principles of statutory construction,' " *Nation v W D E Electric Co*, 454 Mich 489, 494-495; 563 NW2d 233 (1997) (citation omitted), we must presume that when the Legislature amended MCL 765.28(1) in 2002, changing "may" to "shall," it intended "shall" to mean what this Court has held that "shall" means since at least 1850.

The *Lathrop* rule is very similar to the rule set forth in 3 Sutherland, § 57:19, pp 72-74:

> It is difficult to conceive of anything more absolute than a time limitation. And yet, for obvious reasons founded in fairness and justice, time provisions are often found to be directory where a mandatory construction might do *great injury to persons not at fault*, as in a case where slight delay on the part of a public officer might *prejudice private rights or the public interest*. The general rule is that if a provision of a statute states a time for performance of an official duty, without any language denying performance after a speci-

> fied time, it is directory. However, if the time period is provided to *safeguard someone's rights*, it is *mandatory*, and the agency cannot perform its official duty after the time requirement has passed. [Emphasis added.]

While *Moore* quoted and relied on the "general rule" articulated by Sutherland, it completely ignored the sentences immediately preceding and following Sutherland's articulation of the rule. That is, while *Moore* adopted Sutherland's general rule, it did not give any consideration to Sutherland's explanation regarding when this general rule should and should not be applied. Specifically, in the sentence that immediately follows the general rule, Sutherland explained that "if the time period is provided to safeguard someone's rights, it is mandatory, and the agency cannot perform its official duty after the time requirement has passed." *Id.*

This exception to Sutherland's general rule would certainly apply in this case because the time period at issue was clearly "provided to safeguard someone's rights." Cf. *Smith*, 200 Mich App at 243 ("The time limits were created not to protect the rights of accused drunk drivers, but to prod the judiciary, and the prosecutors who handle drunk driving cases, to move such cases with dispatch."). Indeed, it was provided to safeguard both the rights of the surety and the public interest. Requiring the court to provide notice to the surety within seven days of the defendant's failure to appear clearly protects the rights of the surety by enabling the surety to promptly initiate a search for the defendant, which is obviously significant to the surety because "[a] surety is generally discharged from responsibility on the bond when the [defendant] has been returned to custody or delivered to the proper authorities . . . ." *Moore*, 276 Mich App at 489; see also MCL 765.26(2) ("Upon delivery of his or her principal at the

jail by the surety or his or her agent or any officer, the surety shall be released from the conditions of his or her recognizance."). A surety's ability to apprehend an absconding defendant is directly affected by whether the surety has received prompt notice of the defendant's failure to appear because the former's ability to recover and produce an absconding defendant declines with the passage of time. Therefore, the statutory notice provision upholds the surety's right to an effective opportunity to secure the defendant before having its bond forfeited.

At the same time, the notice provision protects the interests of the public in an equally obvious manner because the sooner the court notifies the surety of the defendant's failure to appear, the sooner the surety can begin to search for the defendant, the more effective its pursuit will be, and the sooner the defendant can be placed behind bars and prevented from further harming members of the public.[2] See Helland & Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J L & Econ 93, 94 (2004) (noting an expectation that "the felony defendants who fail to appear are the ones most likely to commit additional crimes"); see also *Moore*, 276 Mich App at 489 (holding that a surety is authorized to arrest and deliver a defaulting defendant to the jail or to the county sheriff); MCL 765.26(1) (authorizing a surety to arrest and deliver a defendant if the surety wishes to be relieved from responsibility for the defendant). Providing timely notice to the surety also protects the public's

[2] The prosecutor conceded at oral argument that the statutory notice provision is designed to protect the public's interest in the "seizure [or] recapture of the absconding defendant" and that the government's interest in collecting the bail money "doesn't outweigh" the public's interest in "apprehending fugitives as [e]ffectively and as quickly as possible[.]"

interest in justice under law by ensuring that those who have been charged with crimes, and who have subsequently absconded, timely face those charges in court. Thus, there is a common interest served by the notice provision: a private interest of the surety in being relieved of financial responsibility under the bond and a public interest in facilitating the apprehension of an absconding defendant, both in order to protect the safety of the public and to ensure a timely trial on the criminal charges.[3]

The apprehension of absconding defendants is essential to the effective guarantee of our criminal laws, and sureties play a critical role in this regard.[4] As one commentator has recognized, sureties are a necessary part of the apprehension process because "public police are often strained for resources, and the rearrest of defendants who fail to show up at trial is usually given low precedence." *Helland*, 47 J L & Econ at 98. As a result, "the probability of being recaptured is some 50 percent higher for those released on surety bond relative to other releases," *id.* at 113, and "[d]efendants released on surety bond are . . . 53 percent less likely to remain at large for extended periods of time," *id.* at 118. These findings indicate that sureties are "effective at . . . recapturing defendants." *Id*. However, sureties can only be effective at recapturing defendants if they are aware that there is an absconding defendant who needs to be recaptured—hence the rationale for, and the importance of, the statutory notice provision.

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[3] Moreover, this public interest can also be viewed in terms of the *private* interest served with regard to eyewitnesses and other potential witnesses at trial whose safety and security are placed at particular risk by an absconding defendant.

[4] Sureties also play a critical role in the process of safeguarding defendants' constitutional due process rights before trial.

Moore also failed to recognize that the underlying rationale of Sutherland's general rule itself does not justify its application in the instant case. Although this rationale is explained in the sentence that immediately precedes the general rule, the Court of Appeals altogether failed to address it. The rationale is contained in the observation that "time provisions are often found to be directory where a mandatory construction might do great injury to persons not at fault, as in a case where slight delay on the part of a public officer might prejudice private rights or the public interest." 3 Sutherland, § 57:19, pp 73-74.[5] See, for example, *Dolan v United States*, 560 US 605; 130 S Ct 2533, 2539-2540; 177 L Ed 2d 108 (2010) ("The fact that a sentencing court misses the statute's 90-day deadline, even through its own fault or that of the Government, does not deprive the court of the power to order restitution" because (a) "the [statute's] efforts to secure speedy determination of restitution is *primarily* designed to help victims of crime secure prompt restitution rather than to provide defendants with certainty as to the amount of their liability" and (b) "to read the statute as depriving the sentencing court of the power to order restitution would harm those—the victims of crime—

[5] The "exception" to Sutherland's general rule and the underlying rationale of Sutherland's general rule are really two sides of the same coin. The underlying rationale for construing time provisions as directory is that in some instances, mandatory construction "might do great injury to persons not at fault, as in a case where slight delay on the part of a public officer might prejudice private rights or the public interest," while the exception to the general rule is that "if the time period is provided to safeguard someone's rights, it is mandatory, and the agency cannot perform its official duty after the time requirement has passed." In other words, according to Sutherland, time provisions should be construed as directory if a mandatory construction might prejudice someone's rights or the public interest, while time provisions should be construed as mandatory if a directory construction might prejudice someone's rights or the public interest.

who likely bear no responsibility for the deadline's being missed and whom the statute also seeks to benefit.") (emphasis in the original).

By contrast, in the instant case, a mandatory construction would neither "do great injury to persons not at fault" nor "prejudice private rights or the public interest." 3 Sutherland, § 57:19, pp 73-74. Indeed, just the opposite is true. Not mandating timely notice of the defendant's failure to appear might well do great injury to persons not at fault because, as explained earlier, if the surety does not know that the defendant failed to appear, the surety would not have begun searching for the defendant, and if the surety has not begun searching for the defendant, not only would the defendant have remained free during this period, possibly to do harm to other individuals, but the longer-term prospects of apprehension would also have been diminished. For this reason, the "public interest" in the instant case is not only *not* prejudiced by *adopting* a mandatory construction, but would instead *be* prejudiced by *not* adopting a mandatory construction. The "private rights" of the surety are also better protected by adopting a mandatory construction because, as discussed earlier, the surety will be discharged from its financial obligation under the bond once the surety finds and returns the defendant to the jail or the county sheriff, which will certainly be easier if the surety is promptly notified of the defendant's failure to appear. Even the trial court in *Moore* acknowledged "the difficulty that a surety might face in apprehending a [defendant] when the court fails to provide timely notice of the [defendant's] default." *Moore*, 276 Mich App at 496.

Moore also failed to realize that Sutherland recognizes circumstances that compel the necessity of mandatory constructions:

> [S]ome limitations of time within which a public officer is to act must be construed as mandatory. Such a construction is necessary where failure to obey the time limitation embodies a risk of unknown injury to public or private rights. [3 Sutherland, § 57:19, p 80.]

For the reasons already explained earlier, a court's failure to notify the surety within seven days of the defendant's failure to appear "embodies a risk of unknown injury to public or private rights." If a court fails to provide the surety with timely notice of the defendant's failure to appear, a statutory scheme designed to create an incentive for third parties to assist in the apprehension of defendants who abscond, commit new crimes, or threaten other persons will almost certainly be rendered less effective and, as a result, "persons not at fault" (i.e., members of the public) will almost certainly face a greater threat from such defendants. The "private rights" implicated by a breach of MCL 765.28(1)—in this case, $50,000 of the resources of the surety—are even more obvious. Because "failure to obey the time limitation embodies a risk of unknown injury to public [and] private rights," a mandatory construction of the notice provision is necessary.

To summarize, by relying exclusively on Sutherland's general rule, *Moore* failed to recognize that the fact that the time period at issue here safeguards both the rights of another and the public interest is relevant not only with regard to our own caselaw, see *Lathrop*, *supra*, but also with regard to (a) Sutherland's exception to his "general rule," (b) Sutherland's underlying rationale for his general rule, and (c) Sutherland's articulation of additional circumstances that compel a mandatory construction.

Sutherland indicates that the remedy for a public entity's failure to follow a mandatory time period is that

the public entity "cannot perform its official duty after the time requirement has passed." 3 Sutherland, § 57:19, p 74. This is consistent with this Court's rule in *Lathrop*, in which we explained that a public entity's "power only arises from the performance of the acts required to be done" by law. *Lathrop*, 1 Mich at 445. When a public entity does not perform its statutory obligations in a timely manner, and fails to respect the statutory preconditions to its exercise of authority, it lacks the authority to proceed as if it had. In this case, the consequence is that the court cannot require the surety to pay the surety bond because the court failed to provide the surety notice within seven days of defendant's failure to appear, as the statute clearly requires. Any other interpretation of the statute would render the seven-day notice requirement entirely nugatory.

It is well established that

> [w]e have no authority to treat any part of a legislative enactment, which is not ambiguous in itself and is capable of reasonable application, as so far unimportant that it is a matter of indifference whether it is complied with or not. We must suppose the legislature saw sufficient reason for its adoption, and meant it to have effect; and whether the reason is apparent to our minds or not, we have no discretion to dispense with a compliance with the statute. [*Hoyt v East Saginaw*, 19 Mich 39, 46 (1869).]

Therefore, in the instant case, we have no authority to treat the statutory notice provision "as so far unimportant that it is a matter of indifference whether it is complied with or not." Because the statutory notice provision is a mandatory provision, it must be complied with, and if it was not, the court may not proceed with its bond forfeiture proceeding.[6]

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[6] The prosecutor argues that MCR 2.613(A) bars relief. We respectfully disagree. MCR 2.613(A) provides that "[a]n . . . error or defect in any-

In *Moore*, 276 Mich App at 494-495, the Court of Appeals relied on *People v Smith*, 200 Mich App 237; 504 NW2d 21 (1993), and *People v Yarema*, 208 Mich App 54; 527 NW2d 27 (1994), to conclude that the surety was not entitled to a remedy for the court's violation of the seven-day notice provision. However, *Smith* and *Yarema* actually stand for the exact opposite proposition, because in those cases the Court of Appeals held that the defendant was entitled to a remedy for the government's failure to follow statutory time limits. That is, in *Smith* and *Yarema*, the Court of Appeals held that the remedy for the failure to arraign the defendant within 14 days, as required by MCL 257.625b(1), was a dismissal without prejudice. *Smith* and *Yarema* in turn relied on this Court's decision in *People v Weston*, 413 Mich 371, 377; 319 NW2d 537 (1982).

Weston involved MCL 766.4, which states that the magistrate "*shall* set a day for a preliminary examination not exceeding 14 days after the arraignment." This Court held that because the statute contains an "unqualified statutory command that the examination be held within 12 days," "[t]he failure to comply with the statute governing the holding of the preliminary examination entitles the defendant to his discharge." *Weston*, 413 Mich at 376. Therefore, these cases actually under-

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thing done or omitted by the court or by the parties is not ground for . . . vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." Refusing to disturb the trial court's judgment against the surety would be "inconsistent with substantial justice" for the reasons explained earlier—namely, given that the court did not uphold its end of the bargain by notifying the surety within seven days of defendant's failure to appear, it would be "inconsistent with substantial justice" to require the surety to uphold its part of the bargain by paying the judgment on the bond. It would also undermine the public's interest in having the court timely notify the surety so that the surety can quickly find and capture absconding defendants.

mine *Moore*'s assumption that there is no remedy for a statutory violation unless the Legislature expressly states that there is a remedy. See also *In re Contempt of Tanksley*, 243 Mich App 123, 128-129; 621 NW2d 229 (2000) ("Given the clear legislative mandate that a respondent be afforded a hearing on a charged [personal protection order] violation within seventy-two hours, we hold that a violation of the time limit expressed in MCL 764.15b(2)(a) or MCR 3.708(F)(1)(a) demands dismissal of the charge.").

Finally, *Moore* also relied on MCL 765.27 to conclude that "[t]he Legislature has plainly declared that the trial court's failure to provide proper notice of a principal's default does not bar or preclude the court's authority to enter judgment on a forfeited recognizance." *Moore*, 276 Mich App at 495. MCL 765.27 provides:

> No action brought upon any recognizance entered into in any criminal prosecution, either to appear and answer, or to testify in any court, shall be barred or defeated nor shall judgment thereon be arrested, by reason of any neglect or *omission to note or record the default* of any principal or surety at the time when such default shall happen, nor by reason of any defect in the form of the recognizance, if it sufficiently appear, from the tenor thereof, at what court the party or witness was bound to appear, and that the court or a magistrate before whom it was taken was authorized by law to require and take such recognizance. [Emphasis added.]

Contrary to *Moore*'s assertion, MCL 765.27 does not refer to the trial court's "failure to provide proper *notice* of a principal's default." (Emphasis added.) Instead, it merely refers to the failure "to *note or record* the default." (Emphasis added.) In this case, there is no question that the trial court did, in fact, "note or

record" the default; it just did not notify the surety of the default within seven days. Therefore, reliance on MCL 765.27 is inapt.

For all these reasons, we conclude that *Moore* was wrongly decided, and therefore we overrule it. Where a statute provides that a public officer "shall" do something within a specified period of time and that time period is provided to safeguard someone's rights or the public interest, as does the statute here, it is mandatory, and the public officer is prohibited from proceeding as if he or she had complied with the statutory notice period.[7]

IV. CONCLUSION

Because we conclude that *Moore* was wrongly decided, we overrule it and hold that a court's failure to comply with the seven-day notice provision of MCL 765.28(1) bars forfeiture of a bail bond posted by a surety. When a statute provides that a public officer

[7] We note that it makes no practical difference whatsoever whether the general rule is expressed in the manner set forth in Sutherland (when a statute provides that a public officer "shall" do something within a specified period of time, it is directory *unless* the time period is provided to safeguard someone's rights or the public interest) or in the manner set forth in this opinion (when a statute provides that a public officer "shall" do something within a specified period of time and the time period is provided to safeguard someone's rights or the public interest, it is mandatory). Both articulations lead to the same result. We adopt the latter articulation, however, because it would seem to be the case more often than not that when the Legislature has chosen to direct a public officer to do something within a specified time, it has done so in order to safeguard another's rights or the public interest, and thus, more often than not, the directive would be mandatory rather than directory. Moreover, the latter articulation has the considerable virtue of communicating as the default position in interpreting the law that "shall" means "shall." *Webster's Seventh New Collegiate Dictionary* (1967) (defining "shall" as "used to express a command or exhortation"; "used in laws, regulations, or directives to express what is mandatory").

"shall" do something within a specified period of time and that time period is provided to safeguard someone's rights or the public interest, as does the statute here, it is mandatory, and the public officer who fails to act timely is prohibited from proceeding as if he or she had acted within the statutory notice period. Accordingly, we reverse the judgment of the Court of Appeals and vacate the trial court's orders to the extent that the orders forfeited the bail bond posted by the surety and ordered the surety to pay $50,000.

YOUNG, C.J., and CAVANAGH, KELLY, ZAHRA, MCCORMACK, and VIVIANO, JJ., concurred with MARKMAN, J.

YOUNG, C.J. (*concurring*). I fully join the majority's opinion. I write separately, however, to note that the majority's holding is perfectly consistent with the recognized narrow exception to the general rule that courts must refrain from creating remedies for statutory violations where the Legislature has not seen fit to provide a remedy.[1]

Generally speaking, this Court applies the plain meaning of the words used in a statute.[2] When a statute contains a mandate but does not specify an accompanying remedy for violating that mandate, courts must refrain from creating a remedy.[3] However, when the legislative mandate is a time limitation imposed on the government, this general rule of refraining from fash-

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[1] See *Lash v City of Traverse City*, 479 Mich 180, 193; 735 NW2d 628 (2007); *People v Anstey*, 476 Mich 436, 445 n 7; 719 NW2d 579 (2006) ("Because the Legislature did not provide a remedy in the statute, we may not create a remedy that only the Legislature has the power to create.").

[2] See *People v Wilcox*, 486 Mich 60, 64; 781 NW2d 784 (2010).

[3] See note 1 of this opinion.

ioning a remedy contains a notable exception:[4] if the time limitation is provided to safeguard the rights of a party, courts may provide a limited remedy by *precluding* the government from acting in derogation of the mandate and to the detriment of the protected party.[5]

This narrow exception, first recognized more than a century ago by this Court in *Agent of State Prison v Lathrop*,[6] does not vest courts with the unbridled authority to fashion whatever remedy they deem just. Rather, the limited remedy provided by the *Lathrop* exception, whether characterized by the majority or by this Court's earlier holdings, is properly understood as a *restraint* on official action, and it does not permit courts to fashion additional extrastatutory remedies permitting official action.[7] Because I have previously identified the adverse consequences that occur when

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[4] This narrow exception is consistent with the general rule of statutory interpretation reiterated by this Court in *Lash v Traverse City*, see note 1 of this opinion, and does *not* provide for an extrastatutory remedy for the violation of a time limitation placed on an official action. As the majority correctly notes, Sutherland's characterization of the general rule is that "if a provision of a statute states a time for performance of an official duty, without any language denying performance after a specified time, it is directory." 3 Sutherland, Statutory Construction (5th ed), § 57:19, p 74.

[5] See *Agent of State Prison v Lathrop*, 1 Mich 438, 444 (1850); *Fay v Wood*, 65 Mich 390, 401; 32 NW 614 (1887); *People v Smith*, 200 Mich App 237, 242-243; 504 NW2d 21 (1993).

[6] *Lathrop*, 1 Mich at 444.

[7] As the majority correctly notes, "the public officer who fails to act timely *is prohibited from proceeding* as if he or she had acted within the statutory notice period." (Emphasis added.) This characterization is consistent with Sutherland's, which states that "if the time period is provided to safeguard someone's rights, it is mandatory, *and the agency cannot perform its official duty after the time requirement has passed*." 3 Sutherland, § 57:19, p 74. Both of these statements align with this Court's prior holding that time limits for the performance of an official act "will be regarded as directory merely, unless the nature of the act to be performed . . . show that the designation of time was *considered as a*

courts are free to cast aside the Legislature's intent under the guise of imposing fairness and equity,[8] I am compelled to underscore the limited scope of the relief available under the exception outlined by the majority today. The narrow exception applied today, *restraining* the performance of official action, provides no cognizable basis for courts to fabricate remedies out of whole cloth.

VIVIANO, J. (*concurring*). The majority concludes that because compliance with the notice requirement in MCL 765.28(1) is mandatory, a court is prohibited from ordering forfeiture of a bail bond if the court has not complied with the statutory notice requirement. I agree, but I write separately because I believe the applicable rule of statutory construction also requires discharge of a surety's bond when a trial court fails to provide timely notice to the surety.

I. ANALYSIS

The majority and the Chief Justice agree on the applicable rule of statutory construction, although they state it differently. The majority says that, when an official fails to perform a duty within a mandatory time limit, "noncompliant public officers are prohibited *from proceeding as if they had complied* with the statute."[1]

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limitation of the power of the officer." *Lathrop*, 1 Mich at 441 (emphasis added; citation and quotation marks omitted).

[8] *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 591; 702 NW2d 539 (2005) ("Indeed, if a court is free to cast aside, under the guise of equity, a plain statute . . . simply because the court views the statute as 'unfair,' then our system of government ceases to function as a representative democracy. No longer will policy debates occur, and policy choices be made, in the Legislature. Instead, an aggrieved party need only convince a willing judge to rewrite the statute under the name of equity.").

[1] *Ante* at 323 (emphasis added).

The Chief Justice says that when a statute imposes a time limit "to safeguard the rights of a party, courts may provide a limited remedy by *precluding the government from acting in derogation of the mandate and to the detriment of the protected party*."[2] However this rule is stated, I believe it requires discharge of the surety's bond.

There are two ways that a trial court can "proceed as if it had complied with the statute." First, the court can forfeit the bond and collect a monetary judgment from the surety.[3] Second, the court can rely on the bond to motivate the surety to find the absconding defendant so that the surety can have the forfeiture set aside and the bond discharged.[4] In either scenario, the court receives a benefit based on its compliance with the notice provision of the statute.

Likewise, there are two ways that a court can act "to the detriment" of a surety after failing to provide immediate notice not to exceed seven days after a defendant's failure to appear, as required by MCL 765.28(1). First, a court can order forfeiture of the surety's bond, and enter a judgment against the surety for the full amount of the bond. The majority's holding prevents this type of injury. The second way a trial court can injure a surety is by retaining a surety's bond. By retaining a bond after failing to give the statutorily required notice, a trial court encumbers a surety with an obligation that, as the majority explains, the surety

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[2] *Ante* at 341 (emphasis added).

[3] MCL 765.28(1).

[4] See MCL 765.28(2). To qualify to have the forfeiture set aside and the bond discharged, the surety must satisfy certain conditions, including (1) fully paying the judgment within 56 days after the forfeiture judgment was entered, MCL 765.28(3), and (2) apprehending the defendant within one year from the date of the forfeiture judgment, MCL 765.28(2).

has little to no chance of ever being able to fulfill.[5] This injury is no less real than the injury of paying a judgment—a surety's financial capacity to bond out other defendants will be compromised by a debt that, through no fault of its own, it will most likely never be able to discharge.[6]

Unless noncompliance with MCL 765.28(1) requires discharge of a surety's bond, a trial court will be able to perpetuate a surety's injury indefinitely even if the court does not comply with the mandatory language of the statute. Furthermore, by retaining the bond in such a case, a trial court will be able to "proceed as if it had complied" with its statutory duty—the court would be free to retain a bond in the hope of motivating a surety to find an absconding defendant, even if the trail has grown cold because of the trial court's own nonfeasance. This result would be inconsistent with the rule of statutory construction on which the majority and the Chief Justice rely. If the governing rule is that "noncompliant public officers are prohibited from proceeding as if they had complied with the statute," then noncompliance requires discharge of the bond. Otherwise, the statute's notice requirement will be "directory" because trial courts will remain free to disregard their notice obligations "to the detriment" of sureties. Absent discharge, trial courts will not be restrained from further action in derogation of the statute.

Contrary to the Chief Justice's suggestion, to require discharge in this case would not be to "cast aside the Legislature's intent under the guise of fairness and

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[5] *Ante* at 331-332, 334-335.

[6] Furthermore, if the surety had posted any collateral for its bond, the Chief Justice's rule would allow the court to retain the collateral in escrow indefinitely, again, through no fault of the surety, even though the court would never be able to collect the collateral.

equity."[7] Nor would doing so amount to "fabricat[ing]" a remedy "out of whole cloth."[8] As I have explained, requiring the trial court to discharge the surety's bond is the logical consequence of the Chief Justice's own stated rule of statutory construction. The Chief Justice offers no account of how a trial court would not be proceeding in derogation of its "mandate and to the detriment of the protected party" if it retained a bond after failing to provide the notice required by statute.[9] Unfortunately, even though this case squarely presents the question and this Court has invoked the legal principles necessary to answer it, sureties in the state of Michigan will have to await some future case to learn whether a trial court's noncompliance with MCL 765.28(1) requires discharge of a surety's bond.

II. CONCLUSION

I agree with the majority that, absent compliance with the notice provision in MCL 765.28(1), a trial court may not order a surety to forfeit its bond. However, I would also hold that because the notice requirement in MCL 765.28(1) is mandatory, a court's noncompliance with that provision mandates discharge of the bond.

CAVANAGH and MARKMAN, JJ., concurred with VIVIANO, J.

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[7] *Ante* at 342.

[8] *Ante* at 342.

[9] Further, it is hard for me to conclude that the Legislature intended to create a legal fiction—a new class of security that must remain pledged but can never be collected—without uttering even a single word on the subject.

In re AJR

Docket No. 147522. Argued March 6, 2014 (Calendar No. 9). Decided June 25, 2014.

Petitioner-mother and respondent were married in 2003 and had one child, AJR, during their marriage. They divorced in 2009. The divorce judgment gave the parties joint legal custody of the child, gave physical custody to petitioner-mother, placed support obligations on respondent, and gave respondent reasonable visitation. Petitioner-mother married petitioner-stepfather in 2010, and they lived together with AJR as a family. In May 2012, petitioners filed a petition in the Kent Circuit Court to terminate respondent's parental rights so that petitioner-stepfather could adopt AJR under MCL 710.51(6), the stepparent adoption statute. Petitioners alleged that respondent had failed to provide support or comply with a support order and had failed to visit or contact AJR for more than two years. The court, Kathleen A. Feeney, J., granted the petition and terminated respondent's parental rights pursuant to MCL 710.51(6). Respondent appealed, and the Court of Appeals, WILDER, P.J., and METER and RIORDAN, JJ., reversed, concluding that respondent's parental rights had been improperly terminated given that respondent and petitioner-mother had joint legal custody of AJR and MCL 710.51(6) only allows a court to terminate the rights of a parent who does not have legal custody. The panel held that the statute requires that the petitioning parent be the parent having sole legal custody. 300 Mich App 597 (2013). The Supreme Court granted petitioners leave to appeal. 495 Mich 875 (2013).

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

Stepparent adoption under MCL 750.51(6) is only available to the spouse of a parent with sole legal custody of the child, and the statute does not apply to situations in which the child's parents share joint legal custody.

1. MCL 710.51(6) provides for the termination of parental rights in the context of stepparent adoption, stating that if (1) the parents of a child are divorced (or if the parents are unmarried but the father has acknowledged paternity or is a putative father who meets certain conditions), (2) the parent having legal custody of

the child subsequently marries, and (3) that parent's spouse petitions to adopt the child, the court may terminate the rights of the other parent if the other parent has for two or more years both failed or neglected to provide regular and substantial support for the child and regularly and substantially failed or neglected to visit, contact, or communicate with the child. When the plain meaning of the statute is considered in the context of other provisions concerning stepparent adoption, it is clear that the Legislature intended the phrase "parent having legal custody of the child" to refer to the parent with sole legal custody.

2. Asserting that when the stepparent adoption statute was added in 1980 the term "legal custody" in MCL 710.51(6) meant a legal right to physical custody, petitioners argued that petitioner-mother was the sole parent having legal custody of AJR because she was the parent with legally sanctioned physical custody of the child. Physical and legal custody were distinct concepts, allocable between parents, well before the Legislature added the stepparent adoption provision to the Michigan Adoption Code, however, and the joint custody rules established by the Legislature in the same session in which it added the stepparent adoption statute, as well as caselaw, directly contravene petitioners' assertion that custody is an indivisible concept.

3. Petitioners are not without a remedy. A parent who shares joint legal custody is free to seek modification of that custody arrangement under MCL 722.27 and may proceed with stepparent adoption under MCL 710.51(6) after securing sole legal custody of the child.

Affirmed.

ADOPTION — STEPPARENT ADOPTION — TERMINATION OF PARENTAL RIGHTS — PARENT WITH SOLE LEGAL CUSTODY — JOINT LEGAL CUSTODY.

MCL 710.51(6) provides for the termination of parental rights in the context of stepparent adoption, stating that if (1) the parents of a child are divorced (or if the parents are unmarried but the father has acknowledged paternity or is a putative father who meets certain conditions), (2) the parent having legal custody of the child subsequently marries, and (3) that parent's spouse petitions to adopt the child, the court may terminate the rights of the other parent if the other parent has for two or more years both failed or neglected to provide regular and substantial support for the child and regularly and substantially failed or neglected to visit, contact, or communicate with the child; stepparent adoption under MCL 750.51(6) is only available to the spouse of a parent with sole legal

custody of the child, and the statute does not apply to situations in which the child's parents share joint legal custody.

Scott Bassett and *Cynthia S. Harmon* for petitioner-mother and petitioner-stepfather.

Vivek S. Sankaran and *Trish Oleksa Haas* for respondent-father.

Amici Curiae:

Yvon D. and Estela M. Roustan *in propriis personis*.

Rebecca Shiemke, *Kent Weichmann*, and *Anne Argiroff* for the Family Law Section of the State Bar of Michigan.

ZAHRA, J. This case requires us to interpret the stepparent adoption statute, MCL 710.51(6), which allows the spouse of "the parent having legal custody of the child" to petition to adopt that child as long as the court orders the termination of the other parent's parental rights in a manner consistent with the criteria provided in MCL 710.51(6)(a) and (b). Applying the stepparent adoption statute to the instant case, the circuit court terminated respondent-father's parental rights to the minor child and also allowed petitioner-stepfather—who is married to petitioner-mother—to adopt the minor child. The Court of Appeals reversed, reasoning that because respondent and petitioner-mother shared joint legal custody of the child, petitioner-mother was not "*the* parent having legal custody of the child" as required by the stepparent adoption statute. We affirm the judgment of the Court of Appeals because when the role of the phrase "the parent having legal custody" within the statutory

scheme is considered, it is clear that the Legislature intended that phrase to refer to the parent with *sole* legal custody.

We also reject petitioners' argument, made for the first time on appeal before this Court, that petitioner-mother is the sole parent having legal custody of the child because she is the parent with legally sanctioned physical custody of the child. Michigan has long recognized that the concepts of legal custody and physical custody are distinct and allocable between parents. This has been so since before the enactment of MCL 710.51(6). Petitioner-mother has always been free to seek modification of the custody arrangement under MCL 722.27. If on remand petitioner-mother secures *sole* legal custody of the child, then petitioners may proceed with stepparent adoption under MCL 710.51(6).

I. FACTS AND PROCEEDINGS

Respondent and petitioner-mother were married in 2003. The couple had one child during their marriage, AJR, but divorced in 2009. The divorce judgment awarded custody of AJR as follows:

> The parties shall share joint legal custody and [petitioner-mother] shall have the physical custody of the minor child . . . .

The divorce judgment also placed support obligations on respondent and provided that he would be given reasonable visitation with the child.

Petitioner-mother married petitioner-stepfather in June 2010. The couple lived together with AJR as a family. In May 2012, petitioners sought to terminate respondent's parental rights to allow petitioner-stepfather to adopt AJR. Petitioners filed a petition for

stepparent adoption consistent with MCL 710.51(6)(a) and (b), alleging that "[t]he noncustodial parent has failed to provide support or comply with a support order and failed to visit or contact the adoptee for a period of 2 years or more." They also filed a supplemental petition and affidavit to terminate the parental rights of the noncustodial parent, alleging that "[a] support order has been entered and the noncustodial parent has failed to substantially comply with the order for a period of two years or more before the petition for adoption was filed."

Following a two-day evidentiary hearing, the circuit court issued an opinion and order granting the petition and terminating respondent's parental rights pursuant to MCL 710.51(6). The circuit court found that respondent had substantially failed to provide support for the child for the two years preceding the filing of the petition and that respondent had substantially failed to visit or communicate with the child during the same period.

Respondent appealed by right in the Court of Appeals, which reversed the circuit court's order terminating his parental rights.[1] The Court of Appeals concluded that "because [respondent] and the mother had joint legal custody over the child and the statute only acts to terminate the rights of those parents who do not have legal custody, [respondent's] rights were improperly terminated."[2] The Court of Appeals held that the language "if *the* parent having legal custody of the child" in the statute must "be construed as requiring the parent initiating termination proceedings to be *the only parent* having legal custody."[3] The Court of Appeals concluded

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[1] *In re AJR*, 300 Mich App 597; 834 NW2d 904 (2013).

[2] *Id*. at 600.

[3] *Id*. at 602.

that "[t]he rights of a parent who maintains joint legal custody are not properly terminated under MCL 710.51(6)."[4] The Court of Appeals observed that the articles "the" and "a" have different meanings and that the Legislature uses the term "the," rather than "a" or "an," to refer to something particular.[5] The Court of Appeals also reasoned that, when possible, every word and phrase in a statutory provision must be given effect and that a court "should not ignore the omission of a term from one section of a statute when that term is used in another section of the statute."[6] The Court of Appeals applied this principle, stating:

> Notably, the preceding subsection in the statute, MCL 710.51(5), uses the phrase "*a* parent having legal custody" to refer to whom that particular subsection applies. Contrastingly, MCL 710.51(6) refers to "*the* parent having legal custody." We presume that the Legislature intended to use the more general phrase "*a* parent" to refer to either of the child's parents in MCL 710.51(5) and that the omission of a general article in MCL 710.51(6) was intentional.[7]

It being undisputed that the divorce judgment provided that respondent and petitioner-mother would maintain joint legal custody of AJR, the Court of Appeals concluded

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[4] *Id.*

[5] *Id.* at 602-603, citing *Paige v Sterling Hts*, 476 Mich 495, 509-510; 720 NW2d 219 (2006) (holding that "the" used in front of "proximate cause" in the statute before the Court referred to the *sole* proximate cause, thereby clarifying that the phrase "the proximate cause" exclusively contemplates *one* cause).

[6] *AJR*, 300 Mich App at 603.

[7] *Id.*, citing *Farrington v Total Petroleum, Inc.*, 442 Mich 201, 210; 501 NW2d 76 (1993), and *Robinson v City of Lansing*, 486 Mich 1, 14 n 13; 782 NW2d 171 (2010) (stating that reviewing courts "must follow these distinctions between 'a' and 'the' because the Legislature has directed that '[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language' "), quoting MCL 8.3a (alteration in original).

that MCL 710.51(6), which requires that the petitioning parent be "*the* parent having legal custody," was inapplicable in the instant case.[8]

This Court granted leave to appeal to determine whether MCL 710.51(6) necessarily refers to "*the*" sole parent with legal custody and whether the term "legal custody" in the statute is synonymous with the concept of joint custody in § 6a(7)(b) of the Child Custody Act, MCL 722.26a(7)(b), under which the parents "share decision-making authority as to the important decisions affecting the welfare of the child," and also to explore the remedies, if any, available to the petitioners in this case if the Court of Appeals had not erred in interpreting MCL 710.51(6).[9]

II. STANDARD OF REVIEW

Whether the application of the stepparent adoption provision is limited to situations in which one parent has sole legal custody of the child is a question of statutory interpretation, which we review de novo.[10]

III. ANALYSIS

A. INTERPRETING MCL 710.51(6)

As always, the objective of statutory interpretation "is to give effect to the Legislature's intent," and "[t]o ascertain that intent, this Court begins with the statute's language."[11] "When that language is unambiguous, no further judicial construction is required or

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[8] *Id.* at 603-604.

[9] *In re AJR*, 495 Mich 875, 875-876 (2013).

[10] *In re MCI Telecom Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999).

[11] *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001).

permitted, because the Legislature is presumed to have intended the meaning it plainly expressed."[12] Moreover, "[w]hen interpreting a statute, courts must ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute," which "requires courts to consider the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme."[13]

MCL 710.51(6) provides for the termination of parental rights in the context of stepparent adoption:

> (6) If the parents of a child are divorced, or if the parents are unmarried but the father has acknowledged paternity or is a putative father who meets the conditions in [MCL 710.39], and if the parent having legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing may issue an order terminating the rights of the other parent if both of the following occur:
>
> (a) The other parent, having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child or if a support order has been entered, has failed to substantially comply with the order, for a period of 2 years or more before the filing of the petition.
>
> (b) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition.

Accordingly, a court may only terminate parental rights under the stepparent adoption statute after concluding that both Subdivision (a) and (b) are satisfied, and also that the conditions provided in the preceding paragraph

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[12] *Id.*

[13] *Fradco, Inc v Dep't of Treasury*, 495 Mich 104, 112; 845 NW2d 81 (2014) (quotation marks and citations omitted).

are satisfied.[14] The phrase "the parent having legal custody of the child" in the preceding paragraph of the stepparent adoption statute is the focus of this case.

Petitioners maintain that the Court of Appeals erred by interpreting the phrase "the parent having legal custody of the child" as necessarily referring to the sole parent with legal custody. We disagree because when the role of the phrase "the parent having legal custody" within the statutory scheme is considered, it is clear that the Legislature intended that phrase to refer to the parent with *sole* legal custody.

When interpreting the phrase "the parent having legal custody," we may consider the role of this phrase within the statutory scheme.[15] Under the Michigan Adoption Code, two provisions are particularly relevant when considering the process by which a stepparent may adopt a child: MCL 710.51 and MCL 710.43. There are two possible avenues pursuant to MCL 710.51 for a petitioning stepparent to adopt a child: adoption by parental consent under MCL 710.51(1) and the procedure for stepparent adoption provided in MCL 710.51(6). MCL 710.43 provides the rules regarding the consent required under MCL 710.51(1) for adoption by parental consent, and MCL 710.43(7) specifically addresses the requirements for *stepparent* adoption by parental consent. MCL 710.43(7) provides:

> If the petitioner for adoption is married to *the parent having legal custody* of the child and that parent has joined the petitioner in filing the petition for adoption, that

[14] *In re Hill*, 221 Mich App 683, 692; 562 NW 2d 254 (1997); see also *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 529; 672 NW2d 181 (2003) (reasoning that a proviso preceded by "if" "restricts the operative effect of statutory language to less than what its scope of operation would be otherwise").

[15] *Fradco*, 495 Mich at 112.

> parent shall not execute a consent to the adoption. The consent of *the parent who does not have legal custody* of the child and whose parental rights have not been terminated shall be executed before the court may enter an order of adoption under [MCL 710.56]. [Emphasis added.]

Thus, in order for a petitioning stepparent to adopt a child by parental consent, the parent without legal custody must consent. By directly contrasting the phrases "the parent having legal custody" and "the parent who does *not* have legal custody," we conclude that the Legislature intended "the parent having legal custody" to mean the parent with *sole* legal custody.

Conversely, when consent from a parent without legal custody has not or cannot be obtained, MCL 710.51(6) provides an alternative procedure that allows the spouse of "the parent having legal custody of the child" to petition the court to involuntarily terminate the other parent's parental rights, if the statutory requirements have been satisfied, so that the child may then be adopted by the spouse of the parent with legal custody.

Importantly, the phrase "the parent having legal custody" appears in both MCL 710.51(6) and MCL 710.43(7). Because the Legislature chose to use the same phrase in MCL 710.51(6), which like MCL 710.43(7) also addresses stepparent adoption, we conclude that the Legislature intended for that phrase to have the same meaning. In other words, because the Legislature expressly contrasted the phrase "the parent having legal custody" with the phrase "the parent who does not have legal custody" in MCL 710.43(7), the phrase "the parent having legal custody" within MCL 710.51(6) also was intended to be contrasted with the parent not having legal custody.[16] Therefore, the term

[16] See *Robinson*, 486 Mich at 16 (stating that "the Legislature is not required to be overly repetitive in its choice of language"). Thus, it was

"other parent" in MCL 710.51(6) refers to the parent not having legal custody pursuant to the distinction made in MCL 710.43(7). Moreover, the plain language of the statute does not otherwise indicate that the phrase "the parent having legal custody" should be interpreted differently in the context of MCL 710.51(6) than it is in MCL 710.43(7).[17] Therefore, when consent to stepparent adoption has not or cannot be obtained, petitioners must follow the statutory procedures to obtain sole legal custody before seeking termination of the respondent-parent's parental rights under MCL 710.51(6). For these reasons, we affirm the Court of Appeal's conclusion that the phrase "the parent having legal custody" in MCL 710.51(6) is inapplicable to situations involving joint legal custody.

Petitioners also invite this Court to reverse the Court of Appeals' judgment by resorting to the absurd-results doctrine of statutory interpretation. Specifically, petitioners argue that the statutory construction of the Court of Appeals is absurd because, under that construction, stepparent adoptions will never be possible when the other parent has joint legal custody, even if that parent has failed to regularly support or maintain contact with the child for the period provided in MCL 710.51(6). But there is nothing absurd about limiting the application of MCL 710.51(6) exclusively to parents having sole legal custody. Contrary to petitioners' con-

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not necessary for the Legislature to again directly contrast "the parent having legal custody" with "the parent who does not have legal custody" in MCL 710.51(6).

[17] Our conclusion that the Legislature intended the phrase "the parent having legal custody" to refer to the parent with *sole* legal custody is also consistent with prior case law recognizing that "the" and "a" have distinctive meanings where the Legislature has qualified the same word with the definite article "the" in one instance and the indefinite article "a" in another instance. See, e.g., *Robinson*, 486 Mich at 14-15.

cern, a parent who shares joint legal custody is free to seek modification of that custody arrangement under MCL 722.27 and may proceed with stepparent adoption under MCL 710.51(6) after securing sole legal custody of the child.[18] This result is akin to the scheme provided in the juvenile code, which in MCL 712A.19b(1) requires that a court "shall hold a hearing to determine if the parental rights to a child should be terminated and, if all parental rights to the child are terminated, the child placed in permanent custody of the court." The hearing required under MCL 712A.19b(1) is a separate proceeding from a review hearing under MCL 712A.19 or a permanency planning hearing under MCL 712A.19a. We do not question the Legislature's wisdom in enacting MCL 710.51(6). While it might be debatable whether the policy behind the statute is a good one, its plain application to the facts of this case does not produce an absurd result. Simply put, there is nothing absurd about requiring a separate proceeding for the sake of modifying a preexisting custodial arrangement falling outside the scope of the stepparent adoption statute.[19]

Having concluded that the stepparent adoption statute applies only to those situations involving a sole legal custodian, we address petitioners' alternative argument, which they raise for the first time on appeal before this Court, that petitioner-mother *is* the sole parent having legal custody of AJR because she is *the*

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[18] See Part III-B of this opinion.

[19] To the extent that trial courts in this state have adopted a practice that allows for stepparent adoption in a manner that we now recognize as being contrary to the statute, this decision guides trial courts on the statute's proper scope and applicability. As this opinion makes clear, no longer ought the statute be employed when the parent initiating stepparent adoption proceedings is not the parent with sole legal custody of the child.

parent with "legally sanctioned physical custody of AJR." Petitioners premise this argument on the notion that when the stepparent adoption statute was added in 1980 the term "legal custody" in what ultimately became MCL 710.51(6)[20] meant "a legal right to physical custody." They argue that despite the fact that the divorce judgment granted joint legal custody to respondent and petitioner-mother, the divorce judgment also granted sole physical custody to petitioner-mother, and therefore, petitioner-mother is "the parent having legal custody" of AJR.

The term "legal custody" is not defined in the Michigan Adoption Code. An undefined term must be accorded its plain and ordinary meaning, except when the term has acquired a unique legal meaning, in which case the term " 'shall be construed and understood according to such peculiar and appropriate meaning.' "[21]

The term legal custody has acquired a unique legal meaning in Michigan law, and because of this, we interpret the term in accordance with its meaning in legal dictionaries and at common law.[22] The ninth edition of *Black's Law Dictionary* (published in 2009) defines the term "custody" in the family-law context as

> [t]he care, control, and maintenance of a child awarded by a court to a responsible adult. • Custody involves legal custody (decision-making authority) and physical custody (caregiving authority), and an award of custody [usually] grants both rights.[23]

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[20] See note 29 of this opinion.

[21] *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 439; 716 NW2d 247 (2006), quoting MCL 8.3a.

[22] *Id*. at 439-440 (stating that "because 'mutual mistake of fact' is a legal term, resort to a legal dictionary to determine its meaning may also be helpful").

[23] *Black's Law Dictionary* (9th ed), p 441.

This Court recently discussed the distinction between physical custody and legal custody, albeit under the Child Custody Act. In *Grange Ins Co of Mich v Lawrence* we noted that "[p]hysical custody pertains to where the child shall physically 'reside,' whereas legal custody is understood to mean decision-making authority as to important decisions affecting the child's welfare."[24]

Neither this Court's decision in *Grange* nor the ninth edition of *Black's Law Dictionary* supports petitioners' interpretation of the term "legal custody." Nonetheless, petitioners' interpretation is not without support. Our inquiry is the intent of the Legislature that in 1980 added the provision that ultimately became the statute before us,[25] MCL 710.51(6).

To determine the Legislature's intent in 1980, we refer to a contemporaneous legal dictionary. The prominent legal dictionary in use in 1980—the fifth edition of *Black's Law Dictionary* (published in 1979)—did not expressly acknowledge the distinction between "legal custody" and "physical custody" in the family-law context.[26] Rather, the fifth edition of *Black's Law Dictionary* defined "custody of children" as "[t]he care, con-

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[24] *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 511; 835 NW2d 363 (2013) (comparing MCL 722.26a(7)(a) (physical custody) with MCL 722.26a(7)(b) (legal custody)).

[25] See note 29 of this opinion.

[26] The fifth edition of *Black's Law Dictionary* discussed the term "custody" as a broad concept, defining it as "[t]he care and control of a thing or person," and noted that "[t]he term is very elastic and may mean actual imprisonment or physical detention or mere power, legal or physical, of imprisoning or of taking manual possession." *Black's Law Dictionary* (5th ed), p 347. "Legal custody" was defined, generally, in the fifth edition as "[r]estraint of or responsibility for a person according to law, such as a guardian's authority over the person or property, or both, of his ward. See also **Commitment; Custody; Guardian; Ward.**" *Id*. *at* 804.

trol and maintenance of a child which may be awarded by a court to one of the parents as in a divorce or separation proceeding."[27] This definition—and the lack of a definition of "joint custody" in the fifth edition—reflect the reality that in 1980 it was not unusual for one parent to come away from a divorce with sole physical and legal custody of a child.[28]

Although the legal dictionary contemporaneous with the statute arguably supports petitioners' premise that "legal custody" included a right to physical custody in 1980, other factors militate against petitioners' interpretation. While the term "custody" was and is often used to refer to the complete bundle of custodial rights (i.e., both physical and legal custody), petitioners' theory relies on the meaning of "*legal* custody." Insight into the meaning of the term "legal custody" can be found by review of a related statute—MCL 722.26a—which was added during the same legislative session in which MCL 710.51(6) was added.[29] MCL 722.26a(7), a portion of the Child Custody Act concerning joint custody, provides:

> (7) As used in this section, "joint custody" means an order of the court in which 1 or both of the following is specified:
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> (a) That the child shall reside alternately for specific periods with each of the parents.

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[27] *Id*. at 347.

[28] *Black's Law Dictionary* (9th ed), p 442, defines "joint custody" in part as "[a]n arrangement by which both parents share the responsibility for and authority over the child at all times, although one parent may exercise primary physical custody."

[29] 1980 PA 509 added the stepparent adoption provision to MCL 710.51 as Subsection (5), effective January 26, 1981. It postdated MCL 722.26a, added by 1980 PA 434 (effective January 14, 1981), by almost two weeks. MCL 710.51 was subsequently amended by 1982 PA 72 to renumber Subsection (5) as Subsection (6) and add the language "or if the parents are unmarried but the father has acknowledged paternity or is a putative father who meets the conditions in [MCL 710.39]."

> (b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.

Thus, the Legislature divided the concept of custody into two categories—custody in the sense of the child residing with a parent and custody in the sense of a parent having decision-making authority regarding the welfare of the child. Therefore, the joint-custody rules established by the Legislature in the same session in which the stepparent adoption statute was added directly contravene petitioners' assertion that custody is an indivisible concept.

A survey of Michigan caselaw further confirms that physical custody and legal custody were distinct concepts, allocable between parents, well before 1980. In *Burkhardt v Burkhardt*, a case decided by this Court in 1938, the circuit court modified its custody order to state that "[the father] shall have the legal custody and control of said minor child . . . but that said child shall be in the actual care and custody of [third parties who had contracted to care for the child]. . . ."[30] In other words, the father in *Burkhardt* was awarded legal custody but not physical custody. Similarly, *Foxall v Foxall*, a 1947 decision of this Court, involved a 1946 custody order that also distinguished between legal custody and physical custody by providing that

> the legal custody of the children [would] remain in the friend of the court and their physical custody [would] remain with the father until the further order of the court, but upon the condition that the children remain at the home of their paternal grandmother under the present prevailing conditions.[31]

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[30] *Burkhardt v Burkhardt*, 286 Mich 526, 531; 282 NW 231 (1938) (quotation marks omitted).

[31] *Foxall v Foxall*, 319 Mich 461; 29 NW2d 912 (1947).

Additionally, *Lustig v Lustig*, a case decided by the Court of Appeals in 1980, involved a 1979 custody order that distinguished between legal custody and physical custody, providing "that legal custody of the minor children . . . be awarded jointly to the parents, plaintiff and defendant herein," and that "[p]hysical custody of [one of the children] was to alternate between plaintiff and defendant."[32] Finally, in *Wilcox v Wilcox*, a case decided by the Court of Appeals in 1980, the Court expressly recognized the distinction between legal custody and physical custody, stating, "There is a difference between joint legal custody, which is concerned with making decisions which significantly affect the life of a child, and joint physical custody, which is concerned with the child living with the parent."[33] Indeed, *Burkhardt*, *Foxall*, *Lustig*, and *Wilcox* illustrate that the concepts of legal custody and physical custody were divisible long before the enactment of MCL 710.51(6).[34]

We also find persuasive that the subsequent edition of *Black's Law Dictionary* (the sixth and centennial edition) published 11 years after the fifth edition and 9 years after the enactment of the stepparent adoption statute, defines "joint custody" as involving

> both parents sharing responsibility and authority with respect to the children; it may involve joint "legal" custody and joint "physical" custody. Such includes physical sharing of child in addition to both parents participating in

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[32] *Lustig v Lustig*, 99 Mich App 716, 719; 299 NW2d 375 (1980).

[33] *Wilcox v Wilcox*, 100 Mich App 75, 84; 298 NW2d 667 (1980), vacated and remanded 411 Mich 856 (1981) (vacated and remanded for reconsideration in light of 1980 PA 434, which added MCL 722.26a).

[34] See also *In re Brown*, 22 Mich App 459, 461; 177 NW2d 732 (1970) (discussing a custody order releasing "both physical and legal custody of the children" to the mother).

> decisions affecting child's life, *e.g.*, education, medical problems, recreation, etc . . . .[35]

The definition of "joint legal custody" did not evolve into its contemporary understanding overnight, but it does seem quite clear, at least *a posteriori*, that many state courts during the 1980s either already recognized, as Michigan courts did, or increasingly began to embrace the above understanding of joint legal custody. Given that Michigan courts had acknowledged the concept of "joint legal custody" well before the enactment of MCL 722.26a(7), we find it entirely plausible that the Michigan Legislature had likewise embraced this understanding of joint legal custody when it added MCL 710.51(6).

In sum, petitioners simply fail to demonstrate that "legal custody" ever meant a legal right to physical custody or that the concepts of physical custody and legal custody are or ever were inextricably merged. Rather, pre-1980 evidence demonstrates that legal custody and physical custody were separate concepts allocable between parents long before the enactment of the stepparent adoption statute. Even before 1980, a parent could have had legal custody without having the legal right to physical custody. In light of these conclusions, and because the divorce judgment clearly awarded joint legal custody to respondent and petitioner-mother, petitioner-mother was not "the parent having legal custody," and therefore, the stepparent adoption statute did not apply in the instant case.

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[35] *Black's Law Dictionary* (6th ed), p 385 (citation omitted). Indeed, we note that the preface of this edition appreciates that "[n]early every area of the law has undergone change and development since publication of the Fifth Edition in 1979" and that "[t]he vocabulary of the law has likewise continued to change and expand to keep pace." *Id.* at iii.

B. REMEDY

In light of our holdings, we now address "what, if any, remedy is available to the petitioners in this case that is consistent with the general purposes of the Adoption Code, MCL 710.21a."[36] Under the Child Custody Act, the court may "[m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age . . . ."[37] Thus, petitioner-mother has always been free to seek modification of the custody arrangement so that she is the parent having sole legal custody of AJR. If she does so and her request is granted, petitioners may proceed with stepparent adoption under MCL 710.51(6).

Requiring such action is not unduly burdensome and is consistent with the general purposes of the Michigan Adoption Code, which exists not only to "safeguard and promote the best interests of each adoptee," but also to "protect the rights of all parties concerned."[38] This approach is also consistent with the general presumption followed by Michigan courts that, when a third party such as petitioner-stepfather is involved, a child's best interests are served by awarding custody to the natural parent or parents.[39] Consequently, petitioners

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[36] *AJR*, 495 Mich at 876.

[37] MCL 722.27(1)(c).

[38] See MCL 710.21a(b).

[39] See, e.g., *Hunter v Hunter*, 484 Mich 247, 279; 771 NW2d 694 (2009) (holding that "the established custodial presumption in MCL 722.27(1)(c) must yield to the parental presumption in MCL 722.25(1)"). MCL 722.25(1) provides:

> If a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control. If the child custody dispute is between the parent or parents and an agency or a third person, the court shall presume

have an avenue by which to pursue stepparent adoption, while at the same time respondent may defend his custodial rights to the extent provided by law.[40] This is the legal framework provided by the Legislature; to the extent that petitioners argue that this remedy is unrealistic or practically unavailable, we disagree. However, we note that to the extent that petitioners are dissatisfied with the remedy available to them in light of their circumstances, they may seek recourse from the Legislature.

IV. CONCLUSION

Because the express language of MCL 750.51(6) provides that stepparent adoption under the statute is only available to the spouse of "the parent having legal custody of the child," meaning the parent with sole legal custody, the statute does not apply to situations like the instant case in which the parents share joint legal custody of the child. Therefore, we affirm the judgment of the Court of Appeals. Petitioners are free to seek modification of the custody arrangement under MCL 722.27. We do not retain jurisdiction.

YOUNG, C.J., and CAVANAGH, MARKMAN, KELLY, MCCORMACK, and VIVIANO, JJ., concurred with ZAHRA, J.

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that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence.

[40] See MCL 722.27(1)(c) and MCR 3.977 (termination of parental rights).

HUNT v DRIELICK

HUBER v DRIELICK

LUCZAK v DRIELICK

Docket Nos. 146433, 146434, and 146435. Argued March 5, 2014 (Calendar No. 3). Decided June 26, 2014.

Marie Hunt, as personal representative of the estate of Eugene Hunt; Brandon Huber; and Thomas and Noreen Luczak brought separate actions in the Bay Circuit Court against Roger Drielick, the owner of Roger Drielick Trucking; Corey Drielick, a truck driver employed by Drielick Trucking; Great Lakes Carriers Corporation (GLC); Great Lakes Logistics & Services, Inc. (GLLS); Sargent Trucking, Inc.; and others following a multivehicle accident in which Eugene Hunt died and Noreen Luczak and Brandon Huber were seriously injured. Drielick Trucking had generally leased its semi-tractors to Sargent, but in October 1995, Roger orally terminated the lease agreement with Sargent and began doing business with Bill Bateson, one of the owners of GLC. In January 1996, Bateson had dispatched Corey to pick up and deliver a trailer of goods stored on GLC's property. Driving the semi-tractor without an attached trailer, Corey proceeded to GLC's truck yard, but less than two miles away from the yard, he was involved in the accident. The court, William J. Caprathe, J., consolidated the actions. Empire Fire and Marine Insurance Company, which insured Drielick Trucking's semi-tractors under a non-trucking-use policy (also called a bobtail policy), denied coverage and refused to defend under the policy's business-use and named-driver exclusions. Plaintiffs settled with Sargent and GLC and later entered into consent judgments with the Drielicks and Drielick Trucking. The parties also entered into an agreement in which they agreed that Roger would assign the rights under the Empire insurance policy to plaintiffs, Sargent, and GLC. Sargent and GLC agreed to help plaintiffs' collection efforts from Empire in exchange for a portion of any proceeds received from Empire. Sargent and GLC filed writs of garnishment against Empire. In response, Empire moved to quash. The court denied Empire's motion and entered an order to execute the consent judgments, reasoning that the business-use exclusion did not apply and that

the named-driver exclusion was invalid under MCL 500.3009(2). Empire appealed, and the Court of Appeals, HOEKSTRA, P.J., and COOPER and K. F. KELLY, JJ., affirmed in part, reversed in part, and remanded in an unpublished opinion per curiam, issued October 5, 2004 (Docket Nos. 246366, 246367, and 246368). The panel affirmed the trial court's ruling regarding the named-driver exclusion but reversed the trial court's ruling regarding the business-use exclusion, holding that further factual determinations were necessary because the fact that the semi-tractor was traveling without a trailer at the time of the accident created a question of fact regarding whether the truck was being used for a business purpose at that time. The panel noted that the policy exclusions were clear but whether the accident was a covered event was not, explaining that Roger had orally revoked his lease with Sargent, and, contrary to federal regulations, there was no written lease with GLC. On remand, the trial court concluded that even if there had been a lease between Roger and GLC, the business-use exclusion did not preclude coverage. Empire again appealed, and the Court of Appeals, RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ., reversed, holding that the first clause of the business-use exclusion, which precluded coverage if the injury or damage occurred while a covered vehicle was used to carry property in any business, applied despite the fact that the truck was not actually carrying property at the moment of the accident. 298 Mich App 548 (2012). Plaintiffs sought leave to appeal, and the Supreme Court granted their applications. 495 Mich 857 (2013).

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

A clause in an automobile insurance policy excluding coverage while a covered vehicle is used to carry property in any business excludes coverage with respect to a semi-tractor only when the accident occurred during the time that property was attached to the semi-tractor that was used in any business.

1. The parties agreed that the policy provided coverage at the time of the accident, but the business-use exclusion in the policy contained two separate clauses that potentially eliminated Empire's liability under the policy. Under the first clause, the policy did not apply while a covered vehicle was used to carry property in any business. Under the commonly used meanings of the terms in the clause, there would be no coverage if the accident occurred while the semi-tractor was engaged in conveying property from one place to another in any business, that is, while the semi-tractor was physically attached to property and the property was carried in a business. The Court of Appeals erred by placing too great an

emphasis on the definition of the phrase "is used" in the clause while overlooking the import of the phrase "carry property." The Court of Appeals interpretation of the first clause, which essentially defines the clause by whether a semi-tractor is driven in the business of carrying property, is too broad because in the commercial-trucking industry, semi-tractors are intended and designed precisely to carry property and, therefore, would always be used for the purpose of carrying property when used in any business. Because it was undisputed that at the time of the accident, the semi-tractor was driven without attached property, the first clause of the business-use exclusion did not preclude coverage in this case.

2. Under the second clause of the business-use exclusion, the policy did not apply while a covered vehicle was used in the business of anyone to whom the vehicle was leased or rented. To determine that issue, further findings of fact by the trial court were necessary. There was no written lease regarding the use of Drielick Trucking's semi-tractors, as required by federal regulations. While an oral arrangement or course of conduct might have existed between GLC and Drielick Trucking, however, whether that agreement constituted a lease for purposes of the policy was a threshold factual determination that had not yet been fully considered.

Reversed and remanded.

INSURANCE — MOTOR VEHICLES — EXCLUSIONS — SEMI-TRACTORS — USE WITHOUT SEMI-TRAILER (BOBTAIL USE).

A clause in an automobile insurance policy excluding coverage while a covered vehicle is used to carry property in any business excludes coverage with respect to a semi-tractor only when the accident occurred during the time that property was attached to the semi-tractor that was used in any business.

O'Neill Wallace & Doyle PC (by *David Carbajal* and *Robert Andrew Jordan*) for Marie Hunt, Brandon J. Huber, Thomas and Noreen Luczak, and Great Lakes Carriers Corporation.

Hickey, Ciancialo, Fishman & Finn, PC (by *Steven M. Hickey* and *Andrew L. Finn*), for Sargent Trucking, Inc.

David S. Anderson and *Nicolette S. Zachary* for Empire Fire and Marine Insurance Company.

CAVANAGH, J. This appeal involves Empire Fire and Marine Insurance Company's obligations under an "Insurance for Non-Trucking Use" policy issued to Drielick Trucking. The policy contains a business-use exclusion, which includes two clauses that Empire argues preclude coverage in this case. The Court of Appeals agreed that the first clause precludes coverage when the covered vehicle is not carrying property at the time of the accident, as in this case. Thus, the Court of Appeals expressly declined to address the second clause relating to leased covered vehicles. *Hunt v Drielick*, 298 Mich App 548, 553 n 2; 828 NW2d 441 (2012). We hold that the Court of Appeals erred for the reasons explained in this opinion and reverse the judgment of the Court of Appeals. Additionally, we remand this case to the trial court for further fact-finding to determine whether Drielick Trucking and Great Lakes Carriers Corporation (GLC) entered into a leasing agreement for the use of Drielick Trucking's semi-tractors as contemplated under the policy's clause related to a leased covered vehicle.

I. FACTS AND PROCEDURAL HISTORY

Roger Drielick owns Drielick Trucking, a commercial trucking company. It seems that throughout most of the year in 1995, Drielick Trucking leased its semi-tractors to Sargent Trucking (Sargent). Around October 1995, Roger orally terminated the lease agreement with Sargent and began doing business with Bill Bateson, one of the operators of GLC, the other being his wife at the time, Jamie Bateson.

On January 12, 1996, Bill Bateson dispatched Corey Drielick, a truck driver employed by Drielick Trucking, to pick up and deliver a trailer of goods stored on GLC's property. While driving the semi-tractor without an attached trailer, Corey picked up his girlfriend and proceeded to GLC's truck yard.[1] When he was less than two miles away from the yard, Corey was involved in a multivehicle accident. Eugene Hunt died, and Noreen Luczak and Brandon Huber were seriously injured.

Marie Hunt (on behalf of her deceased husband), Thomas and Noreen Luczak, and Huber filed suits against Corey and Roger Drielick, Drielick Trucking, Sargent, and GLC. Empire, which insured Drielick Trucking's semi-tractors under a non-trucking-use, or bobtail, policy, denied coverage and refused to defend under the policy's business-use and named-driver exclusions. Plaintiffs settled with Sargent and GLC. Plaintiffs later entered into consent judgments with the Drielicks and Drielick Trucking. The parties also entered into an "Assignment, Trust, and Indemnification Agreement," wherein they agreed that Roger Drielick would assign the rights under the insurance policy with Empire to plaintiffs, Sargent, and GLC. Sargent and GLC agreed to help plaintiffs' collection efforts from Empire in exchange for a portion of any proceeds received from Empire.

Sargent and GLC filed writs of garnishment against Empire. In response, Empire filed a motion to quash, arguing again that the policy exclusions apply, among

[1] This case involves a semi-tractor driven "bobtail," which means without an attached trailer, as opposed to a semi-tractor driven with an attached trailer that is empty. See *Prestige Cas Co v Mich Mut Ins Co*, 99 F3d 1340, 1343 (CA 6, 1996) (defining "bobtail"), and *Zurich Ins Co v Rombough*, 384 Mich 228, 230; 180 NW2d 775 (1970), citing *Ayers v Kidney*, 333 F2d 812, 813 (CA 6, 1964) (noting that driving a semi-tractor with an attached, but empty, trailer is termed "deadheading").

other things. The trial court denied Empire's motion and entered an order to execute the consent judgments, reasoning that the business-use exclusion does not apply and the named-driver exclusion is invalid under MCL 500.3009(2).[2] The Court of Appeals affirmed the trial court's ruling regarding the named-driver exclusion but reversed the trial court's ruling regarding the business-use exclusion, holding that further factual determinations were necessary because the fact that the semi-tractor "was traveling bobtail at the time of the accident, creat[ed] a question of fact whether the truck was being used for a business purpose at that time." *Hunt v Drielick*, unpublished opinion per curiam of the Court of Appeals, issued October 5, 2004 (Docket Nos. 246366, 246367, and 246368), p 5. The Court mentioned that the policy exclusions are clear but "whether this accident was a covered event is not," explaining that Roger Drielick orally revoked his lease with Sargent, and, contrary to federal regulations, there was no written lease with GLC.[3] *Id*.

On remand, the trial court concluded that, "even if there was a lease between Drielick and [GLC]," the business-use exclusion does not preclude coverage. On appeal, the Court of Appeals reversed, holding that the first clause of the business-use exclusion—precluding

[2] MCL 500.3009(2) states:

> If authorized by the insured, automobile liability or motor vehicle liability coverage may be excluded when a vehicle is operated by a named person. Such exclusion shall not be valid unless the following notice is on the face of the policy or the declaration page or certificate of the policy and on the certificate of insurance: Warning—when a named excluded person operates a vehicle all liability coverage is void—no one is insured. Owners of the vehicle and others legally responsible for the acts of the named excluded person remain fully personally liable.

[3] See 49 CFR 376.11; 49 CFR 376.12.

coverage if injury or damage occurred "while a covered 'auto' is used to carry property in any business"[4]—applies, despite the fact that the truck was not actually carrying property at the moment of the accident. *Hunt*, 298 Mich App at 555-557, citing *Carriers Ins Co v Griffie*, 357 F Supp 441, 442 (WD Pa, 1973).

Plaintiffs sought leave to appeal, which this Court granted.[5]

II. STANDARD OF REVIEW

This case involves the interpretation and application of an insurance policy, which is a question of law reviewed de novo. *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 528; 620 NW2d 840 (2001).

III. ANALYSIS

An insurance policy is similar to any other contractual agreement, and, thus, the court's role is to "determine what the agreement was and effectuate the intent of the parties." *Auto-Owners Ins Co v Churchman*, 440

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[4] As used in the policy, "auto" is defined as "a land motor vehicle, trailer, or semitrailer designed for travel on public roads but does not include 'mobile equipment.' " References throughout this opinion to coverage will be to either "auto" or "vehicle."

[5] We asked the parties to address the following:

> (1) whether a lease agreement is legally implied between Roger Drielick Trucking and Great Lakes Carriers Corporation under the facts of the case and under applicable federal regulation of the motor carrier industry; and (2) if so, whether the Court of Appeals erred in resolving this case on the basis of the first clause of the business use exclusion in the non-trucking (bobtail) policy issued by Empire Fire and Marine Insurance Company, instead of on the basis of the second clause, which excludes coverage for " '[b]odily injury' or 'property damage' . . . while a covered 'auto' is used in the business of anyone to whom the 'auto' is leased or rented." [*Hunt v Drielick*, 495 Mich 857 (2013).]

Mich 560, 566; 489 NW2d 431 (1992). "[W]e employ a two-part analysis" to determine the parties' intent. *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 172; 534 NW2d 502 (1995). First, it must be determined whether "the policy provides coverage to the insured," and, second, the court must "ascertain whether that coverage is negated by an exclusion." *Id*. (citation and quotation marks omitted). While "[i]t is the insured's burden to establish that his claim falls within the terms of the policy," *id*., "[t]he insurer should bear the burden of proving an absence of coverage," *Fresard v Mich Millers Mut Ins Co*, 414 Mich 686, 694; 327 NW2d 286 (1982) (opinion by FITZGERALD, C.J.). See, also, *Ramon v Farm Bureau Ins Co*, 184 Mich App 54, 61; 457 NW2d 90 (1990). Additionally, "[e]xclusionary clauses in insurance policies are strictly construed in favor of the insured." *Churchman*, 440 Mich at 567. See, also, *Group Ins Co of Mich v Czopek*, 440 Mich 590, 597; 489 NW2d 444 (1992) (stating that "the exclusions to the general liability in a policy of insurance are to be strictly construed against the insurer"). However, "[i]t is impossible to hold an insurance company liable for a risk it did not assume," *Churchman*, 440 Mich at 567, and, thus, "[c]lear and specific exclusions must be enforced," *Czopek*, 440 Mich at 597.

A. THE POLICY

At issue is the proper interpretation of the bobtail insurance policy. " 'Bob-tail' in trucking parlance is the operation of a tractor without an attached trailer," and "[f]or insurance purposes, . . . it typically means coverage 'only when the tractor is being used without a trailer or with an empty trailer, and is not being operated in the business of an authorized carrier.' " *Prestige Cas Co v Mich Mut Ins Co*, 99 F3d 1340, 1343

(CA 6, 1996) (citations omitted). The relevant portions of the bobtail insurance policy in this case state:

> A. COVERAGE:
>
> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from ownership, maintenance or use of a covered auto . . . .
>
> * * *
>
> B. EXCLUSIONS:
>
> This insurance does not apply to any of the following:
>
> * * *
>
> 13. BUSINESS USE:
>
> "Bodily injury" or "property damage" while a covered "auto" is used to carry property in any business or while a covered "auto" is used in the business of anyone to whom the "auto" is leased or rented.

B. THE BUSINESS-USE EXCLUSION

Because the parties agree that the policy provided coverage at the time of the accident,[6] we must decide whether the business-use exclusion applies to preclude coverage. *Churchman*, 440 Mich at 567 (stating that "coverage under a policy is lost if any exclusion within the policy applies to an insured's particular claims"). The business-use exclusion includes two separate

[6] The parties do not dispute that Drielick Trucking's semi-tractor involved in the accident falls under the policy's coverage provision. That is, they do not dispute whether the semi-tractor at issue was a covered "auto," which, as we have noted, is defined by the policy as "a land motor vehicle, trailer, or semitrailer designed for travel on public roads but does not include 'mobile equipment.' "

clauses that could apply to a covered vehicle that may prevent Empire's liability under the policy. Specifically, the policy does not apply "[1] while a covered 'auto' is used to carry property in any business or [2] while a covered 'auto' is used in the business of anyone to whom the 'auto' is leased or rented." *Mich Pub Serv Co v City of Cheboygan*, 324 Mich 309, 341; 37 NW2d 116 (1949) (stating that the word "or" is used as "used to indicate a disunion, a separation, an alternative"). See, also, *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003) (stating that words and clauses must be read in context of the preceding and following words and phrases).

1. THE FIRST CLAUSE

The business-use exclusion's first clause states that there is no coverage under the policy "while a covered 'auto' is used to carry property in any business." Considering the commonly used meaning of the undefined terms of the clause to ascertain the contracting parties' intent, *Czopek*, 440 Mich at 596, the word "while" means "[a]s long as; during the time that," *The American Heritage Dictionary of the English Language* (1981). Further, "use" is defined as " 'to employ for some purpose; put into service[.]' " *Hunt*, 298 Mich App at 556, quoting *Random House Webster's College Dictionary* (2001). See, also, *The American Heritage Dictionary of the English Language* (1981) (defining "employ" as "[t]o engage in the services of; to put to work"). Finally, "carry" is defined as "1. To bear or convey from one place to another; transport . . . . 3. To serve as a means for the conveyance or transmission of . . . . 4. To hold or bear while moving . . . ." *Id.* Applying these definitions, the clause makes clear that there is no coverage when the accident occurs during the time that

the semi-tractor is engaged in conveying property from one place to another in any business.

More specifically, we conclude that coverage under the first clause is precluded only during the time that a semi-tractor is physically attached to property and the property is carried in a business. "[W]e must enforce the language of this contract as it is written." *Czopek*, 440 Mich 596-597. It follows that the parties intended the phrase "*carry* property" to mean just that—coverage can only be precluded during the time that the semi-tractor is used to actually transport property in a business. (Emphasis added.) See generally *Prestige*, 99 F3d at 1343 (explaining that bobtail policies typically provide coverage "when the tractor is being used *without a trailer*") (emphasis added). Similarly, we must give meaning to all terms of the contract in order to effectuate the parties' intent. *Churchman*, 440 Mich at 566. If the parties had intended to preclude coverage irrespective of whether property was actually attached to the semi-tractor at the time of the accident, there would have been no need to include the phrase "carry property" in the clause. The Court of Appeals' analysis, which reached the opposite conclusion, highlights this point.

The Court of Appeals held that the property does not have to be attached to the semi-tractor at the time of the accident for the clause to apply; rather, the Court held that the clause applies "during an interval of time when the truck was employed for *the purpose of* carrying property in the trucking business." *Hunt*, 298 Mich App at 556 (emphasis added). The Court of Appeals reasoned that its conclusion is compelled by the definition of the phrase "is used" in the clause. *Hunt*, 298 Mich App at 557 (explaining that to interpret the clause to require that the property must be attached in order

for the clause to apply would "disregard the word 'while' or the phrase 'is used' ").

However, the Court of Appeals erred by placing too great an emphasis on the definition of the phrase "is used," while overlooking the import of the phrase "carry property." In the commercial-trucking industry, semi-tractors are intended and designed precisely to *carry* property and, therefore, would always be used "for the purpose of carrying property," *id*. at 556, when used in any business. Thus, under the Court of Appeals' broad interpretation, the clause is essentially defined by whether a semi-tractor is driven in the business of carrying property. If the parties had intended that the clause's scope be defined solely by whether the semi-tractor was driven in a business, the policy could have simply stated that there is no coverage "while the covered auto is used in any business."

As previously mentioned, in order to give the phrase "carry property" meaning, *Churchman*, 440 Mich at 567, we conclude that the clause was intended to more narrowly preclude coverage during the time that the semi-tractor is physically carrying attached property in a business. See, also, *id*. (stating that exclusionary clauses in insurance contracts are strictly construed). Notably, like the first clause, the scope of the business-use exclusion's second clause is in part defined by whether the semi-tractor is used in a business, but the parties chose not to further qualify the second clause with the phrase "carry property." Accordingly, our interpretation of the first clause does not disregard the phrase "is used" but, rather, appreciates the intended meaning of that phrase *and* the phrase "carry property."

In concluding that the first clause does not require the semi-tractor to actually be carrying property at the time of the accident, the Court of Appeals relied on

Griffie, 357 F Supp at 442, which interpreted a similar exclusionary clause under a bobtail insurance policy and stated, in dicta, that the clause applied to preclude coverage because "[t]he mere fact that no cargo was being handled at the particular moment when the accident occurred does not mean that the equipment was not 'used to carry property in any business.' " *Griffie* reasoned that the equipment "was regularly so used to carry property in the carrier's business"; thus, "[i]f the intent had been to extend coverage except when the equipment was actually hauling a load, it would not have been difficult to express such an intention clearly." *Id*. at 442.

Griffie, like the Court of Appeals in this case, conflated whether the policy's clause requires that a semi-tractor be physically carrying attached property at the time of the accident with the additional requirement that the property also be carried "in any business." The question is not whether the semi-tractor *itself* was used in a business for the purpose of carrying property at the time of the accident; rather, the question is whether the accident occurred while the semi-tractor is actually carrying property in any business. Notably, decades after *Griffie* was decided, *Conn Indemnity Co v Stringfellow*, 956 F Supp 553, 557 (MD Pa, 1997), considered an exclusionary clause that was practically identical to the clause at issue and expressly disagreed with *Griffie*. *Stringfellow* explained that "if the covered vehicle or vehicles are not being used to *carry property*, the exclusion does not apply and cannot be relied upon to deny coverage." *Id*. at 558 (emphasis added). *Stringfellow* also concluded that *Griffie* "significant[ly] alter[ed] . . . the actual language" of the exclusion. *Id*.[7]

[7] The Court of Appeals attempted to factually distinguish *Stringfellow*; however, its reasoning stemmed from conflating whether the semi-tractor was, in fact, carrying property with whether the carrying of

In this case, it is undisputed that at the time of the accident, the semi-tractor was driven without attached property. Accordingly, in light of our conclusion that the business-use exclusion's first clause precludes coverage as long as the covered vehicle is carrying attached property in any business, we hold that the first clause does not preclude coverage in this case.

2. THE SECOND CLAUSE

Because we hold that the first clause of the business-use exclusion does not preclude coverage, it is necessary to determine whether the second clause does. After considering the record in light of the trial court's prior factual findings, we conclude that this case requires that the trial court make further findings of fact.

It is clear that Drielick Trucking and the Batesons did not enter a written lease regarding the use of Drielick Trucking's semi-tractors, contrary to federal regulations.[8] Because Drielick Trucking's and the Batesons' business relationship was in direct contravention

property was in furtherance of a business purpose. See *Hunt*, 298 Mich App at 556 n 5 (explaining that "in *Stringfellow*, the driver was not under any order to pick up or drop off property, nor was he engaged in any sort of inspection as was the driver in *Griffie*").

[8] Specifically, 49 CFR 376.11 and 49 CFR 376.12 require that if a semi-tractor owner leases its equipment to a carrier, a written lease agreement must be executed. See *Transamerican Freight Lines, Inc v Brada Miller Freight Sys, Inc*, 423 US 28, 36-37; 96 S Ct 229; 46 L Ed 2d 169 (1975) (explaining that the federal regulations mandate that the "lessee must assume the responsibility for the shipment and have full authority to control it," and, to that end, the regulations require a written lease agreement, which helps in "fixing of the lessee's responsibility") (citation omitted). However, the fact that no written lease was entered into in this case does not preclude the trial court on remand from concluding that a lease was in fact entered into. See *Wilson v Riley Whittle, Inc*, 145 Ariz 317, 321; 701 P2d 575 (Ariz App, 1984) (explaining that "the absence of a written trip lease is legally irrelevant").

of applicable federal regulations, our order granting leave to appeal focused primarily on the potential lease agreement and whether the Court of Appeals should have, instead, resolved this case under the policy's leasing clause.

Apparently considering that clause, the trial court previously explained that the parties had agreed that there are no material issues of fact in dispute; however, that does not appear to be the case. Bill and Jamie Bateson operated Great Lakes Logistics & Services (GLLS), in addition to the carrier company, GLC. GLLS was a brokerage company that connected semi-tractor owners, such as Roger Drielick, with carriers that are federally authorized to transport goods interstate, such as GLC. The parties dispute whether Bill Bateson dispatched Corey under GLC's authority or merely brokered the deal under GLLS's authority. Furthermore, the trial court considered the parties' "verbal agreement and course of conduct," concluding that the payment terms and the fact that Corey was not bound by a strict pick-up deadline meant that the business relationship was not triggered until Corey actually picked up for delivery the trailer of goods. Yet it remains uncertain whether the parties entered into a *leasing* agreement *as contemplated by the terms of the insurance policy*. Barring GLLS's alleged involvement, an oral arrangement or course of conduct might have existed between GLC and Drielick Trucking, but whether that agreement constituted a lease for the purposes of the policy is a threshold factual determination that has not yet been fully considered.

Accordingly, we direct the trial court on remand to consider the parties' agreement to decide whether there was, in fact, a leasing agreement between Drielick Trucking and GLC as contemplated by the business-use

exclusion's leasing clause. If so, the precise terms of that agreement must be determined, and the trial court should reconsider whether Corey was acting in furtherance of a particular term of the leasing agreement at the time of the accident.

IV. CONCLUSION

We hold that the first clause of the business-use exclusion precluding coverage "while a covered 'auto' is used to carry property in any business" is properly construed as excluding coverage with respect to a semi-tractor only when the accident occurs during the time that property is attached to the semi-tractor that is used in any business. Accordingly, we reverse the judgment of the Court of Appeals. Given that coverage is not precluded under the business-use exclusion's first clause, it is necessary to determine whether coverage is nonetheless precluded under the second clause of the exclusion relating to a leased covered vehicle. In that regard, we remand this case for the trial court to make further factual determinations consistent with our analysis and consider whether the second clause precludes coverage in light of the trial court's additional findings of fact.

We do not retain jurisdiction.

YOUNG, C.J., and MARKMAN, KELLY, ZAHRA, MCCORMACK, and VIVIANO, JJ., concurred with CAVANAGH, J.

FORD MOTOR COMPANY v DEPARTMENT OF TREASURY

Docket No. 146962. Argued April 2, 2014 (Calendar No. 1). Decided June 26, 2014.

Ford Motor Company brought an action in the Court of Claims against the Department of Treasury, seeking a refund of taxes it had paid under protest after defendant had determined that contributions made to the voluntary employees' beneficiary association (VEBA) trust fund plaintiff had established were taxable under the now repealed Single Business Tax Act (SBTA), MCL 208.1 *et seq*. The Court of Claims, Paula J. M. Manderfield, J., rejected plaintiff's claim that the VEBA contributions were not taxable under the SBTA and granted summary disposition to defendant. Plaintiff appealed and the Court of Appeals, ZAHRA, P.J., and WHITBECK and M. J. KELLY, JJ., reversed, holding that the VEBA contributions were not taxable under the SBTA. 288 Mich App 491 (2010). The Supreme Court denied defendant's application for leave to appeal. 488 Mich 1026 (2011). Plaintiff filed a motion in the Court of Claims to enforce the Court of Appeals' judgment. Before the motion was decided, the Treasury calculated that it owed plaintiff $15 million, rather than the $17 million that plaintiff claimed was due, and remitted $15 million to plaintiff. The approximate $2 million difference resulted in part from the parties' disagreement regarding the date that plaintiff filed its claim for a refund, thus triggering interest accumulation on the refund under MCL 205.30. The parties agreed that overpayment interest began accruing 45 days after the date that plaintiff provided the Treasury with adequate notice of a claim for refund of tax overpayment, but plaintiff argued that September 17, 2005, was the correct date to calculate the amount of overpayment interest because it was 45 days after plaintiff responded to the Treasury's August 3, 2005 Audit Determination Letter, while the Treasury argued that plaintiff had not provided adequate notice until December 13, 2006, when it filed its initial complaint in the Court of Claims. The Court of Claims ruled in plaintiff's favor, ordered the Treasury to pay additional overpayment interest, and directed the Treasury to pay costs and attorney fees to plaintiff. The Treasury appealed, and after reconsideration, in an unpublished opinion per curiam issued February 26, 2013 (Docket No.

306820), the Court of Appeals, WHITBECK, P.J., and FITZGERALD and BECKERING, JJ., reversed the trial court on the calculation of overpayment interest, vacated the award of attorney fees, and remanded to the trial court for further consideration of the attorney fees. The Supreme Court granted leave to appeal, asking the parties to address issues related to the calculation of interest on the refund. 495 Mich 861 (2013).

In an opinion by Justice CAVANAGH, joined by Justices KELLY, ZAHRA, and MCCORMACK, the Supreme Court *held*:

In order to trigger the accrual of interest on a tax refund under MCL 205.30, a taxpayer must pay the disputed tax, make a claim or petition for a refund, and file the claim or petition. Although a claim or petition need not take any specific form, it must clearly demand, request, or assert a right to a refund of tax payments made to the Department of Treasury that the taxpayer asserts are not due. Additionally, in order to file the claim or petition, a taxpayer must submit the claim to the Treasury in a manner sufficient to provide the Treasury with adequate notice of the taxpayer's claim. Because plaintiff's August 25, 2006 letter to the Treasury satisfied all the requirements of MCL 205.30, pursuant to MCL 205.30(3), interest began accruing on the refund 45 days later, on October 9, 2006.

1. Under MCL 205.30(1), the Treasury must credit or refund taxes erroneously collected. MCL 205.30(2) establishes what a taxpayer who paid a tax must do to obtain a refund of the amount paid. Therefore, in order to seek a tax refund, a taxpayer must first have paid the tax at issue.

2. A taxpayer's claim or petition for a refund under MCL 205.30(2) need not take any specific form as long as it clearly requests or demands that the Treasury return tax payments that the taxpayer asserts were not due. The Revenue Act does not define "petition" or "claim" as used in MCL 205.30; however, the relevant dictionary definitions of these terms indicated that a taxpayer must only demand, request, or assert an existing right to the refund.

3. Under MCL 205.30(3), interest must only be "added to the refund commencing 45 days after the claim is filed." While the Revenue Act does not define "filed," the relevant dictionary definitions indicated that, in order for a taxpayer's claim for refund to trigger the 45-day waiting period in MCL 205.30(3), the taxpayer must have submitted the claim to the Treasury in order to inform or notify the Treasury that the taxpayer believed it was entitled to a refund. This interpretation was consistent with the purpose of the 45-day waiting period between submission of the

claim or petition and the start of interest accumulation on the refund, which was to allow the Treasury to investigate the taxpayer's claim for a refund and determine its validity before interest begins accumulating. In order to give effect to the legislative intent regarding the 45-day waiting period, the Treasury must be permitted to investigate the claim, and, in order to investigate the claim, the Treasury must have adequate notice of it.

4. Plaintiff's expression of disagreement with the Treasury's August 3, 2005 audit determination letter was not sufficient to constitute a claim or petition for refund of the money associated with that determination because it was not a demand for, request for, or assertion of a right to a refund, as MCL 205.30 requires. Likewise, plaintiff's November 17, 2005 request for an informal conference with the Treasury did not constitute a claim or petition for refund under MCL 205.30 because the request did not include a demand or request for or an assertion of a right to a refund. However, plaintiff's August 25, 2006 letter to the Treasury did constitute a claim or petition for refund under MCL 205.30 because, by referring to MCL 205.22 in expressing plaintiff's decision to institute a formal legal action in a court of law, the letter indicated that plaintiff was claiming a refund as contemplated by MCL 205.22.

5. Plaintiff's August 25, 2006 letter to the Treasury satisfied the requirement that the claim or petition for refund of the amount paid be filed because it was mailed to the Treasury and, as evidenced by the Treasury's responsive letter dated September 15, 2006, the Treasury received it. Accordingly, all the requirements of MCL 205.30 were satisfied on August 25, 2006, and pursuant to MCL 205.30(3), interest began accruing on the refund 45 days later, on October 9, 2006.

Reversed and remanded to the trial court for further consideration of the attorney-fee issue.

Justice MARKMAN, joined by Chief Justice YOUNG and Justice VIVIANO, concurring in part and dissenting in part, agreed with Part III of the majority opinion, which held that in order to trigger the accrual of overpayment interest under MCL 205.30, a taxpayer must pay the disputed tax, make a claim or petition for a refund, and file the claim or petition. He dissented from the majority's conclusion in Part IV that plaintiff's August 25, 2006 letter to the Department of Treasury satisfied the statutory requirements of MCL 205.30, because it nowhere made a claim or petition for any right to a refund. He noted that by considering the letter's invocation of MCL 205.22 to constitute

a claim for a refund, the majority had conflated that provision's two separate requirements that a plaintiff first pay the tax under protest and then claim a refund as part of the appeal, thereby rendering the requirement that there be a claim of a refund meaningless. He would have affirmed the result of the Court of Appeals and held that plaintiff did not satisfy the requirements of MCL 205.30 until it actually filed its complaint, which included a claim for a refund, in the Court of Claims on December 13, 2006.

TAXATION — TAX REFUNDS — ACCRUAL OF INTEREST — CLAIM OR PETITION FOR REFUND.

In order to trigger the accrual of interest on a tax refund under MCL 205.30, a taxpayer must pay the disputed tax; make a claim or petition for a refund that clearly demands, requests, or asserts a right to a refund of tax payments made to the Department of Treasury that the taxpayer asserts are not due; and file the claim or petition in a manner that is sufficient to provide the Treasury with adequate notice of the taxpayer's claim.

Miller, Canfield, Paddock and Stone, PLC (by *Loren M. Opper*, *Clifford W. Taylor*, and *Paul D. Hudson*), for plaintiff.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Matthew B. Hodges*, Assistant Attorney General, for defendant.

Amicus Curiae:

Evan H. Kaploe for the State Bar of Michigan, Taxation Section.

CAVANAGH, J. In this case, we must determine what actions a taxpayer must take under MCL 205.30 of the Revenue Act to trigger the accrual of interest on a tax refund. We hold that in order to trigger the accrual of interest, the plain language of the statute requires a taxpayer to (1) pay the disputed tax, (2) make a "claim" or "petition" for a refund, and (3) "file" the claim or

petition. Although a "claim" or "petition" need not take any specific form, it must clearly demand, request, or assert a right to a refund of tax payments made to the Department of Treasury that the taxpayer asserts are not due. Additionally, in order to "file" the claim or petition, a taxpayer must submit the claim to the Treasury in a manner sufficient to provide the Treasury with adequate notice of the taxpayer's claim.

I. FACTS AND PROCEDURAL HISTORY

This case began as a dispute between the parties regarding whether plaintiff owed tax under the now repealed Single Business Tax Act (SBTA) related to plaintiff's contributions to its Voluntary Employees' Beneficiary Association (VEBA) trust fund for 1997 through 2001.

On August 3, 2005, the Treasury sent an Audit Determination Letter informing plaintiff that the Treasury had determined that the VEBA contributions were taxable under the SBTA and, on the same day, plaintiff returned the letter to the Treasury after checking the box on the letter indicating that plaintiff "disagrees with this determination."[1] The Audit Determination Letter incorporated the Audit Report of Findings pre-

[1] The August 3, 2005 Audit Determination Letter stated:

> Michigan Department of Treasury[,] Audit Determination Letter[,] Single Business Tax[,] Taxpayer Name: FORD MOTOR COMPANY[,] Account No. 380549190[,] Audit Determination[,] Audit Period: 12/09/97 to 12/30/01[.] Net Tax Due $19,742,347[.] Interest 1,641,958[.] Penalty 0[.] Total Amount Due 21,384,305[.] The above determination is subject to final review and approval by the Michigan Department of Treasury. . . Taxpayer ___ agrees with this determination. ___ disagrees with this determination . . . Appeal Rights[.] If you disagree with this deficiency, please wait until you receive a notice of 'intent to assess' additional tax, penalty or interest and then file your written

pared by the Treasury, which acknowledged that plaintiff "disagrees with the audit determination" and "want[s] to request a hearing on the contested issue." During the audit process, plaintiff provided the Treasury with detailed summaries of the amount of disputed tax for each tax year.

On November 17, 2005, plaintiff requested an informal conference with the Treasury regarding the determination that the VEBA contributions were taxable, among other issues. On August 25, 2006, plaintiff sent a letter to the Treasury withdrawing plaintiff's request for an informal conference, informing the Treasury that plaintiff intended to file a complaint in the Court of Claims, and requesting that the Treasury verify that the disputed tax liability was satisfied with unassigned funds that plaintiff had on deposit with the Treasury. Plaintiff's August 25, 2006 letter stated that application of plaintiff's funds on deposit with the Treasury should be viewed as a payment "under protest" under MCL 205.22. On September 15, 2006, the Treasury sent plaintiff a Final Audit Determination letter assessing plaintiff a tax liability approximately $20 million greater than the single business tax plaintiff previously paid. The Treasury also stated that plaintiff owed approximately $2 million in tax deficiency interest. On September 19, 2006, plaintiff informed the informal conference division that it was withdrawing its request.

On December 13, 2006, plaintiff filed a complaint in the Court of Claims asserting that the VEBA contributions were not taxable under the SBTA. That court rejected plaintiff's claim and granted summary disposition to the Treasury. Plaintiff appealed and the Court of Appeals reversed, holding that the VEBA contributions

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request for an informal conference (within 30 days after receipt) to the Michigan Department of Treasury[.]

were not taxable under the SBTA. *Ford Motor Co v Dep't of Treasury*, 288 Mich App 491; 794 NW2d 357 (2010), lv den 488 Mich 1026 (2011).

On August 29, 2011, plaintiff filed a motion in the Court of Claims to enforce the Court of Appeals' judgment. Before the motion was decided, the Treasury calculated that it owed plaintiff $15 million rather than the $17 million that plaintiff claimed was due and, on September 19, 2011, the Treasury remitted $15 million to plaintiff. The approximate $2 million difference resulted in part from the parties' disagreement regarding the date that plaintiff filed its claim for a refund, thus triggering interest accumulation on the refund under MCL 205.30.

At a hearing, the parties agreed that overpayment interest began accruing 45 days after the date that plaintiff provided the Treasury with adequate notice of a claim for refund of tax overpayment. Regarding the difference between plaintiff's claim that it was entitled to a $17 million refund rather than the $15 million refund that the Treasury provided, plaintiff argued that September 17, 2005, was the correct date to calculate the amount of overpayment interest because it was 45 days after plaintiff responded to the Treasury's August 3, 2005 Audit Determination Letter, which plaintiff argued constituted adequate notice of a claim of refund. The Treasury argued that plaintiff did not provide adequate notice until December 13, 2006, when plaintiff filed its initial complaint in the Court of Claims and, therefore, the correct date for calculating the overpayment interest was 45 days after December 13, 2006.

The Court of Claims held in plaintiff's favor, ordered the Treasury to pay additional overpayment interest, and directed the Treasury to pay costs and attorney fees to plaintiff. The Treasury appealed, and after reconsid-

eration, the Court of Appeals reversed the trial court on the calculation of overpayment interest, vacated the award of attorney fees, and remanded to the trial court for further consideration of the attorney fees. *Ford Motor Co v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued February 26, 2013 (Docket No. 306820). We granted leave to appeal, asking the parties to address issues related to the calculation of interest on the refund. *Ford Motor Co v Dep't of Treasury*, 495 Mich 861 (2013).

II. STANDARD OF REVIEW AND RULES OF STATUTORY INTERPRETATION

This case requires interpretation of the Revenue Act. Questions of statutory interpretation are reviewed de novo. *Malpass v Dep't of Treasury*, 494 Mich 237, 245; 833 NW2d 272 (2013). A trial court's factual findings are reviewed for clear error. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008). A factual finding is clearly erroneous "only when the reviewing court is left with the definite and firm conviction that a mistake has been made." *Id*. (citation omitted).

When interpreting statutes, "our primary task . . . is to discern and give effect to the intent of the Legislature." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999) (citations omitted). To accomplish that task, we begin by examining the language of the statute itself. *Id*. (citation omitted). "If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Id*. (citation omitted).

III. ANALYSIS

Prior proceedings established that the Treasury erroneously assessed tax on plaintiff's contributions to its

VEBA trust fund; thus, the only issue we consider today is the actions a taxpayer must take to trigger the accumulation of interest on a refund. The Revenue Act, MCL 205.1 *et seq*., governs refunds of erroneously assessed taxes. Specifically, MCL 205.30 provides:

> (1) The department shall credit or refund . . . taxes . . . erroneously assessed and collected . . . with interest . . . .
>
> (2) A taxpayer who *paid a tax* that the taxpayer claims is not due *may petition the department for refund of the amount paid* within the time period specified as the statute of limitations in [MCL 205.27a]. If a tax return reflects an overpayment . . . the declaration of that fact on the return constitutes a claim for refund. If the department agrees the claim is valid, the amount of overpayment, penalties, and interest shall be first applied to any known liability as provided in [MCL 205.30a] and the excess, if any, shall be refunded to the taxpayer or credited, at the taxpayer's request, against any current or subsequent tax liability. . . .
>
> (3) The department shall certify a refund to the state disbursing authority who shall pay the amount out of the proceeds of the tax in accordance with the accounting laws of the state. *Interest . . . shall be added to the refund commencing 45 days after the claim is filed* or 45 days after the date established by law for the filing of the return, whichever is later. Interest on refunds intercepted and applied as provided in [MCL 205.30a] shall cease as of the date of interception. . . . [Emphasis added.][2]

Thus, the statutory language establishes that, before interest begins accumulating on a tax refund, a taxpayer must: (1) pay the disputed tax; (2) make a "claim" or "petition;" and (3) "file" the claim or petition.

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[2] The Legislature amended MCL 205.30 in 2013 and 2014. 2013 PA 133; 2014 PA 3. Because the trial court decided the issues relevant to this case before the effective dates of the 2013 and 2014 amendments, we analyze this case under the statutory provisions in effect at the time of the trial court's decision.

A. A TAXPAYER MUST PAY THE DISPUTED TAX

The statutory language provides that the Treasury must credit or refund taxes "erroneously . . . *collected*." MCL 205.30(1) (emphasis added). Additionally, MCL 205.30(2) establishes what a taxpayer "who *paid a tax*" must do to obtain a refund "of the *amount paid*." Emphasis added. Therefore, the statute makes clear what is already obvious: in order to seek a tax refund, a taxpayer must first pay the tax at issue.

B. A TAXPAYER MUST "PETITION" FOR OR "CLAIM" A REFUND

If the taxpayer paid the tax, MCL 205.30(2) provides that a taxpayer may make a "petition" or "claim" for refund. The Revenue Act does not define "petition" or "claim" as used in MCL 205.30. Therefore, we presume that the Legislature intended for the words to have their ordinary meaning. MCL 8.3a. To assist in determining the ordinary meaning of the relevant words, we may consult a dictionary. *Klooster v City of Charlevoix*, 488 Mich 289, 304; 795 NW2d 578 (2011) (citation omitted). Relevant definitions of "claim" include: (1) "[t]o demand as one's due; assert one's right to," (2) "[a] demand for something as one's rightful due; affirmation of a right," *The American Heritage Dictionary of the English Language: New College Edition*, (3) "to ask for esp. as a right," and (4) "to assert to be rightfully one's own," *Merriam-Webster's Collegiate Dictionary* (11th ed). See, also, *Black's Law Dictionary* (9th ed) (defining "claim" in part as "[t]he assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional the <spouse's claim to half of the lottery winnings>" and "[a] demand for money, property, or a legal remedy to which one asserts a right . . . .").

Because the word "petition" is used as a verb within MCL 205.30(2), see *The American Heritage Dictionary of the English Language: New College Edition* (explaining that when "petition" is used as a verb, it is "[o]ften followed by *for*"),[3] the relevant definitions include: (1) "[t]o ask for by petition; request formally," *The American Heritage Dictionary of the English Language: New College Edition*, and (2) "to make a request to: SOLICIT . . . to make a request; *esp* : to make a formal written request," *Merriam-Webster's Collegiate Dictionary* (11th ed). See, also, *Muldavin v Dep't of Treasury*, 184 Mich App 222, 226; 457 NW2d 50 (1990) (holding that under MCL 205.30(2) "tax overpayment would have to be *requested* either on a . . . tax return or by separate petition . . . .") (emphasis added).

Along with the relevant dictionary definitions, our order in *NSK Corp v Dep't of Treasury*, 481 Mich 884 (2008), provides further insight regarding the proper interpretation of the terms "petition" and "claim" in MCL 205.30. In *NSK Corp*, the Treasury conducted an audit and subsequently sent an Audit Determination Letter informing the taxpayer that the taxpayer had overpaid its taxes.[4] The taxpayer responded to the letter by checking the box indicating that the taxpayer agreed with the Treasury's conclusion that a refund was owed in the amount the Treasury stated, but also checked the box on the letter indicating that the taxpayer disagreed with the Treasury's determination. Regarding that disagreement, the taxpayer included a written statement demanding interest on

[3] As used in MCL 205.30(2), "petition" is followed by "for:" "A taxpayer who paid a tax that the taxpayer claims is not due may *petition* the department *for* refund . . . ." Emphasis added.

[4] The Audit Determination Letter in *NSK Corp* was the same as the Audit Determination Letter that the Treasury sent to plaintiff in this case.

the refund under MCL 205.30. The Court of Appeals concluded that the taxpayer was entitled to interest, and that the triggering date for the 45-day waiting period under MCL 205.30(3) was the date that the Treasury sent the Audit Determination Letter to the taxpayer because that was when the Treasury "was aware that [the taxpayer] was entitled to a refund . . . ." *NSK Corp v Dep't of Treasury*, 277 Mich App 692, 698; 746 NW2d 886 (2008).

We rejected the Court of Appeals' conclusion with respect to the triggering date for accumulation of interest and instead held that MCL 205.30(2) "requires that the claim be one made by the taxpayer seeking a refund *either in a tax return or by separate request*." *NSK Corp*, 481 Mich at 884 (emphasis added). We concluded that the taxpayer in *NSK Corp* did not satisfy that requirement until it "responded . . . to the Treasury Department's Audit Determination Letter, agreeing with the amount of the refund, but demanding interest on the refund." *Id*.

Today, we reaffirm our interpretation of the statute in *NSK Corp*: we conclude that under MCL 205.30 a taxpayer can make a claim for a refund in the form of a tax return, as specifically permitted in MCL 205.30(2), or "by separate request." *NSK Corp*, 481 Mich at 884. Additionally, considering the relevant definitions of "claim" and "petition," we further conclude that a taxpayer is not required to make the claim on a specific Treasury form or in any other specific manner in order to satisfy MCL 205.30. Rather, a taxpayer must only "demand" or "request" the refund or "assert[] . . . an existing right" to the refund. For example, in *NSK Corp*, the taxpayer responded to the Treasury's Audit Determination Letter by adding information to the form and returning it to the Treasury. Because the form, combined with the additional information explic-

itly demanded a refund and interest on the refund, it constituted a "claim" for a refund.[5]

Alternatively, a taxpayer could satisfy the statutory requirement by sending a separate letter to the Treasury, as long as the letter included the information necessary to constitute a definite demand for, request for, or assertion of a right to a refund. For example, the taxpayer in *Lindsay Anderson Sagar Trust v Dep't of Treasury*, 204 Mich App 128, 129; 514 NW2d 514 (1994), "wrote a letter to . . . [the] Treasury *requesting a refund of $156,961*, which the [taxpayer] claimed had been erroneously paid." Emphasis added. In short, because a taxpayer can demand, request, or assert a right to a refund by a multitude of methods, we conclude that the taxpayer's "claim" or "petition" need not take any specific form, so long as it clearly requests or demands that the Treasury return tax payments that the taxpayer asserts were not due.

C. THE PETITION OR CLAIM MUST BE "FILED"

Finally, under MCL 205.30(3), interest must only be "added to the refund commencing 45 days after the claim is *filed* . . . ." Emphasis added. As with the terms "claim" and "petition," the Revenue Act does not define "filed." Therefore, we again consult the dictionary for guidance in determining the ordinary meaning of the word. The relevant definitions of "file" include: (1) "to initiate (as a legal action) through proper formal procedure," (2) "to submit documents necessary to initiate a legal proceeding,"

[5] Although the taxpayer's claim for a refund in *NSK Corp* included a demand for interest on the refund, we clarify that the statutory language only requires a "claim" or a "petition" for a *refund*; it does not require a taxpayer to also "claim" or "petition" for interest itself in order to satisfy the requirements in MCL 205.30.

Merriam-Webster's Collegiate Dictionary (11th ed), (3) "[t]o enter (a legal document, for example) on public record or official record," and (4) "[t]o apply: *file for a job*," *The American Heritage Dictionary of the English Language: New College Edition*.

Applying the definitions of "file" to the statute, we conclude that, in order for a taxpayer's "claim" for refund to trigger the 45-day waiting period in MCL 205.30(3), the taxpayer must "submit" the claim to the Treasury. The clear goal of "filing" the claim is to inform the Treasury that the taxpayer believes that the taxpayer is entitled to a refund. Indeed, the relevant dictionary definitions of "file" seem to imply that the purpose of the act of "filing" is to inform or notify others of something, whether it is the filer's intent to initiate a legal action, apply for a job, or engage in some other activity. Accordingly, as the Court of Appeals stated in *Sagar Trust*, 204 Mich App at 132, "a claim [for a refund] is *filed* when [the Treasury] receives *adequate notice of the claim*." Emphasis added. Indeed, if a taxpayer desires to obtain a refund and seeks to achieve that goal by making a "claim" or "petition" for the refund, logic requires that the taxpayer must notify the Treasury of the taxpayer's belief that it is entitled to a refund. Otherwise, the only entity that can grant the taxpayer's claim for a refund—the Treasury—will remain unaware that the taxpayer seeks a refund.

Likewise, interpreting the word "file" in MCL 205.30(3) as requiring a taxpayer to provide the Treasury with adequate notice of the taxpayer's claim or petition for a refund is consistent with the purpose of the 45-day waiting period between submission of the claim or petition and the start of interest accumulation on the refund. Specifically, MCL 205.30(2) states that a refund shall be paid "[i]f the [Treasury] department *agrees that the claim is valid* . . . ." Em-

phasis added. Therefore, MCL 205.30(3) creates a 45-day waiting period so that the Treasury can investigate the taxpayer's claim for a refund and determine its validity before interest begins accumulating. In order to give effect to the legislative intent regarding the 45-day waiting period, the Treasury must be permitted to investigate the claim, and, in order to investigate the claim, the Treasury must have adequate notice of the claim, as the Court of Appeals held in *Sagar Trust*.

In summary, when the statute is read as a whole it is clear that, in order to trigger the 45-day waiting period before interest begins to accrue on a tax refund, a taxpayer must (1) have actually paid the tax at issue; (2) make a "petition . . . for" a refund or "claim for refund" by demanding, requesting, or asserting a right to a refund of tax payments that the taxpayer made to the Treasury return that the taxpayer asserts are not due; and (3) "file" the claim or petition by submitting it to the Treasury, thereby providing the Treasury with adequate notice of the taxpayer's claim for a refund.

IV. APPLICATION

Applying the above framework to this case, we must first determine when plaintiff paid the disputed tax, because plaintiff could not "claim" or "petition" for a refund until after the disputed tax was paid. The record reflects that plaintiff kept unassigned funds on deposit with the Treasury and that plaintiff could assign those funds to its tax liabilities by directing the Treasury to apply the funds to specific tax liabilities. As relevant to this case, the record reflects that plaintiff had funds on deposit with the Treasury sufficient to pay the disputed tax liability no later than October 31, 2002, and that the Treasury acknowledged that plaintiff directed the Trea-

sury to apply those funds to the disputed tax liability. In addition, during an October 6, 2011 hearing, the trial court concluded that plaintiff had paid the disputed tax liability no later than October 31, 2002. Because the trial court's conclusion is supported by record evidence, we are not left with a definite and firm conviction that a mistake was made. Therefore, plaintiff satisfied the first requirement for obtaining a refund—paying the disputed tax—no later than October 31, 2002.

Next, we must determine whether plaintiff made a "claim" or "petition" for a refund. Plaintiff argues that it made a claim or petition for refund on August 3, 2005, when it responded to the Treasury's Audit Determination Letter by checking the box indicating that plaintiff "disagrees with this determination." Specifically, plaintiff contends that its expression of disagreement on August 3, 2005, coupled with the other information known to the Treasury as a result of the audit process, constitutes a claim or petition for refund.[6] Thus, the question is whether, when considered in context with the information known to the Treasury, expressing disagreement with the Treasury's tax assessment is sufficient to constitute a claim or petition for refund of the money associated with that determination.

To begin with, there is no dispute that plaintiff made clear its *disagreement* with the Treasury's audit determination regarding the taxability of the VEBA contri-

[6] Plaintiff argues that the Treasury knew that plaintiff (1) had filed returns stating the amount of tax plaintiff believed was due, (2) did not treat the VEBA contributions as taxable, (3) disagreed with the Treasury's conclusion that the VEBA contributions were taxable, and (4) had made previous payments sufficient to cover the disputed tax liability. Plaintiff also notes that, in a September 19, 2005 letter, the Treasury acknowledged that it was aware of plaintiff's disagreement with the tax assessment and argument regarding the VEBA contributions and encouraged plaintiff to pursue legal remedies.

butions and that subsequent court proceedings eventually proved plaintiff correct. Additionally, there may be some appeal to the seemingly logical conclusion that a taxpayer who expresses disagreement with a tax assessment is also likely to request a refund of funds paid to satisfy the disputed assessment. However logical that conclusion may appear, the statutory language nevertheless requires more of a taxpayer: the taxpayer must make a claim or petition for a refund, which, as we previously established, requires the taxpayer to explicitly demand, request, or assert a right to a refund. Although expressing disagreement with a tax assessment may *imply* that the taxpayer may seek a refund, an expression of disagreement alone is not a demand for, request for, or assertion of a right to a refund.

Indeed, although we approached the issue from the opposite direction in *NSK Corp* because in that case the Treasury determined that the taxpayer was entitled to a refund, we nevertheless reached the same conclusion. Specifically, we held that the 45-day waiting period before interest begins to accrue on a tax refund is not triggered merely because the Treasury is aware that the taxpayer is entitled to a refund. Although it is seemingly logical that a taxpayer entitled to a refund will indeed request that refund, we nevertheless concluded that the statutory language requires something more: the taxpayer must make a "separate request" for the refund. *NSK Corp*, 481 Mich at 884. Therefore, if the Treasury's actual knowledge that a taxpayer is entitled to a refund is not sufficient to trigger the 45-day waiting period under MCL 205.30(3), a taxpayer's mere expression of disagreement with a tax assessment cannot constitute a claim or petition for a refund sufficient to trigger the interest waiting period. Rather, the taxpayer must make a "separate request" that clearly demands, requests, or asserts a right to a refund. Because plain-

tiff's August 3, 2005 response to the Audit Determination Letter did not make such a demand, request, or assertion, it was not a "claim" for a refund under MCL 205.30.

We also asked the parties to address whether plaintiff's November 17, 2005 request for an informal conference with the Treasury constituted a claim or petition for refund under MCL 205.30. Although a request for an informal conference could potentially constitute a claim or petition for a refund under the statutory language if the request includes a demand or request for or an assertion of a right to a refund, we conclude that plaintiff's request for an informal conference in this case did not make such a demand, request, or assertion.

First, nowhere in the request for an informal conference did plaintiff expressly demand, request, or assert a right to a refund of the VEBA-contribution tax that plaintiff paid. Rather, the request for an informal conference only expressed plaintiff's disagreement with the result of the Treasury's audit. In fact, the request for an informal conference stated that plaintiff "will be working with the [Treasury's] audit team to narrow the issues in dispute." Therefore, plaintiff's request for an informal conference seems to indicate that plaintiff believed that the disagreement could be resolved by further negotiations between the parties rather than a claim or petition for refund. Second, plaintiff's request for an informal conference listed "the most material items" with which plaintiff disagreed, which included issues that do not form the basis for plaintiff's refund associated with its VEBA contributions. Therefore, because the request for an informal conference addressed multiple issues, it did not indicate that plain-

tiff sought a refund for the tax associated with the VEBA contribution. Rather, the request for an informal conference merely listed multiple points of disagreement. Accordingly, we conclude that the request for an informal conference was not a claim or petition for refund for purposes of MCL 205.30.

Next, we consider whether plaintiff's August 25, 2006 letter to the Treasury constituted a claim or petition for refund under MCL 205.30. The August 25, 2006 letter withdrew plaintiff's request for an informal conference and informed the Treasury that plaintiff would file an action in the Court of Claims. The letter stated that plaintiff's prior payment of the tax assessment associated with plaintiff's VEBA contributions "should be viewed as a payment under protest within the meaning of MCL 205.22."

Although a taxpayer need not file a lawsuit under MCL 205.22 in order to make a "claim" or "petition" for a refund, we conclude that the reference to this statute in plaintiff's August 25, 2006 letter constituted a claim or petition for refund under MCL 205.30. By referring to MCL 205.22 in expressing plaintiff's decision to institute a formal legal action in a court of law, the August 25, 2006 letter indicated that plaintiff was at that time "claim[ing] a refund" as distinctly contemplated by MCL 205.22.[7] In other words, by notifying the Treasury that plaintiff would resolve the dispute in the Court of Claims pursuant to MCL 205.22, the August 25, 2006 letter asserted a right to a refund by affirmatively notifying the Treasury that plaintiff was making

[7] Specifically, under MCL 205.22(2), in order to pursue an appeal to the Court of Claims, plaintiff was required to "first pay the tax, including any applicable penalties and interest, under protest and *claim a refund* as part of the appeal." MCL 205.22(2) (emphasis added).

what MCL 205.22 itself terms a "claim" for refund.[8] Therefore, plaintiff's August 25, 2006 letter satisfied the second requirement necessary to trigger the 45-day waiting period before interest begins to accrue under MCL 205.30: plaintiff made a "claim" or "petition" by informing the Treasury that it intended to file suit in the Court of Claims pursuant to the procedures delineated in MCL 205.22.

Finally, we must determine whether plaintiff's August 25, 2006 letter satisfied the requirement that the

[8] The dissent accurately concludes that MCL 205.22(2) imposes two requirements that a taxpayer must satisfy in order to appeal a tax assessment in the Court of Claims: a taxpayer must pay the disputed tax under protest and claim a refund as part of the appeal to the Court of Claims. The dissent also correctly concludes that a taxpayer may pay the disputed tax "under protest" and "claim a refund as part of the appeal" in a single action. In fact, the dissent expressly agrees that plaintiff could satisfy both the requirement to pay under protest and the requirement to claim a refund *in a single letter*.

Thus, our only disagreement with the dissent arises from our interpretation of plaintiff's August 25, 2006 letter: we interpret plaintiff's August 25, 2006 letter to do precisely what the dissent correctly recognizes is permissible. First, plaintiff informed the Treasury that it was paying the disputed VEBA contribution tax assessment "under protest," a conclusion with which the dissent agrees. Second, we conclude that by informing the Treasury that plaintiff would file an action in the Court of Claims and referring to MCL 205.22, plaintiff *asserted a right* to a refund, which, as previously discussed, constitutes a claim or petition for a refund under MCL 205.30. Accordingly, contrary to the dissent's contention, we do not merely treat plaintiff "as if" it made a claim or petition in its August 25, 2006 letter—plaintiff actually did so by affirmatively notifying the Treasury that it was asserting its right to a refund by undertaking formal legal action. The fact that plaintiff *again* claimed a refund in its complaint does not preclude the August 25, 2006 letter from constituting a claim or petition for a refund as required by MCL 205.30. To conclude otherwise would require a taxpayer to use the magic words "refund" and "claim" or "petition" in order to satisfy MCL 205.30, which would be inconsistent with our prior conclusion that a taxpayer's "claim" or "petition" need not take any specific form, a conclusion with which the dissent agrees.

claim or petition for refund of the amount paid be "filed." As previously discussed, in order to "file" the claim, a taxpayer must provide the Treasury with adequate notice by "submit[ting]" the claim to the Treasury. The August 25, 2006 letter satisfied that requirement because plaintiff mailed the letter to the Treasury, and, as evidenced by the Treasury's responsive letter dated September 15, 2006, the Treasury received it. See *Sagar Trust*, 204 Mich App at 132 (holding that the Treasury had adequate notice of the taxpayer's claim and the claim was therefore "filed" on the date that the taxpayer submitted a letter requesting a refund). Accordingly, all the requirements of MCL 205.30 were satisfied on August 25, 2006, and pursuant to MCL 205.30(3), interest began accruing on the refund 45 days later, on October 9, 2006.

V. CONCLUSION

We hold that, in order to satisfy the requirements of MCL 205.30 and trigger the 45-day waiting period before interest begins to accrue on a tax return, a taxpayer must (1) pay the disputed tax, (2) make a "claim" or "petition," and (3) "file" the claim or petition. Although a "claim" or "petition" need not take any specific form, it must clearly demand, request, or assert a right to a refund. In order to "file" the claim or petition, a taxpayer must submit the claim to the Treasury, thereby providing the Treasury with adequate notice of the taxpayer's claim.

Because the Court of Appeals erroneously concluded that plaintiff did not satisfy the requirements of MCL 205.30 until it filed its complaint in the Court of Claims on December 13, 2006, we reverse the judgment of the Court of Appeals in part and instead hold that plaintiff satisfied all of the statutory requirements on August 25,

2006. We remand to the trial court for further consideration of the attorney-fee issue. We do not retain jurisdiction.

KELLY, ZAHRA, and MCCORMACK, JJ., concurred with CAVANAGH, J.

MARKMAN, J. (*concurring in part and dissenting in part*). I concur with the majority's analysis of the law in Part III of the opinion. However, I write separately because I do not believe the majority properly applies its own test in concluding that plaintiff's August 25, 2006 letter to the Department of Treasury satisfied the statutory requirements of MCL 205.30. Specifically, I disagree with its conclusion that, by virtue of this letter, "plaintiff made a 'claim' or 'petition' [for a tax refund] by informing the Treasury that it intended to file suit in the Court of Claims pursuant to the procedures delineated in MCL 205.22." Therefore, I respectfully dissent from that portion of the opinion. I would instead affirm the result of the Court of Appeals and hold that plaintiff did not satisfy the requirements of MCL 205.30 until it actually filed its complaint in the Court of Claims on December 13, 2006.

The instant appeal stems from an earlier dispute regarding whether plaintiff Ford Motor Company owed tax under the Single Business Tax Act (SBT) relating to its contributions to its Voluntary Employees' Beneficiary Association (VEBA) trust fund for the tax years 1997 through 2001. After auditing plaintiff, the Department of Treasury concluded that VEBA contributions were taxable and assessed taxes accordingly. Although plaintiff repeatedly disagreed with the department's conclusion that VEBA contributions were taxable, and therefore disagreed with the amount that the audit determined it owed, plaintiff eventually paid the

amount assessed by the department "under protest" with funds that were at that time being held on deposit by the department. Plaintiff subsequently challenged the taxability of VEBA contributions, and the Court of Appeals ultimately held that these were not taxable under the SBT, meaning that plaintiff was due a refund. *Ford Motor Co v Dep't of Treasury*, 288 Mich App 491; 794 NW2d 357 (2010), lv den 488 Mich 1026 (2011). The issue for purposes of this appeal concerns the proper amount of this refund, as the parties disagree about the date on which plaintiff filed its claim for a refund and thus triggered interest on the refund under MCL 205.30.

MCL 205.30 provides:

> (1) The department shall credit or refund . . . taxes . . . erroneously assessed and collected . . . with interest . . . .
>
> (2) A taxpayer who paid a tax that the taxpayer claims is not due may *petition* the department for refund of the amount paid within the time period specified as the statute of limitations in [MCL 205.27a]. If a tax return reflects an overpayment . . . the declaration of that fact on the return constitutes a claim for refund. If the department agrees the claim is valid, the amount of overpayment, penalties, and interest shall be first applied to any known liability as provided in [MCL 205.30a] and the excess, if any, shall be refunded to the taxpayer or credited, at the taxpayer's request, against any current or subsequent tax liability. . . .
>
> (3) The department shall certify a refund to the state disbursing authority who shall pay the amount out of the proceeds of the tax in accordance with the accounting laws of the state. Interest . . . shall be added to the refund commencing 45 days after the *claim* is filed or 45 days after the date established by law for the filing of the return, whichever is later. Interest on refunds intercepted and applied as provided in [MCL 205.30a] shall cease as of the date of interception . . . . [Emphasis added.]

The majority appropriately concludes that, in order to

trigger the accrual of overpayment interest under this statute, a taxpayer must: "(1) "pay" the disputed tax, (2) make a "claim" or "petition" for a refund, and (3) "file" the claim or petition."[1]

To satisfy the second requirement of this test, the majority concludes that plaintiff made a "claim or petition" for a refund in an August 25, 2006 letter sent to the department. That letter informed the department that plaintiff no longer wished to proceed with an informal conference that had previously been scheduled, that it would file an action in the Court of Claims asserting that VEBA contributions were not taxable, and that plaintiff was paying the assessed tax on its VEBA contributions "under protest within the meaning of MCL 205.22."[2] However, this letter cannot be best understood as constituting a "claim or petition" for a refund for purposes of MCL 205.30, quite simply because it nowhere "claims or petitions" any right to a refund. That is, while the letter did request that the audit deficiency be satisfied with funds held "on deposit," and that this be viewed as a "payment under protest," plaintiff (a) nowhere asked for its money back;

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[1] The majority, not unreasonably, relies on dictionary definitions to conclude that to make a "claim" or "petition" for a refund, a taxpayer must "demand, request, or assert" such a right. While I do not quarrel with these definitions, as I agree it is useful in the course of interpretation to examine the ordinary meanings of terms used in a statute, I believe that the words actually chosen by the Legislature—"claim" and "petition"—are sufficiently clear to render unnecessary repeated references to their synonyms.

[2] Specifically, the letter stated "[i]t is our intent to withdraw our case from Informal Conference and file an action with the Court of Claims on the unresolved issues. Therefore, we are requesting that the audit deficiency, together with the applicable interest, be satisfied with the amounts currently being held by the Department 'on deposit.' The application of the amounts on deposit to the audit deficiencies should be viewed as a payment under protest within the meaning of MCL 205.22."

(b) nowhere made any apparent demand that the department return funds that rightfully belonged to plaintiff; (c) nowhere asserted that it believed it was entitled to a refund; and (d) nowhere even alluded to, or referred to, a refund. While the letter may well *imply* that plaintiff intended to seek a refund—as it might logically follow that any taxpayer who "pays under protest" desires the return of his or her payments—by the majority's own language, a mere "implication" does not satisfy the requirement that the taxpayer "claim or petition" for a refund. *Ante* at 398 ("Although expressing disagreement with a tax assessment may imply that the taxpayer may seek a refund, an expression of disagreement alone is not a demand for, request for, or assertion of a right to a refund."). The requirements set forth in MCL 205.30 are not complicated; a taxpayer either makes the "claim or petition" for a refund, or it does not. It is not up to the department to attempt to read the taxpayer's mind, or to parse the taxpayer's language and actions with a fine comb, or to assess the totality of surrounding circumstances in order to surmise what was within the taxpayer's contemplation. If there is a "claim or petition" (a "demand, request, or assertion") for a refund, the taxpayer has satisfied the statute; if there is not, the taxpayer has not. The law could not be more clear or more straightforward. Given plaintiff's failure in any way to make a "claim or petition" for a refund in its August 25, 2006 letter, I find the conclusion inescapable that it did not satisfy the second requirement of the statute on that date.

To support its contrary conclusion, the majority relies on plaintiff's invocation of MCL 205.22 in its letter. This provision specifies that, "[i]n an appeal to the court of claims, the appellant shall first pay the tax,

including any applicable penalties and interest, under protest *and* claim a refund as part of the appeal." [Emphasis added.] According to the majority, because MCL 205.22 itself requires a claim for a refund, plaintiff's reference to this statute satisfied the "claim or petition" requirement of MCL 205.30, as such reference "affirmatively notif[ied] the Treasury that plaintiff was making what MCL 205.22 itself terms a 'claim' for refund." However, even if a taxpayer *could* affirmatively assert a "claim or petition" for a refund by referring to another statute, plaintiff did not do so by making a "payment under protest" while invoking MCL 205.22. This is because MCL 205.22 clearly differentiates between a payment under protest and a claim for a refund. That is, the taxpayer must *first* "pay the tax . . . under protest," and then, *secondly*, "claim a refund as part of the appeal." MCL 205.22(2). By concluding that the August 25, 2006 letter constituted a claim for a refund on the basis of the invocation of MCL 205.22, the majority conflates these two distinct statutory requirements. If plaintiff's payment under protest *itself* constituted the claim for a refund for purposes of MCL 205.30, the second requirement of MCL 205.22—that there be a "claim [of] a refund"—would be rendered utterly meaningless in contravention of the rule that "[i]n interpreting a statute, we [must] avoid a construction that would render part of the statute surplusage or nugatory." *People v McGraw*, 484 Mich 120, 126; 771 NW2d 655 (2009). The majority also fails to recognize that because MCL 205.22(2) states that a claim must be made "as part of the appeal" following the payment under protest, when plaintiff stated that it was paying "under protest within the meaning of MCL 205.22," the department had every reason based on the language of the statute to believe that the August 25, 2006 letter was not a claim for a refund, but that the claim would

be *forthcoming* as part of the appeal.[3] In short, the majority treats plaintiff *as if* it had made a "claim or petition" for a refund in its August 25, 2006 letter, when it did not actually do so, based exclusively on plaintiff's invocation of a statute that itself logically suggests that plaintiff had *yet* to make such a "claim or petition."[4]

By concluding that the August 25, 2006 letter constituted a "claim or petition" for a refund for purposes of MCL 205.30, the majority injects unnecessary uncertainty into its own test by suggesting to future taxpayers that they need not make an actual "claim or petition" for a refund to trigger the accrual of interest under MCL 205.30, but that some uncertain aggregation of other statements and actions might suffice if they come "close enough" to constituting a "claim or

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[3] Because the August 25, 2006 letter did not itself claim or petition for a refund, but indicated only that plaintiff intended prospectively to file a lawsuit to pursue unresolved issues, the majority holds that the department should have acted not on an *extant* "claim or petition" for a refund, but on a mere intimation of what plaintiff *later* intended to do.

[4] We agree with the majority that a taxpayer may pay the disputed tax "under protest" and make a "claim or petition" for a refund in a "single action." Consistent with the majority's conclusion that the claim for a refund need not take any specific form, nothing precluded plaintiff from making a claim for a refund in the August 25, 2006 letter, in *addition* to its invocation of MCL 205.22. Indeed, plaintiff could without difficulty have made a "claim or petition" for a refund in the very same *sentence* as its payment under protest by including some type of a "demand, request, or assertion" of a right to a refund. Nothing in the statute prohibits such a "dual purpose" letter. However, given the absence of such a "claim or petition" in the letter, the department did not act unreasonably in its assumption that, consistent with MCL 205.22, plaintiff's claim would be *forthcoming*. Consequently, our conclusion that plaintiff's August 25, 2006 letter did not itself constitute a "claim or petition" for a refund does not "require a taxpayer to use the magic words 'refund' and 'claim' or 'petition' in order to satisfy MCL 205.30," but only requires a taxpayer to make some form of the very "petition or claim" ("demand, request, or assertion") required by the majority itself. No "magic words" are necessary, but a communication of the type described by the statute *is* necessary.

petition." After all, if plaintiff's failure to actually "claim or petition" is to be disregarded, its actions effectively will establish a new threshold for satisfying MCL 205.30, and it will not be at all surprising when the next taxpayer's actions which approximate, but fall slightly short of actual compliance with this *new* threshold, are also viewed as being "close enough" to satisfy MCL 205.30.

Because I agree with the majority's analysis that in order to trigger the accrual of interest for purposes of MCL 205.30 a taxpayer must "make a "claim" or "petition" for a refund," I concur in Part III of the majority opinion; however, because I disagree with the majority that plaintiff made such a "claim or petition" in its August 25, 2006 letter, I dissent from that portion of Part IV of the majority opinion. I would instead hold that plaintiff satisfied the requirements of MCL 205.30 when it filed its complaint, which included a claim for a refund, in the Court of Claims on December 13, 2006. In that document, plaintiff asked the court to "order a refund in excess of $12,323,625 for the Single Business Taxes paid under protest by Ford . . . ." Accord *NSK Corp v Dep't of Treasury*, 481 Mich 884 (2008) (taxpayer made a claim for a refund for purposes of MCL 205.30, not when department knew that taxpayer was entitled to a refund, but only when taxpayer made an affirmative request for such refund). Therefore, I would affirm the result of the Court of Appeals for the reasons stated in Part III of the majority opinion and in this dissent.

YOUNG, C.J., and VIVIANO, J., concurred with MARKMAN, J.

PEOPLE v McKINLEY

Docket No. 147391. Argued April 3, 2014 (Calendar No. 4). Decided June 26, 2014.

Matthew C. McKinley was found guilty by a jury in the Calhoun Circuit Court of larceny over $20,000, malicious destruction of property over $20,000, and inducing a minor to commit a felony in connection with a series of thefts of commercial air conditioning units. The trial court, Conrad J. Sindt, J., sentenced the defendant, as a fourth-offense habitual offender, to concurrent terms of 12 to 25 years in prison on each count and reserved a decision regarding restitution. Following a hearing, and over defense counsel's objection to the amount of restitution assessed, the court entered an amended judgment of sentence to reflect the imposition of $158,180.44 in restitution against the defendant. Of that total, the defendant was ordered to pay $63,749.44 to the four victims of the offenses of which he was convicted and $94,431 to the victims of uncharged thefts attributed to the defendant by his accomplice. The Court of Appeals, FORT HOOD, P.J., and FITZGERALD and O'CONNELL, JJ., vacated the defendant's conviction for larceny over $20,000, but otherwise affirmed his convictions and sentences in an unpublished opinion per curiam issued May 16, 2013 (Docket No. 307360). The panel rejected the defendant's argument that Michigan's restitution scheme was unconstitutional because it permitted trial courts to impose restitution on the basis of facts not proved to the trier of fact beyond a reasonable doubt. The Supreme Court granted defendant's application for leave to appeal, limited to the issues whether an order of restitution was equivalent to a criminal penalty and whether Michigan's statutory restitution scheme was unconstitutional insofar as it permitted the trial court to order restitution based on conduct for which a defendant was not charged that had not been submitted to a jury or proven beyond a reasonable doubt. 495 Mich 897 (2013).

In an opinion by Justice MCCORMACK, joined by Chief Justice YOUNG and Justices MARKMAN, KELLY, ZAHRA, and VIVIANO, the Supreme Court *held*:

A trial court's restitution award that is based solely on conduct for which the defendant was not charged may not be sustained.

People v Gahan, 456 Mich 264 (1997), was overruled to the extent it held that MCL 780.766(2) authorizes the sentencing court to order criminal defendants to pay restitution to all victims, even if those specific losses were not the factual predicate for the conviction.

1. It was not necessary to reach either of defendant's constitutional challenges to the restitution award. Under the rule of constitutional avoidance, it was necessary to revisit the statutory analysis of MCL 780.766(2) set forth in *Gahan* because the statutory analysis in that case was plainly incomplete, and the defendant's constitutional challenge to restitution based on conduct for which he had not been charged was a novel one that other courts had not addressed. Defendant's challenge to remainder of the restitution award was waived because he did not challenge it in his initial application for leave to appeal in this Court, but instead had posited that that portion passed constitutional muster.

2. The *Gahan* Court's reading of MCL 780.766(2) was not sustainable and was overruled. The plain language of the statute authorizes the assessment of full restitution only for a victim of the defendant's course of conduct that gave rise to the conviction. Given that only crimes for which a defendant was charged could cause or give rise to the conviction, the statute ties the defendant's course of conduct to the offenses for which the defendant was convicted and requires a causal link between them. Therefore, any course of conduct that did not give rise to a conviction could not be relied on as a basis for assessing restitution against a defendant. Similarly, the statute requires that "any victim" be a victim of the defendant's course of conduct giving rise to the conviction, indicating that a victim for whom restitution was assessed need also have a connection to the course of conduct that gave rise to the conviction. Allowing restitution to be assessed for uncharged conduct would read the phrase "that gives rise to the conviction" out of the statute by permitting restitution awards for "any victim of the defendant's course of conduct" without any qualification. This conclusion was reinforced by reading MCL 780.766(2) *in pari materia* with other provisions in the Crime Victim's Rights Act, MCL 780.751 *et seq*., that also require a direct, causal relationship between the conduct underlying the convicted offense and the amount of restitution to be awarded. Because MCL 780.766(2) did not authorize the assessment of restitution based on uncharged conduct, the trial court erred by ordering defendant to pay $94,431 in restitution to the victims of air conditioner thefts attributed to defendant by his accomplice but not charged by the prosecution.

3. *Gahan* was wrongly decided because it interpreted only one phrase in MCL 780.766(2) and failed to address another. Under the factors for overruling prior decisions set forth in *Robinson v Detroit*, 462 Mich 439 (2000), *Gahan* was overruled to the extent that it held that MCL 780.766(2) authorized the sentencing court to order criminal defendants to pay restitution to all victims, even if those specific losses were not the factual predicate for the conviction.

Judgment of sentence vacated in part; case remanded for entry of an order assessing $63,749.44 in restitution against defendant.

Justice CAVANAGH, dissenting, disagreed with the majority's characterization of *Gahan* and would not have overruled it, particularly given that *Gahan*'s interpretation of MCL 780.766(2) was not fully briefed or argued. He explained that when the Crime Victim's Rights Act was enacted, the well-established common-law meaning of the phrase "course of conduct" included uncharged conduct that was related to the illegal scheme from which the defendant's conviction arose, which the Legislature was presumed to have known at the time. He stated that the majority's interpretation read the phrase "course of conduct" out of the statute, effectively rewriting it to limit restitution to only those losses suffered by victims of the defendant's conduct that resulted in a conviction.

STATUTES — CRIME VICTIM'S RIGHTS ACT — RESTITUTION — UNCHARGED CONDUCT.

A trial court's restitution award that is based solely on conduct for which the defendant was not charged may not be sustained; MCL 780.766(2) does not authorize a sentencing court to order criminal defendants to pay restitution to all victims if those specific losses were not the factual predicate for the conviction.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *David E. Gilbert*, Prosecuting Attorney, and *Marc Crotteau*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender Office (by *Christopher M. Smith*) for defendant.

Amicus Curiae:

Kym L. Worthy and *Timothy A. Baughman* for the people.

MCCORMACK, J. In this case, we decide whether a trial court's restitution award that is based solely on uncharged conduct[1] may be sustained. We conclude that it cannot. We therefore overrule our decision in *People v Gahan*, 456 Mich 264; 571 NW2d 503 (1997), to the extent that *Gahan* held that MCL 780.766(2) "authorizes the sentencing court to order criminal defendants to pay restitution to all victims, even if those specific losses were not the factual predicate for the conviction." *Gahan*, 456 Mich at 270. Accordingly, we vacate the portion of the judgment of sentence ordering that the defendant pay $158,180.44 in restitution, and remand to the trial court for entry of an order assessing $63,749.44 in restitution against the defendant.

I. FACTS AND PROCEDURAL HISTORY

In January 2011, Battle Creek police officers arrested the defendant because they believed him to be responsible for a series of thefts of commercial air conditioning units in the area. Following a trial, a jury found the defendant guilty of larceny over $20,000, malicious destruction of property over $20,000, and inducing a minor to commit a felony.[2] The trial court sentenced the defendant, as a fourth-offense habitual offender, to concurrent terms of 12 to 25 years in prison on each count. The trial court reserved a decision on restitution

[1] For purposes of this opinion, the phrase "uncharged conduct" refers to criminal conduct that the defendant allegedly engaged in that was not relied on as a basis for any criminal charge and therefore was not proved beyond a reasonable doubt to a trier of fact.

[2] The defendant employed a teenage accomplice, whom he rewarded with money and cigarettes, to help him remove the air conditioning units. His accomplice testified against the defendant at trial pursuant to a plea agreement.

until after sentencing. Following a hearing, and over defense counsel's objection to the amount of restitution assessed, the trial court entered an amended judgment of sentence to reflect the imposition of $158,180.44 in restitution against the defendant. Of that total, the defendant was ordered to pay $63,749.44 to the four victims of the offenses of which he was convicted and $94,431 to the victims of uncharged thefts attributed to the defendant by his accomplice.

The Court of Appeals vacated the defendant's conviction for larceny over $20,000, but otherwise affirmed his convictions and sentences. *People v McKinley*, unpublished opinion per curiam of the Court of Appeals, issued May 16, 2013 (Docket No. 307360). The panel rejected the defendant's argument that Michigan's restitution scheme is unconstitutional because it permits trial courts to impose restitution on the basis of facts not proven to the trier of fact beyond a reasonable doubt. *Id*. at 8.

We granted leave to appeal, 495 Mich 897 (2013), limited to the following issues:

> (1) whether an order of restitution is equivalent to a criminal penalty, and (2) whether Michigan's statutory restitution scheme is unconstitutional insofar as it permits the trial court to order restitution based on uncharged conduct that was not submitted to a jury or proven beyond a reasonable doubt. See *Southern Union Co v United States*, 567 US ___; 132 S Ct 2344; 183 L Ed 2d 318 (2012); *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000); contra *People v Gahan*, 456 Mich 264 (1997).

II. STANDARD OF REVIEW

The proper application of MCL 780.766(2) and other statutes authorizing the assessment of restitution at

sentencing is a matter of statutory interpretation, which we review de novo. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009). "The first step when interpreting a statute is to examine its plain language, which provides the most reliable evidence of intent." *Ter Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014). If the statutory language is unambiguous, no further judicial construction is required or permitted. *Id*. Questions involving the constitutionality of a statute are also reviewed de novo. *Hunter*, 484 Mich at 257.

III. ANALYSIS

The defendant's challenge to the restitution award is premised on the Sixth Amendment to the United States Constitution, specifically *Apprendi* and its progeny. Defendant challenges both the amount of the restitution award above $63,749.44 (the amount based on uncharged conduct) and the amount between $20,000 and $63,749.44 (the amount based on convicted conduct above and beyond the amount specifically found by a jury). Only the former argument was preserved by a timely objection.[3] Ultimately, we do not reach either of defendant's constitutional challenges to the restitution award. As to the former, pursuant to the widely accepted and venerable rule of constitutional avoidance,[4]

[3] At the restitution hearing, defense counsel argued that "the current state of the law would require that . . . there would have been have [sic] some proof beyond a reasonable doubt that those other 'complainants' if you will, were also those that were victimized by the Defendant." In other words, counsel argued only that the portion of the restitution award based on the *uncharged* offenses had to be proven beyond a reasonable doubt.

[4] This rule is well established in both United States Supreme Court caselaw and this Court's precedent. See *Ashwander v Tenn Valley Auth*, 297 US 288, 347; 56 S Ct 466; 80 L Ed 688 (1936) (Brandeis, J.,

we conclude that it is necessary to revisit the statutory analysis of MCL 780.766(2) we set forth in *Gahan*. *Ashwander v Tenn Valley Auth*, 297 US 288, 347; 56 S Ct 466; 80 L Ed 688 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.").[5] We believe that adherence to that rule is particularly appropriate in this case because

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concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."); *Slack v McDaniel*, 529 US 473, 485; 120 S Ct 1595; 146 L Ed 2d 542 (2000) (quoting Justice Brandeis's concurring opinion in referring to "[t]he *Ashwander* rule"); *Smith v Curran*, 267 Mich 413, 418; 255 NW 276 (1934) (holding that the "constitutionality of an act will not be passed upon where a case may be otherwise decided").

[5] That is, given that we conclude that Michigan's statutory restitution scheme does not permit the trial court to order restitution based on uncharged conduct, it is unnecessary to decide whether such a scheme would be unconstitutional. Contrary to the dissent's characterization, there is nothing at all inappropriate as to the approach we have taken in this case, and it is an approach that is consistent with the well-established rule that the "constitutionality of an act will not be passed upon where a case may be otherwise decided[.]" *Smith*, 267 Mich at 418. Furthermore, the parties in this case were in no way denied an "opportunity to be heard" regarding this issue, as suggested by the dissent. The parties were free to argue that *Gahan* wrongly held that Michigan's statutory restitution scheme permits the trial court to order restitution based on uncharged conduct, and defense counsel did at least address this point at oral argument, at which he stated:

> I think Justice McCormack's second question is whether there is an alternative way of addressing this and one way would be to limit this Court's previous decision in *People v Gahan*. In *People v Gahan*, this Court construed the statutory language very broadly where a course of conduct could mean anything — it didn't — it wasn't limited to just what the jury found.

In addition, in his brief filed with the Court, defense counsel specifically asked us to "overrule *Gahan*." Finally, the prosecutor also recognized that "[t]his Court, in its order granting leave, pointed the parties at [*Gahan*] as a potential source of useful precedent." Therefore, it is clear

the statutory analysis in *Gahan* is so plainly incomplete and the defendant's constitutional challenge to restitution based on uncharged conduct is a novel one that other courts have not addressed (indeed, have not even been called upon to address).[6]

As to the defendant's challenge to the restitution award based on convicted conduct, we conclude that the issue is not properly before us because the defendant has waived it.[7] The defendant did not raise any question

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that the parties themselves recognized that they were accorded an opportunity to be heard regarding our decision in *Gahan*.

Finally, we note that despite the dissent's criticism of our decision not to reach the constitutional question and its defense of *Gahan*'s statutory analysis, the dissent does not reach the constitutional question either. And if that constitutional hurdle proves unresolvable to the dissent, one wonders whether that opinion should be a concurrence instead.

[6] Notably, and we believe further supporting our decision not to reach the constitutional issue, the apparent reason other courts have not been asked to address the argument that the defendant raises here is because those courts have (seemingly uniformly) construed their restitution statutes as allowing the assessment of restitution based only on convicted conduct. See, e.g., *Hughey v United States*, 495 US 411, 413; 110 S Ct 1979; 109 L Ed 2d 408 (1990); *State v Clapper*, 273 Neb 750, 758; 732 NW2d 657 (2007); *Commonwealth v McIntyre*, 436 Mass 829, 835 n 3; 767 NE2d 578 (2002) (collecting cases applying various standards requiring a causal relationship between the restitution award and the conviction). Accordingly, we are aware of no court that has reached the argument defendant preserved below: whether *Apprendi* and its progeny bar the assessment of restitution based on uncharged conduct. See also *United States v Sharma*, 703 F3d 318, 323 (CA 5, 2012) ("The [Mandatory Victim Restitution Act, 18 USC 3663A] limits restitution to the actual loss directly and proximately caused by the defendant's offense of conviction. An award of restitution cannot compensate a victim for losses caused by conduct not charged in the indictment or specified in a guilty plea, or for losses caused by conduct that falls outside the temporal scope of the acts of conviction.").

[7] Waiver is defined as "the 'intentional relinquishment or abandonment of a known right.' " *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), quoting *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999) (citation and quotation marks omitted).

regarding the portion of the restitution award based on convicted conduct in his initial application for leave to appeal in this Court, but instead posited that the entirety of the restitution award based on convicted conduct passed constitutional muster. Only after we granted leave to appeal did the defendant assert that only $20,000 of the restitution award was constitutional under *Apprendi*. A waiver "extinguishe[s] any error," *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000), thereby foreclosing appellate review, *id*. at 215.

A. STATUTORY INTERPRETATION

MCL 780.766(2) provides in part that "the [sentencing] court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate." In *Gahan*, we discussed the Legislature's use of the term "course of conduct" and determined that term should be given a broad construction in light of its historical background and prior decisions from the Court of Appeals interpreting a similar statute.[8] *Gahan*, 456 Mich at 271-272. Notably, however, the *Gahan* Court devoted no attention to the modifying phrase "that gives rise to the conviction . . . ."[9]

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[8] Those prior decisions interpreted MCL 771.3(2), now MCL 771.3(1)(e), which contains identical language to MCL 780.766(2) for all purposes relevant to our analysis. Similarly, other statutes allowing for the assessment of restitution also have identical language for all relevant purposes. See, e.g., MCL 769.1a(2); MCL 780.826(2).

[9] The dissent provides an impassioned defense of *Gahan* and disagrees that the *Gahan* Court ignored this language, but in fact other than quoting this statutory language as part of its background discussion, the *Gahan* Court did not discuss it or attempt to interpret it or give independent meaning to it; it limited its statement of the question before

We conclude that the *Gahan* Court's reading of MCL 780.766(2) is not sustainable and must be overruled. The plain language of the statute authorizes the assessment of full restitution only for "any victim of the defendant's course of conduct *that gives rise to the conviction* . . . ." The statute does not define "gives rise to," but a lay dictionary defines the term as "to produce or cause." *Random House Webster's College Dictionary* (2000), p 1139. Only crimes for which a defendant is charged "cause" or "give rise to" the conviction. Thus, the statute ties "the defendant's course of conduct" to the convicted offenses and requires a causal link between them. It follows directly from this premise that any course of conduct that does not give rise to a conviction may not be relied on as a basis for assessing restitution against a

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it as "whether 'course of conduct' should be given a broad or narrow construction." *Gahan*, 456 Mich at 271. But "[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." *People v Couzens*, 480 Mich 240, 249; 747 NW2d 849 (2008).

The dissent's view that the Legislature intended to adopt the unique, common-law meaning of "course of conduct" from *People v Gallagher*, 55 Mich App 613; 223 NW2d 92 (1974) is unpersuasive. First, as the dissent acknowledges, that rule was not universally followed. See *People v Blaney*, 139 Mich App 694; 363 NW2d 13 (1984). Second, even in cases purporting to follow *Gallagher*, its scope was open to interpretation. See *People v Seda-Ruiz*, 87 Mich App 100, 105; 273 NW2d 602 (1978) (MAHER, J., concurring) ("I write separately to state my concern that the record does not reveal that all the bad checks allegedly issued by defendant were made part of the plea agreement. *Unless defendant agreed to make restitution for all the checks and the prosecutor agreed not to institute charges on the basis of those checks, defendant may not be required to make restitution for all the checks, but only those listed in the information to which he pled guilty and the information which was nolle prossed as part of the plea agreement.* In such a case, of course, the prosecutor would be entitled to bring charges on the basis of the checks which are not part of the plea agreement.") (emphasis added). We conclude that interpreting the statutory language according to its plain meaning is preferable to concluding that the Legislature selected such language to adopt a standard that was not consistently followed or fully settled.

defendant. Stated differently, while conduct for which a defendant is criminally charged and convicted is necessarily part of the "course of conduct that gives rise to the conviction," the opposite is also true; conduct for which a defendant is *not* criminally charged and convicted is necessarily *not* part of a course of conduct that gives rise to the conviction. Similarly, the statute requires that "any victim" be a victim "of" the defendant's course of conduct giving rise to the conviction, indicating that a victim for whom restitution is assessed need also have a connection to the course of conduct that gives rise to the conviction. Allowing restitution to be assessed for uncharged conduct reads the phrase "that gives rise to the conviction" out of the statute by permitting restitution awards for "any victim of the defendant's course of conduct" without any qualification.[10] The statute, however, provides an explicit qualification that the *Gahan* Court did not address.

Our conclusion is further reinforced when the language of MCL 780.766(2) is read *in pari materia* with other provisions in the Crime Victim's Rights Act, MCL 780.751 *et seq*.[11] MCL 780.767, for example, sets forth

[10] Our reading does not read the phrase "course of conduct" out of the statute, as the dissent asserts. Depending on the nature and circumstances of the offense, a single act of "conduct" may be sufficient to give rise to the offense, or a series of acts—i.e., a "course of conduct"—may be necessary. For example, a defendant may be assessed restitution for a conviction for assault with a deadly weapon for firing a gun at a victim and be required to pay the victim's resulting medical bills, or a defendant may be assessed restitution for a conviction for armed robbery for firing a gun at a victim and taking the victim's money and be required to pay the victim's medical bills and repay the money taken from the victim. The latter example involves a "course of conduct" that gives rise to a conviction, and both the defendant's assault and his theft could result in a restitution award under our decision today.

[11] "[S]tatutes *in pari materia* are to be taken together in ascertaining the intention of the legislature, and . . . courts will regard all statutes

the factors for consideration and the burden of proof in setting the amount of restitution. MCL 780.767(1) provides that "[i]n determining the amount of restitution to order under [MCL 780.766], the court shall consider the amount of the loss sustained by any victim *as a result of the offense*." (Emphasis added.) Similarly, MCL 780.767(4) provides that "[t]he burden of demonstrating the amount of the loss sustained by a victim *as a result of the offense* shall be on the prosecuting attorney." (Emphasis added.) "[T]he offense" in MCL 780.767 can only refer to the offense of which the defendant was convicted, because it is that "offense" that makes him subject to being ordered to pay restitution in the first place. Thus, these provisions further reinforce our conclusion that MCL 780.766(2) requires a direct, causal relationship between the conduct underlying the convicted offense and the amount of restitution to be awarded. See, e.g., *Paroline v United States*, 572 US ___, ___; 134 S Ct 1710, 1720; 188 L Ed 2d 714 (2014) ("The words 'as a result of' plainly suggest causation.").

Because MCL 780.766(2) does not authorize the assessment of restitution based on uncharged conduct, the trial court erred by ordering the defendant to pay $94,431 in restitution to the victims of air conditioner thefts attributed to the defendant by his accomplice but not charged by the prosecution. We therefore vacate that portion of the defendant's judgment of sentence. As this holding makes it unnecessary to address the question whether restitution based on uncharged conduct is unconstitutional under the Sixth Amendment and *Apprendi* and its progeny, we decline to reach that question.

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upon the same general subject matter as part of 1 system." *Dearborn Twp Clerk v Jones*, 335 Mich 658, 662; 57 NW2d 40 (1953).

B. STARE DECISIS

Contrary to the dissent's assertion, we do not "lightly cast aside" our decision in *Gahan*. Rather, in determining whether to overrule our decision in *Gahan*, we are mindful of the factors for overruling our prior decisions set forth in *Robinson v Detroit*, 462 Mich 439, 463-468; 613 NW2d 307 (2000). Stare decisis is "generally 'the preferred course' " because it " 'contributes to the actual and perceived integrity of the judicial process.' " *Id*. at 463, quoting *Hohn v United States*, 524 US 236, 251; 118 S Ct 1969; 141 L Ed 2d 242 (1998). We consider whether *Gahan* was wrongly decided, whether it defies practical workability, whether reliance interests would work an undue hardship, and whether changes in the law or the facts no longer justify the questioned decision. *Id*. at 464.

We have little difficulty concluding that *Gahan* was wrongly decided. For reasons previously explained, we believe that the *Gahan* Court's analysis of MCL 780.766(2) is incomplete because it failed to consider the clause "that gives rise to the conviction." That significant qualification to the phrase "course of conduct" renders untenable the *Gahan* Court's conclusion that the term "course of conduct" should be given a reading so broad that it includes uncharged conduct. This factor weighs in favor of overruling *Gahan*.

We see no basis for concluding that *Gahan* defies practical workability. Trial courts hold hearings and make restitution determinations every day under the *Gahan* Court's reading of the statute, and we see nothing to indicate that *Gahan* is difficult to apply. This factor weighs in favor of retaining *Gahan*.

Regarding reliance, we inquire "whether the previous decision has become so embedded, so accepted, so

fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Robinson*, 462 Mich at 466. We conclude that the reliance interests of crime victims are not implicated here because "to have reliance the knowledge must be of the sort that causes a person or entity to attempt to conform his conduct to a certain norm before the triggering event." *Id*. at 467. Under MCL 780.766(2), the "triggering event" is the defendant's commission of a crime against a victim for which the defendant is not charged; before that act occurs, a person would have no reason to believe he or she would be victimized and adjust his or her conduct accordingly, so by definition there can be no reliance on the *Gahan* rule that he or she may recover restitution for his or her losses as a result of that crime.

Further, when dealing with an issue of statutory interpretation, we have said that "it is to the words of the statute itself that a citizen first looks for guidance in directing his actions." *Id*. Accordingly, when a court misconstrues or misreads a statute, "it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction." *Id*. Because *Gahan* interpreted only one phrase in MCL 780.766(2), and in doing so did not address another phrase in the statute, we conclude that reliance on its holding is not justified. Because overruling *Gahan* will not result in practical, real-world dislocations, this factor weighs in favor of its overruling.

Finally, we are aware of no intervening changes in the law or the facts involving restitution awards that would either support or undermine our *statutory inter-*

pretation analysis in *Gahan*.[12] Thus, this factor neither supports nor weighs against overruling *Gahan*.

In sum, we conclude that *Gahan* was wrongly decided and that no reliance interests are upset by its overruling. Stare decisis is a " 'principle of policy' rather than 'an inexorable command,' " and we are not constrained to follow precedent that is badly reasoned. *Id*. at 464, quoting *Hohn*, 524 US at 251. Accordingly, we conclude that *Gahan* should be overruled to the extent that it held that MCL 780.766(2) "authorizes the sentencing court to order criminal defendants to pay restitution to all victims, even if those specific losses were not the factual predicate for the conviction." *Gahan*, 456 Mich at 270.

IV. CONCLUSION

We hold that MCL 780.766(2) does not authorize trial courts to impose restitution based solely on uncharged conduct. We overrule our decision in *Gahan* to the extent that it held to the contrary. Therefore, we vacate the portion of the judgment of sentence imposing $158,180.44 in restitution and remand to the trial court for entry of an order assessing $63,749.44 in restitution against the defendant.

YOUNG, C.J., and MARKMAN, KELLY, ZAHRA, and VIVIANO, JJ., concurred with MCCORMACK, J.

CAVANAGH, J. (*dissenting*). This Court granted leave to appeal, in part, to address whether "Michigan's statutory restitution scheme is unconstitutional insofar as it permits the trial court to order restitution based on

[12] Because we do not reach the defendant's constitutional challenge to the restitution award based on *Apprendi* and its progeny, we do not consider the impact of those cases in our analysis of this factor.

uncharged conduct that was not submitted to a jury or proven beyond a reasonable doubt." *People v McKinley*, 495 Mich 897 (2013), citing *People v Gahan*, 456 Mich 264; 571 NW2d 503 (1997). As our grant order illustrates, questions regarding the constitutionality of Michigan's restitution scheme have arisen since the Legislature's enactment of MCL 780.766(2) and after *Gahan* was decided. The majority, however, ultimately declines to address the limited issue on which this Court granted leave to appeal, instead finding dispositive an issue neither raised nor briefed by the parties—whether *Gahan* correctly interpreted MCL 780.766(2). I disagree with the majority's characterization of *Gahan* as "badly reasoned," but I also object to the majority's decision to lightly cast aside a unanimous opinion of this Court in disregard of a fundamental premise of our adversarial system of adjudication in which each party is given a full and fair opportunity to be heard. See *NASA v Nelson*, 562 US ___; 131 S Ct 746, 756 n 10; 178 L Ed 2d 667 (2011). Because I believe that *Gahan* was correctly decided, I must respectfully dissent.

I. BACKGROUND: *PEOPLE v GAHAN*

The majority opinion gives little attention and weight to *Gahan*'s actual analysis. Accordingly, a brief overview of *Gahan* is necessary.

In *Gahan*, a defendant sold motor vehicles on consignment at his used car lot, repeatedly telling his customers that their cars sold for less than the true amount of the sale and keeping the difference for himself. The defendant perpetrated this scheme on numerous individuals, ultimately leading to the defendant's conviction of one count of embezzlement regarding a victim who was swindled out of $1,100. *Gahan*,

456 Mich at 265-267.[1] After the defendant was convicted, a probation officer prepared a presentence investigation report quoting an investigator as saying that the prosecution " 'originally had 48 counts against the defendant involving transactions . . . that went on for over a year.' "*Id*. at 268. In order to compensate all known victims, the probation officer recommended that the defendant be ordered to pay restitution in an amount of more than $28,000, which the trial court subsequently adjusted to $25,000 in its order of restitution. *Id*. at 268-269.

The Court of Appeals vacated the order of restitution in a split decision, with the majority concluding that, under the plurality opinion of *People v Becker*, 349 Mich 476, 486; 84 NW2d 833 (1957), "a defendant can be ordered to pay restitution only to the victim(s) of the crime(s) for which he is convicted." *People v Gahan*, unpublished opinion per curiam of the Court of Appeals, issued January 16, 1996 (Docket No. 172159), p 5. The Court of Appeals majority reasoned that, although there were similarities between the defendant's crime and the other acts, the defendant was neither tried for nor convicted of the other acts and, thus, the other acts were related to transactions that were independent from the single transaction that provided the factual basis for the conviction. Stated another way, the majority of the panel held that the other acts were not part of the "course of conduct that gave rise to *this* conviction." *Id*. The Court of Appeals dissent disagreed, explaining that MCL 780.766(2), part of the Crime Victim's Rights Act, requires that a court order " 'that the defendant . . . make restitution to *any* victim of the defen-

[1] The defendant also pleaded guilty to one count of embezzlement involving another victim in a separate proceeding. *Gahan*, 456 Mich at 267 n 3.

dant's *course of conduct* that gives rise to a conviction,' " with a "victim" defined by MCL 780.766(1) as " 'an individual who suffers direct . . . financial . . . harm as a result of the commission of a crime.' " *Gahan*, unpub op at 1 (SMOLENSKI, J., concurring in part and dissenting in part). On this basis, the Court of Appeals dissent explained that the victims of uncharged conduct were "also victims of the commission of a crime, i.e., defendant's other acts of commercial fraud," and "[t]hese persons were also victims of defendant's course of conduct, i.e., his commercial fraud, that gave rise to a conviction, i.e., his conviction in this case." *Id*.

In *Gahan*, we granted leave to appeal to consider whether MCL 780.766(2) permits a sentencing court to "order a defendant to pay restitution to compensate all the victims who were defrauded by [the defendant's] criminal course of conduct, even though the specific criminal acts committed against some . . . victims were not the [factual predicate for] the defendant's conviction." *Gahan*, 456 Mich at 265. See, also, *id*. at 269-270. After full briefing and oral argument, this Court unanimously concluded that it does. *Id*. at 270.

In reaching our conclusion, we stated that the statute applicable at the time was clear that "restitution may be ordered with respect to '*any*' victim" as defined by the act. *Id*. at 271 (emphasis added).[2] Considering the

[2] After the defendant's conviction in *Gahan*, the Legislature amended the Crime Victim's Rights Act to "require, rather than permit, that restitution be ordered." *Gahan*, 456 Mich at 270 n 6. Specifically, MCL 780.766 now provides, in relevant part:

> (1) As used in this section only, "victim" means an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime. . . .
>
> (2) . . . [W]hen sentencing a defendant convicted of a crime, the court shall order, in addition to or in lieu of any other penalty

phrase "course of conduct," this Court explained that the phrase had acquired a unique meaning at common law before the enactment of the Crime Victim's Rights Act, MCL 780.751 *et seq*. Specifically, we explained that the phrase "course of conduct" originated in cases involving the proper scope of restitution ordered under MCL 771.3 as a condition of probation. Under that statute, which provided that a court may require a probationer to "[p]ay restitution to the victim," defendants generally had argued that restitution was limited to those "losses attributable to the specific charges that resulted in the defendant's conviction." *Gahan*, 456 Mich at 271. We noted, however, that panels of the Court of Appeals had repeatedly rejected this argument. Specifically, the Court of Appeals had held that restitution orders requiring a defendant to pay a restitution amount exceeding the losses attributable to the specific charges resulting in the conviction were appropriate because "principles of justice required that the defendant 'pay back the entire amount obtained by his course of criminal conduct.' " *Id*. at 272, quoting *People v Seda-Ruiz*, 87 Mich App 100, 103; 273 NW2d 602 (1978). Because the phrase "course of conduct" had developed a unique meaning at common law, this Court held that the common-law meaning of the phrase should be carried over into the Crime Victim's Rights Act, absent an indication of a contrary legislative intent. *Gahan*, 456 Mich at 272. Finding no such indication, this Court held that the Legislature did not intend to deviate from prior caselaw holding that a defendant should be required to compensate for all losses attributable to his illegal scheme "culminat[ing] in his con-

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authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction . . . .

viction," even if some of the losses did not form the factual basis of the charge resulting in conviction. *Id*.[3] *Gahan* explained that "totally dissimilar crimes committed at different times may not satisfy the statutory 'course of conduct' requirement," but such facts were not presented in *Gahan*. Thus, the Court declined to define the exact parameters of that phrase, noting that the defendant's repeated scheme of defrauding his customers in the same or similar manner clearly fell within the confines of that phrase as developed in previous caselaw. *Id*. at 273 n 11. Accordingly, *Gahan* reversed the Court of Appeals and reinstated the order of restitution. *Id*. at 277-278.

II. ANALYSIS

At issue is whether the majority is correct that *Gahan* is an "untenable," "badly reasoned," and "plainly incomplete" opinion that "ignored" the language of the statute. Despite the majority's bold characterizations of *Gahan*'s analysis, I continue to believe that *Gahan* correctly interpreted the plain language of the statute at issue.

As the above background illustrates, this Court was not presented with a novel issue in *Gahan*. Dating back to the late 1960s, panels of the Court of Appeals have been asked to address the proper scope of restitution orders in light of arguments from defendants, like the

[3] This Court also compared the broader statutory language from MCL 780.766(2) with federal caselaw interpreting a federal restitution statute. *Gahan*, 456 Mich at 271 n 8. Specifically, unlike its federal counterpart, MCL 780.766(2) does not limit restitution to the offense of conviction by providing that, "when sentencing a defendant *convicted of an offense*," a court "may order . . . that the defendant make restitution to any victim *of such offense*[.]" 18 USC 3663(a)(1)(A) (emphasis added). See, also, *Gahan*, 456 Mich at 271 n 8.

defendant in *Gahan*, that this Court's plurality opinion in *Becker* and the applicable statutory language limited restitution orders to only those losses attributable to the specific charges or transaction that resulted in a conviction. See, e.g., *People v Nawrocki*, 8 Mich App 225, 227; 154 NW2d 45 (1967) (upholding an order of probation that required a defendant to pay restitution for forged checks in addition to the forged check for which he was convicted of uttering and publishing).

Notably, in *People v Gallagher*, 55 Mich App 613; 223 NW2d 92 (1974), the Court of Appeals addressed whether MCL 771.3 authorized restitution " 'only as to loss caused by the very offense for which [the] defendant was tried and convicted,' " as argued by the defendant. *Gallagher*, 55 Mich App at 617-618, quoting *Becker*, 349 Mich at 486. At the time, MCL 771.3 provided that, as a condition of probation, a court could order restitution " 'in whole or in part to the person or persons injured or defrauded, as the circumstances of the case may require or warrant, or as in its judgment may be meet and proper.' " *Gallagher*, 55 Mich App at 618, quoting MCL 771.3. Agreeing with *Nawrocki* that the statutory language authorized restitution for losses exceeding those that formed the factual basis for the conviction, *Gallagher* rejected the defendant's reliance on *Becker*, which, after a review of federal authority, concluded that restitution ordered under MCL 771.3 could only be imposed for offenses for which the defendant was convicted. *Becker*, 349 Mich at 485-486. See, also, *Gallagher*, 55 Mich App at 618. *Gallagher* explained that not only was *Becker* nonbinding but, in enacting MCL 771.3, the Michigan Legislature did not choose to follow the narrower federal approach, *Gallagher*, 55 Mich App at 618, which limited restitution to " 'aggrieved parties for actual damages or loss caused by the offense [for] which conviction was had,' " *United*

States v Hoffman, 415 F2d 14, 21 (CA 7, 1969), quoting 18 USC 3651. Rather, *Gallagher* held that Michigan's broadly worded restitution statute was similar to those of other states insofar as the Michigan statute "permit-[ted] restitution of the whole loss caused by a course of criminal conduct upon conviction of a crime arising out of that conduct." *Gallagher*, 55 Mich App at 618, citing *People v Dawes*, 132 Ill App 2d 435; 270 NE2d 214 (1971) (upholding a restitution order as to the single complainant, but also as to other victims of the defendant's conduct that were subsequently discovered).

Later panels of the Court of Appeals applied *Gallagher*'s interpretation of MCL 771.3, holding that the statute permitted restitution to all victims of a defendant's course of conduct, even if the victim's specific losses did not form the factual basis of the defendant's conviction. See *Seda-Ruiz*, 87 Mich App at 102-103 (rejecting a challenge to a restitution order on the ground that it was unlawful for the defendant to be required to pay back amounts for other losses not mentioned in the specific charges for which the defendant was convicted);[4] *People v Pettit*, 88 Mich App 203,

[4] In *Seda-Ruiz*, the Court of Appeals remanded to the trial court for an evidentiary hearing to address the defendant's argument that he was not given the opportunity to examine all of the checks that were the subject of the restitution order and that some of the checks for which he was required to pay restitution were "not his checks." *Seda-Ruiz*, 87 Mich App at 104. The majority states that the concurring opinion in *Seda-Ruiz*, which agreed with the decision to remand but would have additionally limited restitution to only those checks for which the defendant had pleaded guilty or which were part of the plea agreement, *id*. at 105, suggests that *Gallagher*'s interpretation of the proper scope of restitution was in dispute. Although some jurists, such as the concurring author in *Seda-Ruiz*, may have disagreed with *Gallagher*'s nonbinding interpretation of the proper scope of restitution under MCL 771.3, see MCR 7.215(J)(1), it does not follow that the meaning of the phrase "course of conduct" as used by *Gallagher* to describe the scope of restitution under MCL 771.3 was unsettled at the time of the Crime Victim's Rights Act's

205-206; 276 NW2d 878 (1979) (quoting and agreeing with *Gallagher* that restitution may be imposed under MCL 771.3 for the " 'whole loss caused by a course of criminal conduct upon conviction of a crime arising out of that conduct' "); *People v Alvarado*, 142 Mich App 151, 162; 369 NW2d 462 (1984), disapproved on other grounds *People v Music*, 428 Mich 356; 408 NW2d 795 (1987) (same). Although some panels of the Court of Appeals applied the *Becker* plurality to limit restitution to only those losses caused by the very offense for which the defendant was tried and convicted, see, e.g., *People v Blaney*, 139 Mich App 694; 363 NW2d 13 (1984), at the time the Crime Victim's Rights Act was enacted, the weight of authority allowed restitution ordered as a condition of probation for losses exceeding the losses attributable to the specific charges that resulted in a defendant's conviction.[5]

With this expanded historical backdrop in mind, I continue to believe that *Gahan* correctly determined that the phrase "course of conduct" in the Crime Victim's Rights Act should be given a broad construction consistent with its unique meaning at common law. As this Court has repeatedly stated, "[i]t is a well-established principle of statutory construction that the

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enactment, especially in light of *Gallagher*'s clear rejection of the proposition that MCL 771.3 limited restitution to only those losses caused by the offense for which the defendant was convicted.

[5] In fact, after the Crime Victim's Rights Act was enacted, panels of the Court of Appeals continued to apply *Gallagher*'s interpretation to MCL 769.1a, Michigan's similarly worded general restitution statute, as well as MCL 780.766(2), noting that the language adopted by the Legislature was essentially identical to that employed by prior Court of Appeals opinions interpreting MCL 771.3. See, e.g., *People v Littlejohn*, 157 Mich App 729; 403 NW2d 215 (1987); *People v Bixman*, 173 Mich App 243; 433 NW2d 417 (1988); *People v Greenberg*, 176 Mich App 296; 439 NW2d 336 (1989); *People v Persails*, 192 Mich App 380; 481 NW2d 747 (1991); *People v Letts*, 207 Mich App 479; 525 NW2d 171 (1994).

Legislature is presumed to act with knowledge of statutory interpretations by the Court of Appeals and this Court." *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505-506; 475 NW2d 704 (1991). Thus, the Legislature is "deemed to act with an understanding of common law in existence *before* . . . legislation . . . [is] enacted." *Nation v W D E Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997) (emphasis added). "This Court will [also] presume that the Legislature . . . is familiar with the principles of statutory construction," *People v Hall*, 391 Mich 175, 190; 215 NW2d 166 (1974), particularly the notion that words and phrases that have acquired a unique meaning in the common law are interpreted as having the same meaning when they appear in later enacted statutes dealing with the same subject matter "unless a contrary intent is plainly shown," *People v Covelesky*, 217 Mich 90, 100; 185 NW 770 (1921). See, also, *Pulver v Dundee Cement Co*, 445 Mich 68, 75; 515 NW2d 728 (1994); MCL 8.3a. In other words, in keeping with the canons of statutory interpretation, the Legislature is presumed to have known the meaning of "course of conduct" as it relates to restitution when it enacted the Crime Victim's Rights Act.

It bears emphasizing that, despite conflicting opinions of the Court of Appeals regarding the applicability of the *Becker* plurality and the proper scope of restitution ordered as a condition of probation, the Legislature nevertheless incorporated a restitution provision into the Crime Victim's Rights Act substantially mirroring the language of *Gallagher* and its progeny.[6] In light of

[6] Compare *Gahan*, 456 Mich at 270 (emphasis added) (noting that MCL 780.766(2) provided that a trial court may order that the defendant make restitution to "any victim of the defendant's *course of conduct which gives rise to the conviction*"), with *Gallagher*, 55 Mich App at 618 (emphasis added) (interpreting MCL 771.3 as permitting restitution for

the well-established use of the phrase "course of conduct" to broadly define the scope of restitution orders imposed as a condition of probation, *Gahan* was correct that "there was no indication from the Legislature that the common-law meaning was not being incorporated" into the subsequently enacted Crime Victim's Rights Act. *Gahan*, 456 Mich at 272. Indeed, given the Legislature's knowledge of existing precedent at the time of the Crime Victim's Rights Act's enactment in 1985, see *Nation*, *supra*, I cannot conclude that the Legislature's selection of the phrase "course of conduct" within MCL 780.766(2) "plainly shows" a legislative intent to incorporate something other than the phrase's common-law meaning, see *Covelesky*, *supra*. Had the Legislature wished to give MCL 780.766(2) the narrow meaning the majority opinion gives it today, the Legislature could

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"the whole loss caused by a *course of criminal conduct upon conviction of a crime arising out of that conduct*"). Notably, MCL 771.3 was subsequently amended to include a phrase nearly identical to the phrase at issue in this case, illustrating the Legislature's intent to codify *Gallagher*'s, rather than *Becker*'s, interpretation of the proper scope of a restitution order under MCL 771.3. See 1993 PA 343; MCL 771.3(1)(e).

That MCL 771.3 was subject to varying interpretations does not undermine *Gahan*'s interpretation of MCL 780.766(2), as the majority states. As previously noted, the Legislature is presumed to act with knowledge of judicial interpretations by this Court and the Court of Appeals, see *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 439-440; 716 NW2d 247 (2006), yet, in defining the scope of restitution under the Crime Victim's Rights Act, the Legislature did not simply incorporate the language of MCL 771.3 into the act. Instead, it selected language mirroring *Gallagher*'s broad interpretation of MCL 771.3, rather than incorporating language similar to decisions that limited restitution under MCL 771.3 to only those losses related to the transaction that formed the factual basis for the conviction. Simply stated, the fact that *Gallagher*'s interpretation of MCL 771.3 was not universally followed is irrelevant in light of the Legislature's awareness of conflicting interpretations of MCL 771.3 and its subsequent choice to incorporate language mirroring *Gallagher*'s "course of conduct" language into the Crime Victim's Rights Act.

have instead defined the scope of a restitution order under MCL 780.766(2) in a manner that was consistent with the federal statutes discussed in *Gallagher*, 55 Mich App at 619, and *Becker*, 349 Mich at 485-486. Indeed, the Legislature is deemed to be aware of this Court's plurality decision in *Becker*, yet the Legislature did not limit restitution consistent with that opinion to only those "loss[es] caused by the very offense for which [the] defendant was tried and convicted", *Becker*, 349 Mich at 486—a proposition continuously advocated for by defendants decades before the Crime Victim's Rights Act's enactment. Instead, the Legislature chose the broader phrase—"course of conduct that gives rise to a conviction"—which was consistent with Court of Appeals caselaw rejecting *Becker*.

I also disagree with the majority that, in determining the Legislature's intent, seven Justices of this Court "ignored" and "devoted no attention to" one phrase within MCL 780.766(2), i.e., that the defendant make restitution to any victim of the defendant's course of conduct "*that gives rise to the conviction*." The majority asserts that, because the phrase "gives rise to" means "to produce or cause," the statutory language requires a causal link between conduct for which the defendant is criminally charged and the defendant's conviction. Stated another way, the majority reasons that "[o]nly crimes for which a defendant is charged 'cause' . . . the conviction" and, thus, "conduct for which a defendant is *not* criminally charged and convicted is necessarily *not* part of a course of conduct that gives rise to the conviction." Although I agree with the majority that the statute requires some type of a causal link between a defendant's "course of conduct" and his conviction, I disagree with the majority that the requisite connection necessarily excludes uncharged conduct from the scope of a defendant's "course of conduct." As *Gahan* ex-

plained, the historical use of the phrase "course of conduct" included uncharged conduct that was related to a defendant's illegal scheme *from which the defendant's conviction arose*. Thus, the statutorily required causal connection is that a defendant's conviction arises from an illegal scheme. See *Gahan*, 456 Mich at 272-273. If that connection exists, a court may order restitution for the commission of related, but uncharged crimes, within that same illegal scheme.

Similarly, *Gahan* does not permit a restitution award for any victim of a defendant's course of conduct without qualification, as the majority claims. Instead, by requiring that a defendant's conviction must have *arisen* from a specific "course of conduct," the Legislature limited the "course of conduct" from which restitution may be ordered. Thus, a defendant cannot be ordered to pay restitution for "totally dissimilar crimes committed at different times," or those involving an unrelated illegal scheme. *Gahan*, 456 Mich at 273 n 11. Rather, the defendant is only required to compensate for "all the losses attributable to the illegal scheme that [actually] culminated in [the] conviction" that triggered restitution. *Id*. at 272. As *Gahan* explained, in order for uncharged conduct to be included within the restitution order, the uncharged conduct must have occurred as part of the same or similar illegal scheme from which the defendant's conviction arose. *Gahan*, 456 Mich at 272-273. Accordingly, *Gahan* properly concluded that the statutory language requires a defendant to provide restitution not only to the victims that are the subject of the very act that results in the defendant's conviction, but also to those harmed by the defendant's related course of criminal conduct from which the defendant's conviction arose. In doing so, *Gahan* properly gave effect to each word within the statute, while giving the phrase "course of conduct" its unique common-law

meaning. In contrast, by holding that only conduct for which a defendant is "charged *and convicted* is . . . part of the 'course of conduct *that gives rise to the conviction*' " (emphasis added), the majority reads the phrase "course of conduct" out of the statute, effectively rewriting the statute to limit restitution to only those losses suffered by "victims of the defendant's conduct that results in a conviction."[7]

Notably, our grant order in this case assumed that *Gahan*'s statutory interpretation was correct. Yet, despite the interpretation unanimously afforded to the statute's plain language by this Court in *Gahan*, the majority brushes *Gahan* aside on the basis of its conclusion that *Gahan* is so poorly reasoned that it must be overruled without full briefing and oral argument on

[7] I also disagree with the majority's suggestion that *Gahan*'s interpretation of MCL 780.766(2) conflicts with MCL 780.767. MCL 780.767(1) provides that, "[i]n determining the amount of restitution to order under [MCL 780.766], the court shall consider the amount of the loss sustained by any victim as a result of the offense." The majority concludes that, by referring to "the offense," MCL 780.767 can "only refer to the offense of which the defendant was convicted, because it is that 'offense' that makes him subject to being ordered to pay restitution in the first place." However, MCL 780.767 can be read harmoniously with *Gahan*'s interpretation of MCL 780.766(2). Notably, it is MCL 780.766(2) that defines the proper scope of the restitution order, explaining that the order shall include losses for *any* victim of a defendant's "course of conduct that gives rise to the conviction." Accepting that the phrase "course of conduct" within MCL 780.766(2) includes uncharged conduct that does not form the factual basis for a defendant's conviction, MCL 780.767 merely directs the sentencing court to consider, in determining the amount of restitution to order under MCL 780.766(2), the loss sustained by any victim as a result of an uncharged offense that is a part of the defendant's illegal scheme from which the defendant's conviction arose. To that end, although the issue was not raised by the parties and therefore I do not opine on it, nowhere in the 21 pages of transcript of the restitution hearing did defense counsel contradict the prosecution's evidence regarding the defendant's commission of the uncharged crimes or the amount of restitution assessed for each.

the issue.[8] In doing so, the majority ignores that the Legislature has subsequently amended MCL 780.766, but it has not otherwise sought to correct what the majority claims is *Gahan*'s "plainly incomplete" interpretation in the 17 years since *Gahan* was decided.

Further, in classifying *Gahan* as an "untenable" opinion that "ignored" the statutory language, the majority fails to appreciate that *Gahan* was decided after a careful review of a divided Court of Appeals opinion, after full briefing and oral argument, and after post-argument discussions. Thus, in overruling *Gahan* by finding dispositive an issue neither raised nor briefed by the parties in this case, the majority not only fails to appreciate the thoughtful consideration given to the statutory language by the *Gahan* Court, but it also fails to consider whether the advocates in this case could

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[8] The majority guides us astray in suggesting that the parties addressed the validity of *Gahan*'s statutory analysis in their briefs to this Court. In light of this Court's grant order, which *limited* the issues to be briefed, it is no surprise that the parties did not actually argue whether this Court should overrule *Gahan* on nonconstitutional statutory interpretation grounds in their briefs, but instead focused solely on the issues raised in this Court's grant order—whether restitution is a criminal penalty and whether, in light of post-*Gahan* precedent, Michigan's statutory restitution scheme is unconstitutional insofar as it permits a trial court to order restitution based on uncharged conduct. Further, although one litigant made a single, conclusory comment at oral argument regarding *Gahan*'s interpretation of the statutory language, in my view, that does not substitute for full briefing on the actual substance of *Gahan*'s statutory analysis from both of the parties in this case.

Finally, the majority is correct that I do not reach the constitutional issue on which this Court granted leave to appeal, but it is not because, as the majority suggests, a "constitutional hurdle prove[d] unresolvable to [this] dissent." Instead, it is precisely because *Gahan* was correctly decided that I believe that this Court should address the issues upon which it granted leave to appeal, rather than overruling a longstanding and correct determination of the Legislature's intent in enacting the Crime Victim's Rights Act. Nevertheless, because my position has not garnered majority support, I decline to opine on those issues.

have added anything insightful to the newfound debate over the correctness of unanimous precedent.[9] Quite simply, I disagree with the majority that *Gahan* was wrongly decided.

III. CONCLUSION

Today, the majority holds that seven Justices of this Court ignored a portion of the statute at issue. I disagree with the majority's characterization of *Gahan*'s analysis. But I also disagree with the majority's decision to disregard one of the foundational principles of our adversarial system of justice by failing to give each party an opportunity to be heard in order to assist this Court in understanding the issue before it and prevent a preliminary understanding of the issue from improperly influencing the Court's final decision of an issue that was previously and unanimously decided. Accordingly, I must respectfully dissent.

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[9] It requires no citation to authority to note that the vast majority of convictions in this state result from guilty pleas, many of which are the result of plea negotiations when a prosecutor offers to dismiss some charges if a defendant agrees to plead guilty to others. In light of crime victims' constitutional right to restitution, see Const 1963, art 1, § 24, only time will tell the impact of the majority opinion on prosecutorial charging decisions, plea negotiations, and trials.

PEOPLE v CARP

PEOPLE v DAVIS

PEOPLE v ELIASON

Docket Nos. 146478, 146819, and 147428. Argued March 6, 2014 (Calendar Nos. 4, 5, and 6). Decided July 8, 2014.

Raymond Curtis Carp was charged in the St. Clair Circuit Court with first-degree murder, MCL 750.316, for his participation in the bludgeoning and stabbing of a woman. Carp was 15 years old at the time of the murder and was tried as an adult. Following Carp's conviction, the court, James P. Adair, J., imposed the mandatory sentence of life imprisonment without the possibility of parole. The Court of Appeals, SCHUETTE, P.J., and ZAHRA and OWENS, JJ., affirmed Carp's conviction in an unpublished opinion per curiam, issued December 30, 2008 (Docket No. 275084), and the Supreme Court denied his application for leave to appeal, 483 Mich 1111 (2009). His conviction and sentence became final for purposes of direct appellate review in June 2009. In September 2010, Carp sought to collaterally attack the constitutionality of his sentence by filing a motion for relief from the judgment. The trial court denied the motion, concluding that imposing a mandatory nonparolable life sentence on a juvenile convicted of first-degree murder did not constitute cruel or unusual punishment. Carp then sought leave to appeal, which the Court of Appeals denied in an unpublished order, entered June 8, 2012 (Docket No. 307758). Seventeen days later, on June 25, 2012, the United States Supreme Court decided *Miller v Alabama*, 567 US ___; 132 S Ct 2455 (2012), which held that the Eighth Amendment's prohibition of cruel and unusual punishment prohibits a sentencing scheme that mandates life in prison without parole for juvenile offenders. Carp moved for reconsideration, which the Court of Appeals granted in an unpublished order, entered August 9, 2012 (Docket No. 307758). On reconsideration, the Court of Appeals, TALBOT, P.J., and FITZGERALD and WHITBECK, JJ., determined that *Miller* had created a new rule that was procedural in nature and not subject to retroactive application under the rules set forth in *Teague v Lane*, 489 US 288 (1989), or the separate and independent Michigan test for retroactivity set forth in *People v Sexton*, 458 Mich 43 (1998), and *People*

v Maxson, 482 Mich 385 (2008). 298 Mich App 472 (2012). The Supreme Court granted Carp's application for leave to appeal to consider whether *Miller* should be applied retroactively under either federal or state law. 495 Mich 890 (2013).

Cortez Roland Davis was charged in the Recorder's Court for the City of Detroit (now part of the Wayne Circuit Court) with felony murder, MCL 750.316(1)(b). Davis was 16 when he and another individual accosted two individuals to rob them. A witness testified that when one of the victims tried to flee, Davis and the other individual fired shots, killing the victim. Davis was convicted on May 10, 1994. At sentencing, the court, Vera Massey Jones, J., initially ruled that Michigan's sentencing scheme for first-degree murder could not constitutionally be applied to juvenile homicide offenders because it was cruel and unusual to impose a nonparolable life sentence on a juvenile who was capable of rehabilitation. In concluding that Davis was capable of reforming, the court determined that his role in the commission of the offense was that of an aider and abettor, not an actual shooter, but made no findings concerning Davis's intentions about the fleeing victim or whether he had reasonably foreseen when he initially engaged in the armed robbery the possibility that a life might be taken. The court sentenced Davis to a term of imprisonment of 10 to 40 years. In an unpublished order, entered November 23, 1994 (Docket No. 176985), the Court of Appeals reversed and remanded for resentencing. At resentencing, the trial court imposed the mandatory sentence of life without parole. Direct appellate review of Davis's conviction and sentence concluded in 2000. Following habeas corpus proceedings in federal court, Davis moved for relief from the judgment in the Wayne Circuit Court in 2010, contending that *Graham v Florida*, 560 US 48 (2010), had established a retroactive change in the law by categorically barring sentences of life without parole for juveniles convicted of nonhomicide offenses. Concluding that felony murder is a homicide offense even if the defendant was an aider and abettor rather than the actual shooter, however, the trial court denied the motion. The Court of Appeals denied Davis's application for leave to appeal in an unpublished order, entered November 16, 2011 (Docket No. 304075). *Miller* was decided while Davis's application for leave to appeal was pending in the Supreme Court. The Supreme Court remanded Davis's case to the trial court for a determination of whether *Miller* applied retroactively. 492 Mich 871 (2012). On remand, the trial court concluded that *Miller* applied retroactively, entitling Davis to be resentenced. The prosecution appealed, and the Court of Appeal reversed in an unpublished order, entered January 16, 2013 (Docket No. 314080), citing *Carp*, 298 Mich App 472. The Supreme Court granted Davis

leave to appeal to address whether the Eighth Amendment or Const 1963, art 1, § 16 categorically bars the imposition of a nonparolable life sentence on a juvenile convicted of felony murder under an aiding-and-abetting theory. 495 Mich 890 (2013).

Dakotah Wolfgang Eliason was charged in the Berrien Circuit Court with first-degree murder, MCL 750.316(1)(a), after he shot his sleeping stepgrandfather in the head. Eliason was 14 at the time. Following his conviction, the court, Scott Schofield, J., sentenced Eliason in October 2010 to life without parole. *Miller* was decided while Eliason's appeal was pending. The Court of Appeals, O'CONNELL and MURRAY, JJ. (GLEICHER, P.J., concurring in part and dissenting in part), held that *Miller* requires a trial court to perform an individualized sentencing analysis using the factors in *Miller* and choose whether to impose a sentence of life with or without parole. Eliason sought leave to appeal in the Supreme Court, challenging the sentencing procedures and options defined by the Court of Appeals and contending that a trial court should have the further option of imposing a sentence of a term of years. He additionally argued that Const 1963, art 1, § 16 categorically bars the imposition of nonparolable life sentences on a juvenile. The Supreme Court granted Eliason leave to appeal on both issues. 495 Mich 891 (2013). Eliason subsequently limited his second issue to juveniles who were 14 at the time of the offense.

In an opinion by Justice MARKMAN, joined by Chief Justice YOUNG and Justices ZAHRA and VIVIANO, the Supreme Court *held*:

The rule announced in *Miller* does not satisfy either the federal test for retroactivity set forth in *Teague* or the Michigan test set forth in *Sexton* and *Maxson*. Furthermore, neither the Eighth Amendment nor Const 1963, art 1, § 16 categorically bars the imposition of a sentence of life without parole on a juvenile homicide offender.

1. The family division of the circuit court typically has initial jurisdiction under MCL 712A.4(1) of a juvenile 14 years of age or older charged with a felony. Under what is termed the "automatic waiver process," however, if the prosecution charges a juvenile with a specified juvenile violation (which includes first-degree murder), MCL 764.1f authorizes the filing of a complaint and warrant, and the circuit court itself, rather than the family division, acquires jurisdiction over the juvenile's case. MCL 712A.2(a)(1) then requires the court to try the juvenile as an adult. After *Miller* was decided, the Legislature enacted 2014 PA 22, which added MCL 769.25 and MCL 769.25a to the Code of Criminal Procedure. MCL 769.25 prescribed a new sentencing scheme for juveniles convicted of offenses that had previously

required the imposition of nonparolable life sentences. The new scheme established a default sentencing range. In the absence of a prosecution motion to impose life without parole, MCL 769.25(9) requires the trial court to sentence the juvenile to a term of imprisonment that has a minimum term of not less than 25 or more than 40 years and a maximum term of not less than 60 years. If the prosecution seeks a nonparolable life sentence, MCL 769.25(6) requires the trial court to conduct a hearing on the motion as part of the sentencing process and consider the factors listed in *Miller*. MCL 769.25a(1) provides that the procedures set forth in MCL 769.25 do not apply to cases that were final for purposes of appeal on or before June 24, 2012, (the day before *Miller* was decided). MCL 769.25a(2), however, provides that if *Miller* is applied retroactively to all defendants who were under the age of 18 at the time of their crimes, the trial court will be required to decide whether to impose a sentence of imprisonment for life without parole or a term of years as set forth in MCL 769.25(9). Because each defendant in these appeals would be subject to the new sentencing rules established for juveniles by 2014 PA 22 if granted resentencing, a determination of whether *Miller* applies retroactively was necessary.

2. The form and effect of a new rule is essential in determining whether the rule applies retroactively under *Teague*. *Miller* was the product of two strands of precedent, one requiring a particular form of individualized sentencing before capital punishment may be imposed and the other addressing the constitutionality of imposing specific punishments on juvenile offenders. The capital-punishment strand of precedent prescribed rules requiring a sentencer to perform an individualized sentencing analysis that results in a decision whether to impose capital punishment. By contrast, the juvenile-sentencing strand prescribed rules that categorically bar the imposition of a particular sentence, requiring the sentencer to impose a lesser sentence in every case. The form and effect of the rule in *Miller* is similar to that of the rules in capital-punishment cases because it requires a sentencer to perform an individualized sentencing analysis that results in a decision whether to impose a nonparolable life sentence. Accordingly, whether *Miller* had to be applied retroactively depended on whether a rule with a form and effect similar to the rules in the capital-punishment cases is the type of rule entitled to retroactive application under *Teague*.

3. There is a general rule of nonretroactivity for cases on collateral review with respect to applying new constitutional rules to cases that became final before the new rule was announced. The

first inquiry when determining whether a rule applies retroactively to cases presented on collateral review is whether it constitutes a new rule as defined by *Teague*. If a rule is not deemed a new rule, the general rule of nonretroactivity does not apply and the rule will be applied retroactively, even to cases on collateral review. If the rule is deemed a new rule, however, the general rule of nonretroactivity does apply and the court must engage in the second *Teague* inquiry: whether the new rule satisfies one of the two exceptions to the general rule, in which case the rule will be applied retroactively. The *Teague* exceptions provide that a new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.

4. *Miller* established a new rule because it imposed an obligation on state and lower federal courts to conduct individualized sentencing hearings before sentencing a juvenile to life without parole, including the requirement that the prosecution present evidence of aggravating factors relevant to the offender and the offense and that defendants be given the opportunity and financial resources to present evidence of mitigating factors As a result of *Miller*, a considerable number of juveniles who would previously have been sentenced to life without parole will now receive a lesser sentence.

5. In light of Carp's and Davis's arguments, it was only necessary to consider whether the rule in *Miller* fits within the first exception. Categorical rules, such as those derived from the juvenile-sentencing strand of precedent, are substantive because they have a form and effect that always results in the unconstitutionality of the punishment imposed. Conversely, noncategorical rules, such as those derived from the capital-punishment strand of precedent and *Miller*, are procedural because they have a form and effect that does not always result in the unconstitutionality of the punishment imposed. Rather, they merely require a court to perform a new or amended analysis before determining whether a given punishment can be imposed on a particular defendant. A new procedural rule creates the possibility that the defendant would have received a less severe punishment but does not necessitate such a result. Accordingly, a rule is procedural when it affects how and under what framework a punishment may be imposed but leaves intact the state's fundamental legal authority to seek the imposition of the punishment on a defendant currently subject to the punishment. Because the rule in *Miller* is procedural, *Teague* did not require its retroactive application.

6. States may give broader retroactive effect to a new rule than *Teague* requires. Michigan's retroactivity test requires consideration of three factors: (1) the purpose of the new rule, (2) the general reliance on the old rule, and (3) the effect of retroactive application on the administration of justice. The general principle of nonretroactivity for new rules of criminal procedure, to which Michigan adheres, is properly served by applying in a retroactive fashion only those new rules of procedure that implicate the guilt or innocence of a defendant. A new rule of procedure that does not affect the integrity of the fact-finding process should be given prospective effect only. Therefore, the first factor clearly militated against the retroactive application of *Miller* because *Miller* altered only the process by which a court must determine a defendant's level of moral culpability for purposes of sentencing and had no bearing on the defendant's legal culpability for the offense. The second and third factors did not favor the retroactive application of *Miller* to the extent that they overcame the first factor's clear direction against retroactive application. In particular, there would be considerable financial, logistical, and practical barriers placed on prosecutors to re-create or relocate evidence that had previously been viewed as irrelevant and unnecessary, a task made all the more burdensome and complicated by the passage of time. This process would not further the achievement of justice under the law, and *Miller* was not entitled to retroactive application under Michigan's test.

7. Defendants asserted that the Eighth Amendment categorically bars the imposition of a nonparolable life sentence on any juvenile regardless of whether an individualized sentencing analysis occurs before that sentence is imposed, consequently requiring the resentencing of all juveniles sentenced to life without parole under the pre-*Miller* sentencing scheme and rendering invalid those portions of MCL 769.25 that allow the imposition of a nonparolable life sentence on particular juveniles following an individualized sentencing hearing. The caselaw defendants cited in support did not compel such a categorical rule, however, and defendants failed to show that the federal proportionality rule for sentences that the United States Supreme Court used in *Miller* and the juvenile-sentencing cases supported a categorical rule.

8. While the Eighth Amendment prohibits cruel and unusual punishments, Const 1963, art 1, § 16 prohibits cruel or unusual punishments. Consequently, it prohibits a punishment that is unusual but not necessarily cruel. The state test for proportionality of sentences assesses (1) the severity of the sentence imposed compared to the gravity of the offense, (2) the penalty imposed for

the offense compared to penalties imposed on other offenders in the same jurisdiction, (3) the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states, and (4) whether the penalty imposed advances the penological goal of rehabilitation. A nonparolable life sentence for a juvenile does not serve the penological goal of rehabilitation, but because only the fourth factor supported defendants' contention that their sentences were disproportionate, defendants failed to meet their burden of demonstrating that their sentences were facially unconstitutional under Const 1963, art 1, § 16.

9. Davis argued that the Eighth Amendment categorically bars imposing nonparolable life sentences on juvenile homicide offenders convicted of felony murder under an aiding-and-abetting theory, attempting to derive that categorical rule from *Miller* and *Graham*. The commission of a murder during a robbery is first-degree murder. In MCL 767.39, the Legislature chose to treat offenders who aid and abet the commission of an offense exactly the same as those offenders who more directly commit the offense, in particular subjecting them to the same punishment. This legislative choice is entitled to great weight, and Davis failed to persuade the Court that it should establish a categorical rule.

10. Eliason asserted that Const 1963, art 1, § 16 categorically bars the imposition of a nonparolable life sentence on a juvenile homicide offender who was 14 years of age at the time of the offense. Because Eliason's case was on direct review, however, he was entitled to resentencing under MCL 769.25(1)(b)(*ii*) and subject to a default sentence of a term of years. A juvenile will only face life without parole if the prosecution seeks that sentence and the trial court concludes that the sentence is appropriate following an individualized sentencing hearing in accordance with *Miller*. Even though the prosecution had filed a motion for imposition of a nonparolable life sentence, whether the trial court will depart from the default sentence on resentencing would only be speculation and it was not apparent that Eliason faced a real and immediate threat of receiving life without parole. Accordingly, his facial constitutional challenge was no longer justiciably ripe.

Carp and *Davis* affirmed.

Eliason remanded for resentencing.

Justice KELLY, joined by Justices CAVANAGH and MCCORMACK, dissenting, would have concluded that *Miller* applies retroactively to cases on collateral review because it established a substantive rule and because state law alternatively compelled its retroactive application. The United States Supreme Court has established in numerous cases that juveniles are different as a matter of consti-

tutional law. *Miller* determined that because certain juvenile homicide offenders have diminished culpability for their crimes compared to adult offenders and greater prospects for reform, states cannot subject juvenile homicide offenders to mandatory nonparolable life sentences. Accordingly, *Miller* expanded the range of punishments available to juveniles in states that had previously mandated a nonparolable life sentence for juveniles convicted of first-degree murder. *Miller* required sentencers to consider an offender's youth and attendant characteristics before imposing a nonparolable life sentence. Under *Miller*, age affects the range of sentences that can be imposed on someone convicted of first-degree murder. *Miller* produced a class of persons subject to a different range of sentences and therefore established a substantive rule of law that applies retroactively under the *Teague* framework. While *Miller* did not foreclose sentencers from imposing nonparolable life sentences on juveniles in appropriate cases, it categorically barred a mandatory nonparolable life sentence for those offenders. The *Teague* analysis focuses on whether the decision is substantive or procedural, not on whether it is categorical or noncategorical, but even if all categorical bars are substantive, it does not follow that all noncategorical bars must be procedural. The fact that *Miller* did not categorically bar nonparolable life sentences for juvenile offenders did not negate the substantive import of its decision to invalidate mandatory nonparolable life sentences as applied to juvenile offenders. *Miller* did more than merely allocate decision-making authority; it altered the range of punishments available to a juvenile homicide offender by requiring that a state's mandatory minimum punishment be something less than nonparolable life. *Miller* involved not just who exercises the decision-making authority when imposing punishment, but what punishments must be considered. Accordingly, Justice KELLY would have held that *Miller* applies retroactively to cases on collateral review. Furthermore, the first factor that a reviewing court must consider in assessing a new rule's retroactivity under the state test for retroactivity is the purpose of the new rule. While sentencing procedures do not concern the ascertainment of guilt or innocence for the underlying offense, sentencing is a fact-finding process that allows the sentencer to ascertain an offender's culpability for the offense. *Miller* mandated a new fact-finding process to determine whether a nonparolable life sentence is appropriate in a particular case and, as a result, the first factor supported the retroactive application of *Miller*. The second factor examines whether individuals have been adversely positioned in reliance on the old rule. Carp and Davis were adversely positioned because the trial courts did not have the

discretion to impose any sentence but nonparolable life, there was no basis before *Miller* to appeal this lack of discretion, and it is likely that many of the juvenile offenders already serving nonparolable life sentences would have been sentenced to a term of years had they received a sentencing hearing. The third factor examines whether applying the new rule retroactively would undermine the state's strong interest in finality of the criminal justice process. Applying *Miller* retroactively would not affect the finality of convictions in this state, but would only require an individualized resentencing process for the relatively small class of prisoners sentenced to nonparolable life for homicides they committed as juveniles. Because each factor of the state test supported it, Justice KELLY would have held that independent state-law grounds also existed to apply *Miller* retroactively. Justice KELLY would have reversed the judgments of the Court of Appeals in *Carp* and *Davis* and remanded all three cases to the trial courts for resentencing.

1. CRIMINAL LAW — SENTENCING — JUVENILES — IMPOSITION OF NONPAROLABLE LIFE SENTENCES — RETROACTIVITY OF *MILLER*.

Miller v Alabama, 567 US ___; 132 S Ct 2455 (2012), held that the Eighth Amendment's prohibition of cruel and unusual punishment prohibits a sentencing scheme that mandates life in prison without parole for juvenile offenders; *Miller* does not apply retroactively under either the federal test for retroactivity set forth in *Teague v Lane*, 489 US 288 (1989), or the separate and independent Michigan test set forth in *People v Sexton*, 458 Mich 43 (1998), and *People v Maxson*, 482 Mich 385 (2008).

2. CRIMINAL LAW — SENTENCING — JUVENILES — IMPOSITION OF NONPAROLABLE LIFE SENTENCES — CRUEL AND UNUSUAL PUNISHMENTS.

Neither the Eighth Amendment nor Const 1963, art 1, § 16 categorically bars the imposition of a sentence of life without parole on a juvenile homicide offender.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Michael D. Wendling*, Prosecuting Attorney, and *Hilary B. Georgia*, Assistant Prosecuting Attorney, for the people in *Carp*.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, and *Timothy A. Baughman*, Chief of Research, Training and Appeals, for the people in *Davis*.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Michael J. Sepic*, Prosecuting Attorney, and *Elizabeth A. Wild*, Assistant Prosecuting Attorney, for the people in *Eliason*.

Selby Law Firm, PLLC (by *Patricia L. Selby*), for Raymond C. Carp.

Hubbell DuVall PLLC (by *Clinton J. Hubbell*) and *Bryan A. Stevenson* for Cortez R. Davis.

State Appellate Defender (by *Jonathan Sacks* and *Brett DeGroff*) for Dakotah Wolfgang Eliason.

Amici Curiae:

Kym L. Worthy, Prosecuting Attorney, and *Timothy A. Baughman*, Chief of Research, Training and Appeals, for the Wayne County Prosecuting Attorney in *Eliason*.

Miller Johnson (by *Jon R. Muth* and *Patrick M. Jaicomo*) for 450 students of Father Gabriel Richard High School, Ann Arbor, Michigan.

Daniel S. Korobkin, *Michael J. Steinberg*, and *Kary L. Moss* for the American Civil Liberties Union and the American Civil Liberties Union of Michigan in *Carp*.

Baker & McKenzie LLP (by *Sarah Winston*) for numerous victims of crime and victims' rights organizations.

Covington & Burling LLP (by *Sarah E. Tremont*, *Brendan Parets*, and *Krysten Rosen*) for numerous faith-based organizations and religious leaders.

Honigman Miller Schwartz and Cohn LLP (by *Mitra Jafary-Hariri*) and *NAACP Legal Defense and Educa-*

tional Fund, Inc. (by *Jin Hee Lee* and *Vincent M. Sutherland*), for NAACP Legal Defense and Educational Fund, Inc.

Miller, Canfield, Paddock and Stone, PLC (by *Thomas W. Cranmer* and *Paul D. Hudson*), for an ad hoc committee made up of former officials of the Department of Corrections; numerous correctional, penological, mental health, community, and justice organizations; and individual criminal-justice experts in *Carp* and *Davis*.

Schiff Hardin LLP (by *Robert J. Wierenga*, *Kimberly K. Kefalas*, *Suzanne Larimore Wahl*, and *Jessica Anne Sprovtsoff*) for an ad hoc committee made up of former prosecuting attorneys, former judges, former governmental officials, and various leaders of bar associations, law school deans, and law school professors in *Carp* and *Davis*.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *B. Eric Restuccia*, Deputy Solicitor General, for the Attorney General in *Carp*.

Juvenile Law Center (by *Marsha L. Levick*) and *Rhoades McKee PC* (by *Bruce W. Neckers*) for the Juvenile Law Center and numerous organizations and individuals.

Stuart G. Friedman for the Criminal Defense Attorneys of Michigan in *Carp*.

Kimberly Thomas for the Criminal Defense Attorneys of Michigan in *Davis*.

State Appellate Defender (by *Michael L. Mittlestat* and *Erin Van Campen*) for the State Appellate Defender Office in *Carp*.

MARKMAN, J. We granted leave to appeal to address (1) whether *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012), should be applied retroactively—pursuant to either the federal or state test for retroactivity—to cases in which the defendant's sentence became final for purposes of direct appellate review before *Miller* was decided and (2) whether the Eighth Amendment of the United States Constitution or Const 1963, art 1, § 16 categorically bars the imposition of a life-without-parole sentence on a juvenile homicide offender. After considering these matters, we hold that the rule announced in *Miller* does not satisfy either the federal test for retroactivity set forth in *Teague v Lane*, 489 US 288; 109 S Ct 1060; 103 L Ed 2d 334 (1989), or Michigan's separate and independent test for retroactivity set forth in *People v Sexton*, 458 Mich 43; 580 NW2d 404 (1998), and *People v Maxson*, 482 Mich 385; 759 NW2d 817 (2008). We further hold that neither the Eighth Amendment nor Const 1963, art 1, § 16 categorically bars the imposition of a life-without-parole sentence on a juvenile homicide offender.

I. FACTS AND HISTORY

A. DEFENDANT CARP

Defendant Raymond Carp was 15 years of age when he participated in the 2006 bludgeoning and stabbing of Mary Ann McNeely in Casco Township. He was charged with first-degree murder in violation of MCL 750.316 and tried as an adult. On October 5, 2006, a St. Clair County jury convicted Carp of this offense, and in accordance with the law he was sentenced to life imprisonment without parole. Carp's conviction was subsequently affirmed by the Court of Appeals, *People v Carp*, unpublished opinion

per curiam of the Court of Appeals, issued December 30, 2008 (Docket No. 275084), and his application for leave to appeal in this Court was denied on June 23, 2009, *People v Carp*, 483 Mich 1111 (2009). Because Carp did not seek review in the United States Supreme Court, his conviction and sentence became final for the purposes of direct appellate review on June 23, 2009.

In September 2010, Carp sought to collaterally attack the constitutionality of his sentence by filing a motion for relief from judgment pursuant to MCR 6.501 *et seq*. The trial court denied this motion, concluding that the imposition of a mandatory sentence of life without parole on a juvenile first-degree-murder offender did not constitute cruel or unusual punishment, citing *People v Launsburry*, 217 Mich App 358, 363-365; 551 NW2d 460 (1996), lv den 454 Mich 883 (1997), and recon den 454 Mich 883 (1997). Carp then sought leave to appeal in the Court of Appeals, which was denied on June 8, 2012. *People v Carp*, unpublished order of the Court of Appeals, entered June 8, 2012 (Docket No. 307758). Seventeen days later, the United States Supreme Court issued its decision in *Miller*, leading Carp to move for reconsideration, and the Court of Appeals granted his motion. *People v Carp*, unpublished order of the Court of Appeals, entered August 9, 2012 (Docket No. 307758). On reconsideration, the Court determined that *Miller* had created a "new rule" that was "procedural" in nature and therefore not subject to retroactive application under the rules set forth in *Teague*. *People v Carp*, 298 Mich App 472, 511-515; 828 NW2d 685 (2012). The Court further held that *Miller* was not subject to retroactive application under Michigan's separate test for retroactivity set forth in *Sexton* and

Maxson.[1] *Id*. at 520-522. This Court subsequently granted Carp leave to appeal with respect to whether *Miller* should be applied retroactively under either federal or state law. *People v Carp*, 495 Mich 890 (2013).

B. DEFENDANT DAVIS

Defendant Cortez Davis, age 16 at the time of his offense, and one of his cohorts, while both brandishing firearms, accosted two individuals in Detroit for the purpose of robbery.[2] Two witnesses testified that when one of the victims attempted to flee, Davis and his cohort fired five or six shots, killing the victim. Davis was charged with felony first-degree murder in violation of MCL 750.316(1)(b) and convicted by a jury in the former Recorders Court for the City of Detroit (now part of the Wayne Circuit Court) on this charge on May 10, 1994.

At sentencing, the trial court initially ruled that Michigan's statutory sentencing scheme for first-degree murder could not constitutionally be applied to juvenile homicide offenders because it was "cruel and unusual" to impose a sentence of life without parole on a juvenile who was "capable of rehabilitation." In concluding that Davis was such an individual, the court surmised that Davis's role in the commission of the offense was that of an aider and abettor, not an actual shooter. The court, however, did not make any finding concerning Davis's intentions with respect to the fleeing victim or whether

[1] The Court of Appeals also opined in dictum how *Miller* should be applied by trial courts in resentencing juvenile first-degree-murder offenders in cases that were not presented on collateral review. *Carp*, 298 Mich App at 523-537.

[2] At trial, Davis testified that he had not participated in the robbery, but that a third cohort, "Shay-man," and the other cohort, had committed the offense without Davis's help or encouragement.

he reasonably foresaw the possibility that a life might be taken when he initially engaged in the armed robbery. The trial court thereupon sentenced Davis to a term of imprisonment of 10 to 40 years.

On appeal, however, the Court of Appeals reversed and remanded for resentencing pursuant to Michigan's statutory sentencing scheme, *People v Davis*, unpublished order of the Court of Appeals, entered November 23, 1994 (Docket No. 176985), and at resentencing, the trial court imposed the required sentence of life without parole. Direct appellate review of defendant's conviction and sentence concluded in 2000. *People v Davis*, unpublished order of the Court of Appeals, entered June 15, 2000 (Docket No. 224046).[3]

In 2010, Davis filed his current motion for relief from judgment, contending that *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010), constituted a "retroactive change in the law" in that it categorically

[3] A federal district court dismissed Davis's federal habeas petition, expressly rejecting his contention "that there was insufficient evidence to convict him of first-degree felony murder." *Davis v Jackson*, unpublished opinion and order of the United States District Court for the Eastern District of Michigan, issued April 30, 2008 (Docket No. 01-CV-72747), p 9. The court relied on the surviving victim's "testi[mony] that both [Davis] and his co-defendant fired their weapons at the decedent." *Id*. Davis challenged the credibility of this witness, but the court rejected this assertion because "[t]he testimony of a single, uncorroborated prosecuting witness or other eyewitness is generally sufficient to support a conviction, so long as the prosecution presents evidence which establishes the elements of the offense beyond a reasonable doubt." *Id*. at 11. The court later denied Davis's request for a certificate of appealability. *Davis v Jackson*, unpublished order of the United States District Court for the Eastern District of Michigan, entered June 4, 2008 (Docket No. 01-CV-72747). The United States Court of Appeals for the Sixth Circuit affirmed this denial, stating that "[a]n eyewitness . . . testified that both Davis and his co-perpetrator fired shots at the decedent." *Davis v Jackson*, unpublished order of the United States Court of Appeals for the Sixth Circuit, entered July 14, 2009 (Docket No. 08-1717), p 2.

barred life-without-parole sentences for juveniles convicted of nonhomicide offenses. Concluding, however, that felony murder is in fact a "homicide offense," even when the defendant is not the actual shooter but an aider and abettor, the trial court denied this motion. The Court of Appeals denied Davis's application for leave to appeal. *People v Davis*, unpublished order of the Court of Appeals, entered November 16, 2011 (Docket No. 304075). While Davis's application for leave to appeal in this Court was pending, the United States Supreme Court issued its decision in *Miller*. In light of *Miller*, Davis's case was remanded to the trial court for a determination of whether *Miller* applied retroactively. *People v Davis*, 492 Mich 871 (2012). On remand, the trial court concluded that *Miller* did apply retroactively, entitling Davis to be resentenced. The prosecutor then appealed, and the Court of Appeals reversed. *People v Davis*, unpublished order of the Court of Appeals, entered January 16, 2013 (Docket No. 314080), citing *Carp*, 289 Mich App 472. Davis again sought leave to appeal in this Court, which we granted to address whether the Eighth Amendment of the United States Constitution or Const 1963, art 1, § 16 categorically bars imposing a sentence of life without parole on a juvenile convicted of felony murder on aiding-and-abetting grounds. *People v Davis*, 495 Mich 890 (2013).

C. DEFENDANT ELIASON

Unlike Carp and Davis, whose sentences became final for purposes of direct review before *Miller* was decided, at least 10 defendants were convicted and sentenced before *Miller*, but their cases were on direct appeal at the time *Miller* was decided. Dakotah Eliason is one of those defendants. At age 14, Eliason, without provocation and after hours of deliberation, fired a

single deadly shot into the head of his stepgrandfather as he slept in his Niles Township home. Eliason was charged with first-degree murder in violation of MCL 750.316(1)(a) in the Berrien Circuit Court, convicted by a jury, and sentenced in October 2010 to life without parole.

While Eliason's appeal was pending before the Court of Appeals, *Miller* was decided. In assessing the effect of *Miller* on Michigan's sentencing scheme for juvenile first-degree-murder offenders, the Court of Appeals held that a trial court must as a result of *Miller* perform an individualized sentencing analysis based upon the factors identified in *Miller*. *People v Eliason*, 300 Mich App 293, 309-311; 833 NW2d 357 (2013), citing *Carp*, 289 Mich App at 522-532. Using this analysis, the trial court must then choose between imposing a sentence of life with or without parole. *Eliason*, 300 Mich App at 310. Eliason sought leave to appeal in this Court, challenging the sentencing procedures and options defined by the Court of Appeals, contending that the trial court should have the further option of imposing a sentence of a term of years. Eliason additionally argued that Const 1963, art 1, § 16 categorically bars the imposition of a life-without-parole sentence on a juvenile. We granted leave to appeal on both issues. *People v Eliason*, 495 Mich 891 (2013).

II. MICHIGAN STATUTES

Pending our resolution of this appeal, and in response to *Miller*, the Legislature enacted, and the Governor signed into law, 2014 PA 22, now codified as MCL 769.25 and MCL 769.25a. This law significantly altered Michigan's sentencing scheme for juvenile offenders convicted of crimes that had previously carried a sentence of life without parole.

A. PRE-*MILLER*

To understand the full context of defendants' appeals and the relief each seeks in reliance on *Miller*, it is necessary first to delineate the pre-*Miller* statutes that controlled the trial and sentencing of juvenile first-degree-murder offenders in Michigan. Each defendant before this Court was charged with first-degree murder under MCL 750.316. When a juvenile defendant "14 years of age or older" is charged with a felony, the family division of the circuit court would typically possess initial jurisdiction. MCL 712A.4(1). However, when a juvenile is charged with a "specified juvenile violation," including first-degree murder in violation of MCL 750.316, "the prosecuting attorney may authorize the filing of a complaint and warrant on the charge . . . ." MCL 764.1f. If the prosecutor does so, the circuit court itself, rather than the family division of the circuit court, acquires jurisdiction over the juvenile defendant's case and must try that person as an adult. See MCL 712A.2(a)(1).

This process has been termed the "automatic waiver process" because the Legislature has vested exclusively in the prosecutor the executive discretion to charge and try a juvenile as an adult when the juvenile stands accused of first-degree murder. *People v Conat*, 238 Mich App 134, 141-142; 605 NW2d 49 (1999). The prosecutors in the instant three cases filed complaints and warrants placing the cases within the jurisdiction of the circuit court, where each defendant was then tried and convicted as an adult. When this occurs and the offense is included in an enumerated subset of specified juvenile violations (which includes first-degree murder), "[t]he court shall sentence a juvenile . . . in the same manner as an adult[.]" MCL 769.1(1). Because an adult convicted of first-degree murder "shall be

punished by imprisonment for life," MCL 750.316(1), and is not eligible for parole, MCL 791.234(6)(a), defendants were ultimately sentenced to terms of life without parole. Each defendant now seeks resentencing and, pursuant to the statutory response to *Miller*, would, if granted resentencing, be subject to the new sentencing rules established for juveniles by 2014 PA 22.

B. POST-*MILLER*

MCL 769.25, enacted in response to *Miller*, prescribes a new sentencing scheme for juveniles convicted of violating certain provisions of Michigan laws, such as MCL 750.316, that had previously carried with them a fixed sentence of life without parole. The effect of MCL 769.25 is that even juveniles who commit the most serious offenses against the laws of this state may no longer be sentenced under the same sentencing rules and procedures as those that apply to adults who commit the same offenses. Rather than imposing fixed sentences of life without parole on all defendants convicted of violating MCL 750.316, MCL 769.25 now establishes a default sentencing range for individuals who commit first-degree murder before turning 18 years of age. Pursuant to the new law, absent a motion by the prosecutor seeking a sentence of life without parole,

> the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years. [MCL 769.25(4) and (9).]

When, however, the prosecutor does file a motion seeking a life-without-parole sentence, the trial court "shall conduct a hearing on the motion as part of the sentencing process" and "shall consider the factors listed in Miller v Alabama . . . ." MCL 769.25(6). Accordingly, the

sentencing of juvenile first-degree-murder offenders now provides for the so-called "individualized sentencing" procedures of *Miller*.

In adopting this new sentencing scheme, the Legislature was clearly cognizant of the issue surrounding whether *Miller* was to be applied retroactively. In defining the scope of the new scheme, the Legislature asserted that "the procedures set forth in [MCL 769.25] do not apply to any case that is final for purposes of appeal on or before June 24, 2012 [the day before the United States Supreme Court's decision in *Miller*]." MCL 769.25a(1). Instead, the Legislature specified:

> If the state supreme court or the United States supreme court finds that the decision of the United States supreme court in Miller v Alabama, [567] US ___; 183 L Ed 2d 407; 132 S Ct 2455 (2012), applies retroactively to all defendants who were under the age of 18 at the time of their crimes, and that decision is final for appellate purposes, the determination of whether a sentence of imprisonment for a violation set forth in [MCL 769.25(2)] shall be imprisonment for life without parole eligibility or a term of years as set forth in [MCL 769.25(9)] shall be made by the sentencing judge or his or her successor as provided in this section. [MCL 769.25a(2).][4]

We now take up the question identified in MCL 769.25a(2)—whether *Miller* must be applied retroactively.

III. STANDARD OF REVIEW

Whether a decision of the United States Supreme Court applies retroactively under either federal or state

[4] MCL 769.25a(3) contains a similar exception to the prospective application of MCL 769.25 in the event that this Court or the United States Supreme Court holds that *Miller* applies retroactively to juvenile first-degree-murder offenders convicted on a felony-murder theory under MCL 750.316(1)(b).

retroactivity rules poses a question of law that is reviewed de novo. *Maxson*, 482 Mich at 387. Whether a statute is constitutional also poses a question of law that is reviewed de novo. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009). When the constitutionality of a statute is brought into question, "[t]he party challenging [it] has the burden of proving its invalidity." *People v Thomas*, 201 Mich App 111, 117; 505 NW2d 873 (1993). To sustain its burden, the party challenging the statute must overcome the presumption that a statute is constitutional, and the statute "will not be declared unconstitutional unless clearly so, or so beyond a reasonable doubt." *Cady v Detroit*, 289 Mich 499, 505; 286 NW 805 (1939). Furthermore, a "party challenging the facial constitutionality of a statute faces an extremely rigorous standard, and must show that no set of circumstances exists under which the [a]ct would be valid." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11; 740 NW2d 444 (2007) (citations and quotation marks omitted).

IV. ANALYSIS

To determine whether *Miller* must be applied retroactively, it is helpful to first identify exactly what *Miller* held by way of understanding what precedents were relied on in forming its rule. *Miller* is the product of "two strands of precedent," one requiring a particular form of individualized sentencing before capital punishment can be imposed and the other addressing the constitutionality of imposing specific punishments on juvenile offenders. *Miller*, 567 US at ___; 132 S Ct at 2463-2464. We now consider both strands of precedent with the purpose of identifying what is required by the rules formed from each strand of precedent and then

comparing and contrasting what is required by each with what is required by the rule in *Miller* in order to determine whether the latter rule should be applied retroactively.

A. GENESIS OF *MILLER*

1. CAPITAL-PUNISHMENT STRAND

In *Furman v Georgia*, 408 US 238; 92 S Ct 2726; 33 L Ed 2d 346 (1972), the United States Supreme Court decided 5-4 in seven separate opinions that it constituted cruel and unusual punishment in violation of the Eighth Amendment to impose capital punishment pursuant to a sentencing scheme that, in its words, "vested the [sentencer] with complete and unguided discretion to impose the death penalty . . . ." *Beck v Alabama*, 447 US 625, 639; 100 S Ct 2382; 65 L Ed 2d 392 (1980). In response, some states enacted sentencing schemes requiring the imposition of capital punishment for select crimes by way of the *mandatory* operation of law. *Woodson v North Carolina*, 428 US 280, 286-287, 298; 96 S Ct 2978; 49 L Ed 2d 944 (1976). Those sentencing schemes were also challenged on Eighth Amendment grounds in *Woodson*, with the Court understanding the case as challenging not the state's ability to impose capital punishment but "the *procedure* employed by the State to select persons for the . . . penalty of death." *Id*. at 287 (emphasis added).

In *Woodson*, the Court, in another 5-4 decision, held that those schemes were unconstitutional. The plurality opinion viewed as unconstitutional sentencing schemes that employed a process that did not permit for "the prevailing practice of individualizing sentencing determinations" as part of the process for imposing capital punishment. *Id*. at 303-304 (opinion of Stewart,

Powell, and Stevens, JJ.). Accordingly, post-*Woodson*, capital punishment could only be constitutionally imposed after "consideration of the character and record of the individual offender and the circumstances of the particular offense . . . ." *Id*. at 304. Notably, however, on the same day that the United States Supreme Court decided *Woodson*, it also declined to categorically bar the imposition of capital punishment. *Gregg v Georgia*, 428 US 153; 96 S Ct 2909; 49 L Ed 2d 859 (1976).

Following *Woodson* and *Gregg*, the United States Supreme Court confronted two additional cases challenging whether the sentencing procedures employed to impose capital punishment complied with *Woodson*'s requirement of individualized sentencing determinations. See *Lockett v Ohio*, 438 US 586; 98 S Ct 2954; 57 L Ed 2d 973 (1978), and *Eddings v Oklahoma*, 455 US 104; 102 S Ct 869; 71 L Ed 2d 1 (1982). Both *Lockett* and *Eddings* were cited in *Miller* as part of the capital-punishment strand of precedent that culminated in *Miller*. *Miller*, 567 US at ___; 132 S Ct at 2467. The plurality opinion in *Lockett* stated that statutory schemes authorizing capital punishment must permit the sentencer to consider all forms of mitigating evidence relating to two measuring points for determining the propriety of the sentence—evidence relating to the defendant's "character or record and any of the circumstances of the offense . . . ." *Lockett*, 438 US at 604 (opinion by Burger, C.J.). Relevantly listed as factors that the sentencer must be permitted to consider were the defendant's "role in the offense" and the defendant's "age." *Id*. at 608.

In *Eddings*, the Court, in a 5-4 decision, applied *Lockett* to a case in which the trial court, in considering mitigating factors before imposing capital punishment, declined to consider either the defendant's family back-

ground, including the physical abuse and neglect he had suffered, or the fact that he suffered from an alleged "personality disorder." *Eddings*, 455 US at 112-113. The Court ruled that while a sentencer may "determine the weight to be given relevant mitigating evidence," the sentencer may not decide to give a piece of relevant mitigating evidence "no weight by [altogether] excluding such evidence from . . . consideration." *Id*. at 114-115. Under *Lockett* and *Eddings*, in which individualized sentencing is required, not only must statutory procedures for imposing capital punishment permit the defendant to present all relevant mitigating evidence, but the sentencer must also consider and accord some weight to that evidence. *Id*. at 112-115.

2. JUVENILE-SENTENCING STRAND

The second strand of precedent was developed in two cases, *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005), and *Graham*. *Roper* and *Graham* were understood by the Court in *Miller* to have "establish[ed] that children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 US at ___; 132 S Ct at 2464. This constitutional distinction has resulted in downward alterations in *Roper* and *Graham* in the range of punishments that the state may constitutionally impose on juvenile offenders. When the rules from *Roper* and *Graham* are considered together, a state may only impose a sentence of life without parole on a juvenile for the commission of an offense that if committed by an adult would constitutionally permit the state to punish the adult by capital punishment.

In *Roper*, the Court held that the "Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Roper*, 543 US at 578.

The Court characterized the rule it was adopting as a "categorical rule." *Id*. at 572.[5] The subsequent decision in *Graham* adopted what the Court again characterized as a "categorical rule," i.e., that a sentence of life without parole could not be imposed on a juvenile nonhomicide offender. *Graham*, 560 US at 79. In reaching this conclusion, *Graham* drew comparisons between a capital sentence for an adult offender and a life-without-parole sentence for a juvenile offender. *Id*. at 69-70. To justify this categorical rule, the Court relied on the factors identified in *Roper* that assertedly distinguished juvenile and adult offenders. *Id*. at 68, citing *Roper*, 543 US at 569-570. The Court also supported its prohibition of life-without-parole sentences for juvenile nonhomicide offenders by concluding that the goals of punishment (retribution, deterrence, incapacitation, and rehabilitation) are not furthered when a nonparolable life sentence is imposed. *Id*. at 71-74. Combining strands of precedent that were previously limited to capital sentences and juvenile nonhomicide offenders respectively, and holding for the first time that these separate strands were relevant to noncapital sentences for juvenile homicide offenders, the United States Supreme Court reached its holding in *Miller*.

3. *MILLER v ALABAMA*

Miller v Alabama created the rule that Carp and Davis seek to have applied retroactively. Having identi-

[5] The Court's basis for prescribing this rule, distinguishing between adult and juvenile offenders for purposes of constitutional analysis, rested on three factors: (1) juveniles, by way of their "lack of maturity," tend to engage in "impetuous and ill-considered actions," (2) "juveniles are more vulnerable or susceptible to negative influences and outside pressures" because they "have less control . . . over their own environment," and (3) "the character of a juvenile is not as well formed as that of an adult." *Roper*, 543 US at 569-570 (citation and quotation marks omitted).

fied what is required by the rules from each of the two strands of precedent that underlie *Miller*, we now identify what is required by the rule in *Miller* in order to determine whether *Miller* is more like the juvenile-sentencing strand whose rules have applied retroactively under *Teague* or more like the capital-punishment strand whose rules have not been applied retroactively under *Teague*. We compare and contrast the rule in *Miller* in this way because, as discussed later, the "form and effect" of a rule is essential in determining whether a rule is to be applied retroactively under *Teague*. One form of a rule will produce a single invariable result, or a single effect, when applied to *any* defendant in the class of defendants to whom the rule is pertinent. Another form of a rule will produce a range of results, or have multiple possible effects, when applied to *different* defendants in the class of defendants to whom the rule is pertinent. The form and effect of the rules derived from the capital-punishment strand of precedent varies considerably from the form and effect of the rules derived from the juvenile-sentencing strand of precedent, and this variance has markedly different consequences for the question of retroactivity. The capital-punishment strand of precedent prescribed rules that require a sentencer to perform an individualized sentencing analysis resulting in capital punishment being *either* imposed or not. By contrast, the juvenile-sentencing strand of precedent prescribed rules that categorically bar the imposition of a particular sentence, requiring the sentencer to impose a lesser sentence in every case. The former class of rules does not clearly satisfy the test for retroactivity, while the latter class of rules does. In assessing whether the form and effect of the rule in *Miller* is more akin to that of the capital-punishment strand of precedent, and therefore less clearly retroactive, or more akin to the

juvenile-sentencing strand of precedent, and therefore more clearly retroactive, we find it important to examine what *Miller* itself stated about the form and effect of its own holding.

Miller held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 567 US at ___; 132 S Ct at 2469. Within the very same paragraph in which *Miller* announced this holding, the Court also stated that its decision "require[s] [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id*. at ___; 132 S Ct at 2469. *Miller* then provides substantial details regarding what must be considered as part of the individualized sentencing process before a sentence of life without parole can be imposed on a juvenile:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it. [*Id*. at ___; 132 S Ct at 2468 (citation omitted).]

Miller's summarization of what the trial court must evaluate as part of the new individualized sentencing process tracks in large part the two measuring points

about which a defendant must be allowed to present mitigating evidence within the capital-punishment context of *Lockett*—evidence relating to "the 'circumstances of the particular offense and [to] the character and propensities of the offender.' " *Id*. ___ n 9; 132 S Ct at at 2471 n 9, quoting *Roberts v Louisiana*, 428 US 325, 333; 96 S Ct 3001; 49 L Ed 2d 974 (1976) (opinion of Stewart, Powell, and Stevens, JJ.), and citing *Sumner v Shuman*, 483 US 66; 107 S Ct 2716; 97 L Ed 2d 56 (1987). Although the focus of the rule in *Miller*—life-without-parole sentences for juvenile offenders—is, of course, distinct from the focus of the rules in capital-punishment cases, the form and effect of the rule in *Miller* is quite similar to that of the rules in capital-punishment cases. That is, the rule in *Miller* requires a sentencer to perform an individualized sentencing analysis resulting in a life-without-parole sentence being *either* imposed or not, very much like the capital-punishment cases require a sentencer to perform an individualized sentencing analysis resulting in capital punishment being *either* imposed or not.

It is considerably more difficult to draw the same comparison between the rule in *Miller* and the categorical rules in *Graham* and *Roper*. Indeed, the United States Supreme Court itself specifically distinguished the form and effect of these rules:

> Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty. [*Miller*, 567 US at ___; 132 S Ct at 2471.][6]

[6] This is but one of several statements from *Miller* highlighting the limited effect of its rule as it pertains to requiring "a certain process"

Thus, rather than relying on *Graham* and *Roper* to give form and effect to *Miller*, in the same manner as the capital-punishment decisions, the Court relied on *Graham* and *Roper* in *Miller* only for a generalized

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rather than "categorically bar[ring] a penalty." In the paragraph in which it describes its holding and addresses the sentencer's obligations before imposing a life-without-parole sentence, the Court stated, "[W]e do not foreclose a sentencer's ability to make that judgment in homicide cases . . . ." *Id*. at ___; 132 S Ct at 2469. Additionally, in discussing the breadth of its holding, the Court stated unequivocally that it has not placed any bar on imposing a life-without-parole sentence on juvenile homicide offenders because it had declined to even reach the question of whether the Eighth Amendment requires such a bar. See *id*. at ___; 132 S Ct at 2469 ("[W]e do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles . . . ."). Indeed, the only opinion in *Miller* even to entertain the possibility that the Eighth Amendment imposes a categorical bar on life-without-parole sentences for juvenile homicide offenders was Justice Breyer's concurrence, joined in only by Justice Sotomayor, in which he stated,

> Given *Graham*'s reasoning, the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim. [*Id*. at ___; 132 S Ct at 2475-2476 (Breyer, J., concurring).]

Had the Court itself adopted Justice Breyer's proposed rule, then *Miller* might be said to have the same form and effect of the categorical rules adopted in *Graham* and *Roper*, but the Court did not. The dissent in this case further errs in its attempt to read the rule in *Miller* and the rule proposed by Justice Breyer as one and the same. See *post* at 545. Whereas the rule proposed by Justice Breyer draws a bright line, foreclosing the state's ability to impose a sentence of life without parole for a juvenile convicted of a homicide offense in which the juvenile offender did not kill or intend to kill, the rule in *Miller* does not foreclose imposing a life-without-parole sentence on such an offender. This is because the rule in *Miller*, unlike that proposed by Justice Breyer, requires a sentencer to look at not only the circumstances of the offense, but also at the characteristics of the defendant such that a juvenile homicide offender who did not kill or intend to kill could be sentenced to life without parole if the offender, for example, possessed a prior criminal record, showed no signs of amenability to rehabilitation, and exhibited mental faculties similar to those possessed by an adult offender.

"principle" regarding juvenile offenders. *Id*. at ___; 132 S Ct at 2471, 2472 n 11. That is, *Miller* relied on *Graham* and *Roper* for the general principle of law that juveniles possess different mental faculties than adults, so the United States Constitution requires that they be treated differently than adults for sentencing purposes with respect to the imposition of capital punishment and sentences of life without parole. Although this principle of law explains why the United States Supreme Court found it necessary to adopt the rule in *Miller*, it has no bearing on the actual form and effect of the rule adopted in *Miller*. Accordingly, because the form and effect of a rule rather than the principle underlying the rule's formation controls whether the rule must be applied retroactively under federal retroactivity rules, whether *Miller* must be applied retroactively will center on whether a rule with a form and effect similar to the rules in *Woodson*, *Lockett*, and *Eddings* (rather than *Roper* and *Graham*) is the type of rule entitled to retroactive application under *Teague*.[7] With this in mind, we next define *Teague*'s federal retroactivity test so as to determine whether the rule in *Miller* is entitled to retroactive application under that test.

B. FEDERAL RETROACTIVITY

1. GENERAL OVERVIEW

There is a "general rule of *nonretroactivity* for cases on collateral review" when it comes to applying new constitutional rules to cases that became final before

[7] The dissent does not appear to dispute that the rule in *Miller* has the form and effect of the rules from *Woodson*, *Lockett*, and *Eddings*, rather than those from *Roper* and *Graham*, when it describes the latter decisions as having "forbade" and "prohibited" specific types of punishments as applied to juveniles while describing *Miller* as having "struck down a sentencing scheme." *Post* at 531.

the new rule was announced.[8] *Teague*, 489 US at 307 (opinion by O'Connor, J). This default rule is driven by "the principle of finality which is essential to the operation of our criminal justice system." *Id*. at 309. Supporting this same principle are concerns arising from the burdens placed on the administration of justice when new rules are applied retroactively, in that "[t]he 'costs imposed upon the State[s] by retroactive application of new rules of constitutional law on [collateral review] generally far outweigh the benefits of this application.' "[9] *Id*. at 310, quoting *Solem v Stumes*,

[8] This general rule of nonretroactivity stands in contrast to the general rule requiring the retroactive application of new rules to cases that have not become final for purposes of direct appellate review before the new rule is announced. *Griffith v Kentucky*, 479 US 314, 328; 107 S Ct 708; 93 L Ed 2d 649 (1987).

[9] By our count, Carp and Davis are 2 of 334 defendants currently serving life-without-parole sentences in Michigan for crimes committed before they turned 18 years of age whose sentences became final for purposes of direct review before the Supreme Court's decision in *Miller*. To fully understand the effect of applying *Miller* retroactively, it may be helpful to briefly consider the demographics and case histories of the defendants who would be entitled to resentencing if *Miller* is applied retroactively. There are at least two reasons why these factors are relevant to the *Miller* analysis: first, *Miller* focuses its individualized sentencing analysis on the defendant's circumstances and personal characteristics *at the time* of the offense, so any retroactive application of *Miller* necessarily requires an analysis specific to that time, however long ago it may have been. The older the case generally, the greater the state's interest in finality and, concomitantly, the more burdensome it is likely to be to accurately reconstruct what characterized the offense and the offender at that time. Second, because *Miller* identifies age and mental development as two consequential factors in determining whether a life-without-parole sentence is constitutionally permissible for a juvenile offender, that sentence is increasingly likely to be permissible the closer an offender was to 18 years of age at the time of the offense. See note 35 of this opinion.

Of the 334 affected defendants, 4 were 14 years of age when they committed their first-degree-murder offenses, 44 were 15 years of age, 105 were 16 years of age, and 181 were 17 years of age. Of the 181

465 US 638, 654; 104 S Ct 1338; 79 L Ed 2d 579 (1984) (second alteration in original).

For this reason, the first inquiry in which a court must engage when determining whether a rule applies retroactively to cases presented on collateral review concerns whether the rule constitutes a "new rule" as defined by *Teague*, 489 US at 299-301 (opinion by O'Connor, J.), and *Penry v Lynaugh*, 492 US 302, 329; 109 S Ct 2934; 106 L Ed 2d 256 (1989). *Saffle v Parks*, 494 US 484, 487; 110 S Ct 1257; 108 L Ed 2d 415 (1990). Generally speaking, a rule is "new" if the rule announces a principle of law not previously articulated or recognized by the courts and therefore "falls outside [the] universe of federal law" in place at the time defendant's conviction became final. *Williams v Taylor*, 529 US 362, 381; 120 S Ct 1495; 146 L Ed 2d 389 (2000) (opinion by Stevens, J.). If a rule is not deemed a "new rule," then the general rule of nonretroactivity is inapplicable and the rule will be applied retroactively even to cases that became final for purposes of direct appellate review before the case on which the defendant relies for the rule was decided. *Whorton v Bockting*, 549 US 406, 416; 127 S Ct 1173; 167 L Ed 2d 1 (2007). If, however, a rule is deemed a "new rule," then the general rule of nonretroactivity does apply. See *Saffle*, 494 US at 494.

When a rule is deemed a "new rule" and the general rule of nonretroactivity applies, a court must then

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defendants who were 17 years of age at the time of their offenses, 28 were within two months of turning 18 years of age, with several of those individuals within days of turning 18. As for *when* the defendants were initially sentenced, 172 of the defendants were sentenced at least 20 years ago, with several sentenced as early as the mid- to late 1970s. Another 83 defendants were sentenced between 15 and 20 years ago, 46 were sentenced between 10 and 15 years ago, 33 were sentenced between 5 and 10 years ago, and none were sentenced within the last 5 years.

engage in *Teague*'s second inquiry, to wit, whether the "new rule" satisfies one of *Teague*'s two exceptions to the general rule of nonretroactivity for new rules. See *id*. If the "new rule" satisfies either of *Teague*'s two exceptions, then it will be applied retroactively. *Id*. If, however, the "new rule" fails to satisfy either of those exceptions, the rule will only be entitled to prospective application. *Id*. *Whorton* succinctly summarized *Teague*'s two exceptions to the general rule of nonretroactivity as follows:

> A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a " 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." [*Whorton*, 549 US at 416, quoting *Saffle*, 494 US at 495, quoting *Teague*, 489 US at 311 (opinion by O'Connor, J.) (alteration in original).]

2. "NEW RULE"

Turning to the first inquiry of the retroactivity analysis, whether the rule in *Miller* is "new," we note that the United States Supreme Court has defined a rule as "new" when the rule " 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not 'dictated by precedent existing at the time the defendant's conviction became final.' " *Saffle*, 494 US at 488, quoting *Teague*, 489 US at 301 (opinion by O'Connor, J.) (emphasis omitted). Essential to any of these bases for finding that a rule is "new" is the question of whether "*all* reasonable jurists would have deemed themselves compelled to accept" the rule at the time defendant's conviction became final. *Graham v Collins*, 506 US 461, 477; 113 S Ct 892; 122 L Ed 2d 260 (1993) (emphasis added). The fact that a "decision is within the 'logical compass' of an earlier decision . . . is not conclusive for purposes of deciding

whether the current decision is a 'new rule' under *Teague*." *Butler v McKellar*, 494 US 407, 415; 110 S Ct 1212; 108 L Ed 2d 347 (1990). In determining whether the rule in *Miller* is "new," this Court inquires whether before *Miller* courts of this state, if presented with a constitutional challenge to our pre-*Miller* sentencing statutes, would have felt bound to declare those statutes unconstitutional for the reasons expressed in *Miller*.

It is apparent, in our judgment, that the rule in *Miller* constitutes a new rule. *Miller* imposed a hitherto-absent obligation on state and lower federal courts to conduct individualized sentencing hearings before imposing a sentence of life without parole on a juvenile homicide offender. As part of this process, a prosecutor seeking a life-without-parole sentence must now present evidence of aggravating factors relevant to the offender and the offense, juvenile defendants must be afforded the opportunity and the financial resources to present evidence of mitigating factors relevant to the offender and the offense, psychological and other evaluations relevant to the youthfulness and maturity of the defendants must be allowed, and courts must now embark upon the consideration of aggravating and mitigating evidence offered regarding juvenile defendants as a condition to imposing sentences that previously required no such consideration. It thus seems certain as a result of *Miller* that a considerable number of juvenile defendants who would previously have been sentenced to life without parole for the commission of homicide offenses will have a lesser sentence meted out. Under *Teague* and *Saffle*, these new obligations clearly render the rule in *Miller* a new rule. We are not aware of any statement of this Court by any justice before *Miller* that argued in support of, or anticipated, the constitutional requirements set forth in that decision.

Unless every affirmation by this Court of a sentence of life without parole on a juvenile offender before *Miller*, including those that followed decisions such as *Roper*, *Graham*, *Eddings*, and *Lockett*, can be characterized as "unreasonable," there cannot be serious argument that *Miller* did not define a "new rule."

Although *Miller* may be "within the logical compass" of earlier decisions, and built upon their foundation, cases predating *Miller* can hardly be read as having "dictated" or "compelled" *Miller*'s result. *Miller* undoubtedly broke new ground in that it set forth the first constitutional rule to mandate individualized sentencing before noncapital punishment can be imposed. In this respect, the capital-punishment cases, although providing a model for the form and effect of *Miller*, would not have required a reasonable jurist to conclude that a life-without-parole sentence for a juvenile could only be constitutionally imposed following an individualized sentencing hearing.

Turning to the juvenile cases, *Roper* also dealt exclusively with the imposition of capital sentences without discussing the constitutionality of life-without-parole sentences and the need for individualized sentencing hearings. While *Graham*'s focus was on life-without-parole sentences, its constitutional rule was limited to nonhomicide offenses, and it did not make individualized sentencing the constitutional threshold for imposing a sentence of life without parole. Furthermore, while *Graham* drew a comparison between life-without-parole sentences for juvenile offenders and capital punishment, which was pivotal in deciding *Miller*, *Graham* also stopped well short of finding the two punishments equivalent. See *Graham*, 560 US at 69. This is evident by *Graham*'s reference to life without parole as " 'the second most severe penalty permitted by law,' " *id*.,

quoting *Harmelin v Michigan*, 501 US 957, 1001; 111 S Ct 2680; 115 L Ed 2d 836 (1991) (Kennedy, J., concurring in part), and its description of capital punishment as " '*unique* in its severity and irrevocability,' " *id*., quoting *Gregg*, 428 US at 187 (emphasis added). Accordingly, although *Roper* and *Graham* could certainly be argued as being part of a longer-term movement toward application of the individualized sentencing capital-punishment cases to life-without-parole sentences for juvenile homicide offenders, *Graham* itself nowhere compelled or dictated this application. Since before *Miller* a court of this state could have reasonably rejected a constitutional challenge to Michigan's pre-*Miller* sentencing scheme similar to that raised in *Miller*, *Miller* is clearly a "new rule."

3. PROCEDURE VERSUS SUBSTANCE

Concluding that *Miller* announced a new rule, we turn to the second inquiry, whether the rule in *Miller* fits within one of *Teague*'s two "narrow exceptions" to the general rule of nonretroactivity. *Saffle*, 494 US at 486. At the outset, we note that neither Carp nor Davis advanced any argument before this Court suggesting that *Miller* should be applied retroactively under the second exception, the "watershed rule of criminal procedure" exception. Accordingly, we consider any argument regarding *Miller* identifying a "watershed rule of criminal procedure" unpreserved, and we will only consider whether the rule in *Miller* fits within the first exception to the general rule of nonretroactivity.[10]

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[10] Nonetheless, we observe that

> [i]n order to qualify as watershed, a new rule must meet two requirements. First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction. Second, the

The first exception differentiates between new *substantive* rules and new *procedural* rules, allowing for the retroactive application of only the former. See *Whorton*, 549 US at 417; *Schriro v Summerlin*, 542 US 348, 351-352; 124 S Ct 2519; 159 L Ed 2d 442 (2004). The origin of the first exception predates *Teague*, as that decision drew the contours of this exception from Justice Harlan's partial concurrence and partial dissent in *Mackey v United States*, 401 US 667; 91 S Ct 1160; 28 L Ed 2d 404 (1971). *Teague*, 489 US at 311 (opinion by O'Connor, J.). In speaking of the "general" rule against retroactive application of new constitutional rules, Justice Harlan commented that the Court's

> discussion is written only with new 'procedural due process' rules in mind, that is, those applications of the Constitution that forbid the Government to utilize certain techniques or processes in enforcing concededly valid societal proscriptions on individual behavior. New 'substantive due process' rules, that is, those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, must, in my view, be placed on a different footing [and afforded retroactive application]. [*Mackey*, 401 US at 692 (Harlan, J., concurring in the judgments in part and dissenting in part).]

> rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding. [*Whorton*, 549 US at 418 (citations and quotation marks omitted).]

In applying this standard, the *only* rule that the United States Supreme Court has ever identified as a "watershed rule" for purpose of *Teague*'s second exception is the rule drawn from *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963), which established that the Sixth Amendment included the right to appointed counsel at trial for indigent defendants. See *Whorton*, 549 US at 419. Furthermore, the sentencing rule in *Miller* has no possible effect in preventing any "impermissibly large risk of an inaccurate conviction" and pertains to no "bedrock procedural elements essential to the fairness of a proceeding."

Justice Harlan supported this differentiation by emphasizing that retroactive application of a substantive rule "represents the clearest instance where finality interests should yield" because "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Id*. at 693. Contrasting the retroactive application of a substantive rule with that of a procedural rule, Justice Harlan proceeded to offer the observation that the retroactive application of a substantive rule "entails none of the adverse collateral consequences of retrial" certain to follow the retroactive application of a procedural rule. *Id*. This is because a substantive rule precludes the possibility of retrial given that its application dictates a *single result* for the class of individuals or type of conduct formerly regulated by the old rule and now governed by the new rule. It is in this sense that categorical rules, such as those derived from the juvenile-sentencing strand of precedent, are substantive because they have a "form and effect" that *always* results in the imposed punishment being unconstitutional, i.e., they produce a "single result." Conversely, noncategorical rules, such as those derived from the capital-punishment strand of precedent—and *Miller*—are procedural because they have a "form and effect" that does *not* always result in the imposed punishment being unconstitutional, i.e., they do not produce a "single result." The latter rules merely require a court to perform a new or amended analysis before it can be determined whether a given punishment can be imposed on a particular defendant.

Teague subsequently adopted Justice Harlan's distinction between procedural and substantive rules, including the definition of when a rule is substantive. *Teague*, 489 US at 310-311 (opinion by O'Connor, J.). Since *Teague*, the United States Supreme Court has continued to recognize that the exceptions proposed by

Justice Harlan in his opinion in *Mackey* were adopted in *Teague*. See, e.g., *Danforth v Minnesota*, 552 US 264, 273-275; 128 S Ct 1029; 169 L Ed 2d 859 (2008); *Penry*, 492 US at 329-330; see also *Schriro*, 542 US at 362 (Breyer, J., dissenting).

Although *Teague* addressed whether a new rule germane to the trial stage of a criminal case could be applied retroactively, later cases have addressed whether new rules pertaining only to punishments and the sentencing phase are substantive and fit into *Teague*'s first exception to the general rule of nonretroactivity. In so doing, the United States Supreme Court has provided three descriptions of what makes a new rule "substantive" within the context of a new rule governing the sentencing stage of a criminal case. Each of these, however, can be boiled down to whether the punishment imposed is one that the state has the authority to, and may constitutionally, impose on an individual within the pertinent class of defendants.

First, a new rule has been described as "substantive" when the rule "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense." *Penry*, 492 US at 330; see also *Saffle*, 494 US at 494-495. Put another way, the new rule is "substantive" when the punishment at issue is categorically barred. The requirement that the new rule be "categorical" in its prohibition is the direct product of how Justice Harlan's first exception has been understood. That is, his first exception permits the retroactive application of "substantive categorical guarantees accorded by the Constitution, *regardless of the procedures followed*." *Penry*, 492 US at 329 (emphasis added); see also *Saffle*, 494 US at 494.

Second, a new rule has been described as "substantive" if it "alters the range of conduct or the class of

persons that the law punishes." *Schriro*, 542 US at 353, citing *Bousley v United States*, 523 US 614, 620-621; 118 S Ct 1604; 140 L Ed 2d 828 (1998). The dissent contends that when a new rule "expand[s] the range of punishments" available to the sentencer, the rule fits within this second description of a new rule as substantive. *Post* at 545. Although a new rule could potentially be viewed as altering the range of punishments available to the sentencer when the rule makes a previously unavailable lesser punishment available to the sentencer, the United States Supreme Court has adopted a different definition for when a new rule "alters the range" of available punishments. We are bound to abide by that definition when considering the rule in *Miller* for federal retroactivity purposes. Under that definition, a new rule alters the "range of conduct" that the law can punish when it "place[s] particular conduct or persons covered by the statute *beyond the State's power to punish*." *Schriro*, 542 US at 352 (emphasis added) (citations omitted). In this sense, the new rule transforms the conduct in which the defendant engaged, and which was previously within the state's power to regulate, into conduct that is no longer subject to criminal regulation. Applied in the context of rules governing sentencing and punishment, it must be the case that under the previous rule, the defendant "faces a punishment that the law cannot [any more] impose upon him" in light of the new rule. *Id*. In this sense, a new rule only "alters the range" of punishments available to the sentencer if it shifts the upper limits of the range of punishments downward so that the previously most severe punishment to which defendants have been sentenced is no longer a punishment that the sentencer may constitutionally impose.[11]

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[11] Although the dissent argues that *Schriro*'s definition of a rule that alters the range of punishments is "inclusive and not exclusive," *post* at

Third, a new rule has been described as "substantive" when it "narrow[s] the scope of a criminal statute *by interpreting its terms* . . . ." *Id*. at 351, citing *Bousley*, 523 US at 620-621 (emphasis added). This third description addresses situations in which a criminal statute has previously been interpreted and applied beyond the statute's intended scope so that the "defendant stands convicted of 'an act that the law does not make criminal.' " *Bousley*, 523 US at 620, quoting *Davis v United States*, 417 US 333, 346; 94 S Ct 2298; 41 L Ed 2d 109 (1974).[12] Put another way, this description is implicated when a court, rather than a legislature, has criminalized conduct, authorized punishment, or construed a statute to apply more broadly than it is later deemed to apply. See *id*. at 620-621 ("For under our federal system it is only Congress, and not the courts, which can make conduct criminal."). In this sense, the state cannot constitutionally impose the punishment at issue because the new rule determines that no lawfully enacted statute has given the state the authority to impose such a punishment.

In distinguishing what makes a new rule substantive, the United States Supreme Court has also afforded considerable direction regarding the qualities and contours of nonsubstantive, or procedural, rules. Simply

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545 n 68, the dissent fails to identify a single Supreme Court decision that classifies a rule as "altering the range" of punishments when the rule requires the sentencer to *consider* a lesser punishment, but does not *exclude* any punishment from the range of punishments that may be considered. Despite no such decision, the dissent would make retroactive a type of rule that the Supreme Court has never before granted retroactive status under *Teague*'s first exception to the general rule of nonretroactivity.

[12] Notable to the scope and application of this third description, both *Bousley* and *Davis* involved collateral attacks to federal criminal convictions in which such attacks were dependent on the interpretation of federal law, rather than the development of a new constitutional rule.

put, "rules that regulate only the *manner of determining* the defendant's culpability are procedural." *Schriro*, 542 US at 353. This is because a rule that alters the "manner of determining" culpability "merely raise[s] the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id*. at 352. Applying this understanding to new rules governing sentences and punishments, a new procedural rule creates the possibility that the defendant would have received a less severe punishment but does not necessitate such a result. Accordingly, a rule is procedural when it affects how and under what framework a punishment may be imposed but leaves intact the state's fundamental legal authority to seek the imposition of the punishment on a defendant currently subject to the punishment.

Turning to how the United States Supreme Court has applied this distinction between substantive and procedural rules, in *Schriro* the Court was confronted with whether the new rule from *Ring v Arizona*, 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002), was substantive or procedural. *Ring*'s rule invalidated Arizona's capital-punishment sentencing scheme and required that a jury rather than a judge make the determination whether aggravating factors necessary for the imposition of capital punishment had been proved. *Id*. at 609. Despite the fact that *Ring* invalidated Arizona's statutory sentencing scheme authorizing capital punishment, *its* rule was ultimately deemed "procedural" on the basis that it

> did not alter the range of conduct Arizona law subjected to the death penalty. . . . Instead, *Ring* altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment. Rules that allocate decisionmaking authority

> in this fashion are prototypical procedural rules, a conclusion we have reached in numerous other contexts. [*Schriro*, 542 US at 353.]

In *Saffle*, the Court similarly deemed a new rule "procedural" when it would have prohibited anti-sympathy instructions to juries performing the individualized sentencing process as a condition to imposing capital punishment. See *Saffle*, 494 US at 486. In doing so, *Saffle* stated that the rule "would neither decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons." *Id*. at 495. It is with *Schriro* and *Saffle* in mind that we turn to the question of whether the rule in *Miller* is properly viewed as substantive or procedural.

Although the new procedures required by *Miller* may be more elaborate and detailed than the new procedures at issue in *Schriro* and *Saffle*, the basic form and effect is the same. As discussed earlier, *Miller* requires that the trial court "follow a certain process" before it can impose a sentence of life without parole on a juvenile homicide offender. *Miller*, 567 US at ___; 132 S Ct at 2471. *Miller*, however, specifically "does not categorically bar a penalty for a class of offenders or type of crime[.]" *Id*. at ___; 132 S Ct at 2471.

Considering *Miller*'s self-description of its rule, it is clear that the rule is not substantive within the terms of the first description of when a rule is substantive, i.e., when the rule "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense." *Penry*, 492 US at 330; see also *Saffle*, 494 US at 494. The *category* of punishment implicated by *Miller* is a sentence of "life without parole,"[13] the *class* of

[13] Carp and Davis argue that the sentence imposed on them was a sentence of "mandatory" life without parole. Regardless of the process by which a defendant is sentenced to life without parole, however, the term

defendants receiving the benefit of *Miller* are juvenile defendants who are under the age of 18 at the time they commit their offenses, and the *types* of offenses implicated by *Miller* are homicide offenses. Accordingly, for *Miller* to be considered "substantive" under the first description of when a rule is substantive, it must prohibit sentences of life without parole for juvenile offenders under the age of 18 who are convicted of homicide offenses, and clearly *Miller* does no such thing. Instead, as with the procedural rules in *Schriro* and *Saffle*, and the rules from the capital-punishment cases of *Woodson*, *Lockett*, and *Eddings*, *Miller* creates only the *possibility* that a defendant may have received a lesser punishment had the trial court employed the new process that is constitutionally required by *Miller*.

The second description of when a rule is substantive is equally of no avail to Carp and Davis because a rule is substantive under that description only when it alters the range of punishments that a state is permitted to impose by foreclosing the state's ability to impose the punishment defendant is serving. See *Schriro*, 542 US at 353. In this sense, a rule is only substantive if it acts to ratchet down the previously most severe punishment possible. Conversely, and contrary to the dissent, a rule will be considered procedural if it merely *expands* the range of possible punishments that may be imposed on the defendant. Applied to Michigan's sentencing scheme, *Miller* now requires the sentencer to consider imposing a sentence of life with the possibility of parole,

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that the defendant serves is simply life without parole. Had, for instance, Carp and Davis received all the procedural protections afforded by *Miller* before being sentenced, the terms they would serve in prison would be identical. The specific *manner* in which a defendant is sentenced, i.e., by operation of law or as a result of individualized sentencing, does not alter the actual sentence rendered or the length of time the defendant must remain in prison.

but it does not require the sentencer to exclude from consideration a sentence of life without parole. Accordingly, *Miller* does not remove the punishment imposed on Carp and Davis from within the range of punishments the state has the power to impose. Accordingly, the rule in *Miller* again cannot be viewed as substantive under the second United States Supreme Court description.

The third description of when a rule is substantive is altogether inapplicable to *Miller*. The decision did not rest on any principle of statutory interpretation, and it did not pertain to a situation in which life-without-parole sentences were being imposed on juvenile homicide offenders absent clear statutory authority to do so. Just as Carp and Davis were sentenced to life without parole in full accordance with Michigan's statutory sentencing scheme, Miller was sentenced to life without parole in full accordance with Alabama's statutory sentencing scheme. See *Miller*, 567 US at ___; 132 S Ct at 2462-2643.

Ultimately, the rule in *Miller* is procedural because, as with the rule in *Ring*, it merely shifts "decisionmaking authority" for the imposition of a life-without-parole sentence on a juvenile homicide offender.[14] *Schriro*, 542 US

[14] The dissent asserts that the rule in *Miller*, although having "procedural implications," is nonetheless substantive because it invalidated "*an entire* '*sentencing scheme*.' " *Post* at 540. While the dissent is correct that *Miller* invalidated Michigan's sentencing scheme authorizing the imposition of a life-without-parole sentence for a juvenile homicide offender, *Ring* also invalidated Arizona's sentencing scheme authorizing the imposition of capital punishment on a homicide offender. As *Ring* was deemed procedural, it follows that the distinction between substantive and procedural rules does not turn on whether the new rule invalidates a sentencing scheme authorizing a punishment. Instead, the distinction turns on whether the punishment is one that the state may constitutionally impose under any conceivable sentencing scheme governing the class of defendants to which the defendant belongs.

at 353. Whereas *Ring* shifted decision-making authority for imposing capital punishment from the judge to the jury, *Miller* shifted decision-making authority for imposing a sentence of life without parole on a juvenile homicide offender from the legislature to the judiciary, by way of its individualized sentencing requirements.[15] Although the process set forth in *Miller* is undoubtedly more favorable to juvenile homicide defendants as a class, the new process has no effect on Michigan's inherent authority to lawfully and constitutionally seek the imposition of a life-without-parole sentence on any and every given juvenile homicide offender. Just as no court may impose a sentence of life without parole without conducting an individualized consideration of certain factors, no court relying on *Miller* may categorically refuse to impose a sentence of life without parole if the individualized sentencing factors do not operate in a defendant's favor. Accordingly, in contrast to a substantive rule that avoids the adverse collateral consequences of retrial by dictating a singular result, *Mackey*, 401 US at 693 (Harlan, J., concurring in the

[15] The dissent argues that while a shift in decision-making authority from a judge to a jury is procedural, a shift in decision-making authority from the legislature to the judiciary is substantive because it vests new authority (the authority to impose a lesser sentence) in the judiciary. *Post* at 544-545. Although we acknowledge that there is a difference between these respective shifts in decision-making authority, we do not find the difference pivotal in determining whether a new rule is substantive or procedural. This is because the question at hand is not focused on whether the *judiciary's* or the *legislature's* or the *executive's* authority has changed as a function of the new rule, but inquires only whether the punishment imposed is one that is beyond the *state's* or the *law's* power to impose. *Schriro*, 542 US at 352 (defining a rule as substantive when it "place[s] particular conduct or persons covered by the statute beyond the *State's* power to punish" or means that the defendant "faces a punishment that the *law* cannot [any more] impose upon him") (emphasis added). Both before and after *Miller* the state of Michigan possessed the authority to constitutionally impose a sentence of life without parole on a juvenile homicide offender.

judgments in part and dissenting in part), retroactive application of *Miller* necessarily requires this adverse collateral consequence. In this regard, the rule in *Miller* in no reasonable way can be said to "represent[] the *clearest* instance where finality interests should yield." *Id*. (emphasis added). Because *Miller* continues to permit Michigan to impose a life-without-parole sentence on any juvenile homicide offender (but only after individualized consideration), it must necessarily be viewed as procedural rather than substantive. Therefore, we hold that the rule in *Miller* does not satisfy the first exception to the general rule of nonretroactivity in *Teague*.

An additional consideration serves to strengthen this conclusion. In its description of the rule in *Miller*, the articulation employed by the United States Supreme Court is telling. *Teague*'s retroactivity analysis distinguishing substantive and procedural rules is in no sense new or novel. Rather, the proposition that "substantive *categorical* guarantees" should receive retroactive application while "procedural *noncategorical* guarantees" should only receive prospective application predates *Teague*. See *Penry*, 492 US at 329. In the face of this reasonably well-defined and longstanding distinction, *Miller*, in describing the nature and scope of its rule, repeatedly employs language typically associated with nonretroactive procedural rules. Although fully recognizing that *Roper* and *Graham* announced "categorical" bars, *Miller* twice states that its rule does *not* create a "categorical" bar. *Miller*, 567 US at ___; 132 S Ct at 2469, 2471. Furthermore, *Miller*, in straightforward terms, speaks of its rule as one that "mandates only that a sentencer follow a *certain process*[.]" *Id*. at ___; 132 S Ct at 2471 (emphasis added). It is hard to view these statements as anything other than expressions of continuity in the Court's understanding of the law of

retroactivity, particularly in a circumstance in which the four justices of the Supreme Court who were presumably the *least* inclined to extend *Miller* to a broader range of cases—the dissenting justices who had rejected the new rule in the first place—were absent from the majority opinion.[16]

Carp advances three arguments in an effort to overcome our conclusion that *Miller* does not qualify for retroactive application under *Teague*. First, he argues that each of the strands of precedent that underlie *Miller* has been granted retroactive status. While there may be considerable force to the argument that categorical rules like those in *Roper* and *Graham* must be applied retroactively under *Teague*, the same cannot be said for the strand of cases requiring individualized sentencing before capital punishment can be imposed

[16] One of the critical divides between how this majority resolves the question of *Miller*'s retroactivity and how the dissent resolves the same question centers on the significance each accords to the words the Supreme Court chose to use in describing the rule in *Miller*. Despite its many thoughtful arguments, the dissent is unable to explain why the Supreme Court, if it genuinely intended for the rule in *Miller* to be applied retroactively under *Teague*, specifically stated that the rule in *Miller* does not "categorically bar a penalty," *Miller*, 567 US at ___; 132 S Ct at 2471, when the "categorical bar" versus "noncategorical bar" distinction defines the critical element of the retroactivity analysis in *Teague*. The dissent contends that by focusing on "categorical" versus "noncategorical" distinction, the majority "muddles" the *Teague* analysis. *Post* at 540. However, it is the dissent that misapprehends *Teague* by its conclusion that the rule in *Miller* is entitled to retroactive application despite its acknowledgement that *Miller* did not categorically bar life-without-parole sentences for juveniles. *Id*. Neither defendants nor the dissent has identified a single Supreme Court decision that has ever concluded that a noncategorical rule is entitled to retroactive application under the first of *Teague*'s two exceptions to the general rule of nonretroactivity. From this, we can only reason that *Teague* does not merely stand for the proposition, as the dissent asserts, that a categorical rule is substantive, but also for the proposition that a rule is substantive only when it is categorical.

on an adult offender. Despite considerable effort by Carp, including post-oral-argument supplemental briefings, we remain unpersuaded that the United States Supreme Court, or even any federal court of appeals,[17] has declared any of the individualized sentencing capital-punishment cases retroactive under *Teague*.

In an effort to demonstrate to the contrary, Carp principally cites *Sumner*, in which the United States Supreme Court held that individualized sentencing was required before capital punishment could be imposed on a defendant, Shuman, who was serving a life-without-parole sentence at the time he committed the capital offense. *Sumner*, 483 US at 80-81. Carp is correct that *Sumner* relied on *Woodson* in creating its rule, *id*. at 70-75, and is also correct that *Sumner* involved the review of a state conviction on collateral habeas review, see *id*. at 68. However, not all cases presenting themselves on collateral review are equivalent for retroactivity purposes. Some cases on collateral review assert that state courts failed to properly apply constitutional rules in effect before the defendant's conviction became final, while others seek the application or creation of a new rule that was not announced before the defendant's conviction became final.

If, with respect to the application of *Woodson*, *Sumner* fell into the latter category, then we might agree with Carp that *Woodson* had been applied retroactively. *Sumner*, as it relates to the application of *Woodson*, however, falls into the former category of cases presenting themselves on collateral review. *Woodson* was decided on July 2, 1976, and Shuman's conviction did not become final for direct review purposes until May 17,

[17] We include federal courts of appeal in our discussion because Carp cites federal courts of appeal decisions for the proposition that the capital-punishment strand of precedent has been applied retroactively.

1978, nearly two years after *Woodson* was decided. See *Shuman v State*, 94 Nev 265; 578 P2d 1183 (1978). Accordingly, to the extent that *Woodson* was applied in *Sumner*, it was simply not applied retroactively to a case that had become final for direct review purposes before *Woodson* was issued.[18]

Apparently anticipating these flaws in the argument that *Woodson* has been applied retroactively, Carp contends that *Sumner* itself has been applied retroactively post-*Teague*. For this proposition, he cites *Thigpen v Thigpen*, 926 F2d 1003, 1005 (CA 11, 1991). We, however, do not read *Thigpen* as addressing the question of *Sumner*'s retroactivity. Although the district court below had applied *Sumner* retroactively to invalidate Thigpen's sentence, that portion of the district court's ruling was never appealed and the only issue before the United States Court of Appeals for the Eleventh Circuit was Thigpen's appeal concerning whether the district court had erred by upholding his conviction. See *id*.[19]

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[18] We further note that even if *Sumner* had applied *Woodson* retroactively to a case that had become final for direct review purposes before *Woodson* was announced, it still would not follow that *Woodson* qualified for retroactive application under *Teague*. This is because *Sumner* was decided in 1987 and *Teague*, in which a plurality of the United States Supreme Court announced the current federal retroactivity test, was not decided until 1989. It is for this same reason that we reject Carp's contention that the retroactive application of *Lockett*'s rule in *Songer v Wainwright*, 769 F2d 1488, 1489 (CA 11, 1985), and *Dutton v Brown*, 812 F2d 593, 599 n 7 (CA 10, 1987), carries any weight with regard to whether those courts applying *Lockett* retroactively would have done so under *Teague*. The same can also be said about the significance of the retroactive application of the rule from *Furman* as acknowledged in *Michigan v Payne*, 412 US 47, 57 n 14; 93 S Ct 1966; 36 L Ed 2d 736 (1973).

[19] In framing the issue before the court, the Eleventh Circuit stated:

> On appeal, Thigpen raises only one issue: whether the admission of evidence that he was convicted in 1972 of another first-degree murder and received a death sentence . . . rendered his trial so fundamentally unfair that he was convicted without the due

Accordingly, Carp has not succeeded in demonstrating that any of the individualized sentencing capital-punishment cases, i.e., *Furman*, *Woodson*, *Lockett*, *Eddings*, or *Sumner*, have been applied retroactively under *Teague*. This failure is pivotal given our earlier conclusion that the rule in *Miller* is of the same form and effect as the rules in the individualized sentencing capital-punishment cases.

Second, Carp argues that *Miller* has added "age" and "incorrigibility" as elements of what must be assessed before a life-without-parole sentence can be imposed on a juvenile offender. Carp argues that it follows from this that age and the juvenile offender's incorrigibility are aggravating factors that raise the mandatory minimum sentence that a defendant could receive under Michigan's pre-*Miller* sentencing scheme because they must now be shown by the state before a juvenile offender can be sentenced pursuant to MCL 750.316(1) and MCL 791.234(6). Citing *Alleyne v United States*, 570 US ___; 133 S Ct 2151, 2155; 186 L Ed 2d 314 (2013), Carp notes that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." Accordingly, he argues that the rule in *Miller* must be viewed as substantive and applied retroactively when it is considered in light of *Alleyne* because *Miller* combined with *Alleyne* substantively alters the way Michigan law defines and sentences juvenile homicide offenders.

Even assuming for the sake of argument that *Miller* made assessments of "age" and "incorrigibility" necessary elements for imposing a life-without-parole sentence on a juvenile homicide offender, Carp's argument

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process of law. For the reasons set forth below, we affirm the district court's conclusion that Thigpen's conviction was constitutional. [*Thigpen*, 926 F2d at 1005.]

still fails.[20] This is because his argument relies on the new rule adopted in *Alleyne* and therefore *Alleyne* itself would need to qualify for retroactive application to have any bearing on the instant case. Carp, however, has failed to even argue, much less persuade this Court, that *Alleyne* established a substantive rule entitled to retroactive application under *Teague*. Absent being so persuaded, we treat the rule in *Alleyne* as a procedural rule entitled only to prospective application.[21] Accordingly, to the extent that we view *Alleyne* as establishing a nonretroactive procedural rule, *Alleyne* may not be bootstrapped onto the rule in *Miller* to transform the

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[20] Because Carp's argument fails here, we find it unnecessary to address whether *Miller* adds the elements of age and incorrigibility to what must be found before a life-without-parole sentence may be imposed on a juvenile homicide offender. We do note that *Miller*'s repeated statements that individualized sentencing hearings could occur before a "*judge* or jury," *Miller*, 567 US at ___; 132 S Ct at 2460, 2470, 2475, tend to suggest that *Miller* did not make age or incorrigibility aggravating elements because under *Alleyne* aggravating elements that raise the mandatory minimum sentence "must be submitted to the *jury* and found beyond a reasonable doubt," *Alleyne*, 570 US at ___; 133 S Ct at 2155. (Emphasis added.) However, because *Alleyne* was decided after *Miller*, *Miller*'s reference to individualized sentencing being performed by a "*judge* or jury" might merely be instructive on the issue but not dispositive. As none of the defendants before this Court asserts that his sentence is deficient because it was not the product of a jury determination, we find it unnecessary to further opine on this issue and leave it to another day to determine whether the individualized sentencing procedures required by *Miller* must be performed by a jury in light of *Alleyne*.

[21] Treating *Alleyne* as a procedural rule is consistent with how multiple federal courts have resolved the issue of whether *Alleyne* is procedural or substantive for federal retroactivity purposes. See, e.g., *Simpson v United States*, 721 F3d 875, 876 (CA 7, 2013) (comparing *Alleyne* to the rule from *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), which has been held to be procedural); *United States v Evans*, ___ F Supp 2d ___ (WD Ark, February 25, 2014, Case Nos. 1:11-CR-10012 and 1:13-CV-1025), citing *United States v Lara-Ruiz*, 721 F3d 554, 557 (CA 8, 2013); *Willoughby v United States*, ___ F Supp 2d ___ (WD NC, September 17, 2013, Case Nos. 3:13-CV-493-FDW and 3:99-CR-24-FDW-6).

latter from a nonretroactive procedural rule into a retroactive substantive rule.

Third, Carp cites *Miller*'s companion case of *Jackson v Hobbs* as evidence that *Miller* has *already* been accorded retroactive status, and therefore presumably that the present judicial exercise has been rendered unnecessary. In offering this argument, Carp is correct that *Jackson* presented itself on collateral review and that the case was remanded for resentencing pursuant to the rule announced in *Miller*. *Miller*, 567 US at ___; 132 S Ct at 2475. Accordingly, Carp also correctly notes that Jackson received retroactive relief under *Miller*. *Id*. at ___; 132 S Ct at 2475. That being said, the fact that Jackson received the benefit of *Miller* being applied retroactively does not lead to the conclusion that *Miller* must be applied retroactively to any other defendant. This is because the assertion that a rule is nonretroactive is an "affirmative defense," available to a prosecutor in *objection* to collateral relief being sought by a defendant. *Thompson v Runnels*, 705 F3d 1089, 1099 (CA 9, 2013) (noting that *Caspari v Bohlen*, 510 US 383, 389; 114 S Ct 948; 127 L Ed 2d 236 (1994) held that " 'a federal court may, but need not, decline to apply *Teague* if the State does not argue it,' but 'if the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court must apply *Teague* before considering the merits of the claim' "). As such, the nonretroactivity argument must be affirmatively raised by the state and when it is not raised, it is waived:

> Since a State can waive the *Teague* bar by not raising it, and since the propriety of reaching the merits of a dispute is an important consideration in deciding whether or not to grant certiorari, the State's omission of any *Teague* defense at the petition stage is significant. Although we undoubtedly have the discretion to reach the State's *Teague* argu-

> ment, we will not do so in these circumstances. [*Schiro v Farley*, 510 US 222, 229; 114 S Ct 783; 127 L Ed 2d 47 (1994) (citation omitted).]

In this sense, a defense premised on the nonretroactivity of a new rule is "not 'jurisdictional' " in nature, and the court does not have any duty sua sponte to conduct a retroactivity analysis. *Collins v Youngblood*, 497 US 37, 41; 110 S Ct 2715; 111 L Ed 2d 30 (1990). Rather, because the question of retroactivity is "grounded in important considerations of federal-state relations," a state is free to "[choose] not to rely on *Teague*" without the federal courts' invalidating that choice. *Id*. By opting not to raise the defense in *Jackson*, the defense was waived and the question whether *Miller* should be applied retroactively was never presented to the United States Supreme Court.[22]

Carp, however, contends that "principles of even-handed justice" dictate that the rule in *Miller* be applied retroactively in his case since it was applied retroactively in Jackson's case. He draws his argument from *Teague*, wherein the United States Supreme Court stated:

> We can simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated. . . . We think this approach is a sound one. Not only does it eliminate any problems of rendering advisory opinions, it also avoids the inequity resulting from the uneven application of new rules to similarly situated defendants. We therefore hold that, *implicit in the retroactivity ap-*

[22] Tellingly, with regard to the prosecutor's intentions in *Jackson*, we further note that on remand the prosecutor conceded the defense of retroactivity, but did so only on the basis "*that Jackson* is entitled to the benefit of the United [States] Supreme Court's opinion *in his own case*." See *Jackson v Norris*, 2013 Ark 175, p 6; 426 SW3d 906 (2013) (emphasis added).

> *proach we adopt today*, is the principle that *habeas corpus cannot be used* as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review . . . . [*Teague*, 489 US at 316 (opinion by O'Connor, J.) (all but last emphasis added).]

As evidenced by the very quotation on which Carp relies, the application of the "principles of even-handed justice" only become relevant when the United States Supreme Court has actually *undertaken* a retroactivity analysis in the course of announcing a new rule. If no such analysis is necessary *because of the posture of the case*, as here, the Court will obviously not have the occasion to consider whether the new rule can be applied retroactively to all defendants who are situated similarly to the defendant before the Court.[23] Under those circumstances, the idiosyncrasies, strategies, or policies and practices of a single prosecutor, among more than 3,000 throughout the country, cannot possibly be allowed under our system of federalism to determine what "even-handed justice" requires (and what the law does or does not command) of all prosecutors in every jurisdiction throughout the country.[24]

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[23] The dissent similarly acknowledges that the Supreme Court's application of the rule in *Miller* to Jackson is "inconclusive" about whether the rule should be applied retroactively and that the relief Jackson received does not mandate the retroactive application of *Miller* to any other case. *Post* at 535 n 31.

[24] Although the issue was not raised in any way by any of the defendants, the dissent argues that *Miller* is similar to *Atkins v Virginia*, 536 US 304; 122 S Ct 2242; 153 L Ed 2d 335 (2002), because "considerable discretion" is left to the states by both rules, so that where *Atkins* has been applied retroactively, so too should *Miller*. *Post* at 547-549. While the dissent is not incorrect to suggest that *Miller* and *Atkins* both allow some discretion to the states, it fails to examine this issue with greater precision. *Atkins* held that the Eighth Amendment bars the imposition of capital punishment on a "mentally retarded offender." *Atkins*, 536 US at 321. *Atkins*, however, left it to the discretion of the states to establish criteria for whether a defendant

Having concluded that *Miller* established a new procedural rule that does not "categorically bar a penalty," but instead requires "only that a sentencer follow a certain process," *Miller*, 567 US at ___; 132 S Ct at 2471, and having rejected the arguments in support of the retroactive application of *Miller*, we hold that the United States Supreme Court's decision in that case does not require retroactive application under *Teague*. In light of this holding, we now turn to whether *Miller* is entitled to retroactive application under Michigan's separate test for retroactivity.

C. STATE RETROACTIVITY

Although states must apply a new rule of criminal procedure retroactively when the new rule satisfies

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qualifies as "mentally retarded." *Id*. at 317. Accordingly, the discretion left to the states by *Atkins* pertains to when *Atkins* applies and which defendants fall within the universe of defendants governed by *Atkins*. Once a defendant is deemed to be mentally retarded, however, the state's discretion ceases and *Atkins* compels the *single* result that the state is constitutionally prohibited from imposing capital punishment on the defendant. Under *Miller*, by contrast, all juveniles are entitled to individualized sentencing hearings and accordingly the state has no discretion to determine when, and to which defendants, *Miller* applies. Instead, the discretionary element of *Miller* only comes into play in selecting a sentence for a defendant after it has been determined, per *Miller*, that the defendant is a juvenile by virtue of being under the age of 18 at the time of the offense. In this regard, the rules announced in *Atkins* and *Miller* have both different forms and different effects. That is, *Atkins* has the form of a categorical rule in that after a state has determined that a defendant is "mentally retarded," it applies to bar the imposition of capital punishment on that defendant, while *Miller* has the form of a noncategorical rule in that it requires individualized sentencing before a life-without-parole sentence may be imposed on a juvenile homicide offender but expressly does not bar the imposition of that sentence. Further, the effect of *Atkins* will always produce a *single* result in invalidating the capital sentence of every defendant who falls within the rule because the defendant is "mentally retarded," while the effect of *Miller* will necessarily result in the imposition of a variety of sentences for different offenders, creating only the potential that any given juvenile will receive a sentence other than life without parole.

Teague's exceptions to the general rule of nonretroactivity, they are permitted to "give broader retroactive effect" to a new rule than is required by *Teague*. *Danforth*, 552 US at 288-289. In this sense, *Teague* provides a floor for when a new rule of criminal procedure must be applied retroactively, with a state nonetheless free to adopt its own broader test for requiring the retroactive application of a new federal or state constitutional rule. See *id*. at 289-290.

Michigan has adopted its own separate test for when a new rule of criminal procedure should be applied retroactively. See *Maxson*, 482 Mich at 392-393. Michigan's test for retroactivity was originally derived from the pre-*Teague* federal test set forth in *Linkletter v Walker*, 381 US 618; 85 S Ct 1731; 14 L Ed 2d 601 (1965). See *People v Hampton*, 384 Mich 669, 674; 187 NW2d 404 (1971).

Despite Michigan's having adopted its own retroactivity test that may give broader retroactive effect to some new rules than is mandated by the *Teague* test, Michigan nonetheless still adheres to the general principle of nonretroactivity for new rules of criminal procedure.[25] As a result, "Michigan law has regularly

[25] Contrary to Carp's and Davis's assertions, and consistently with the general principle of nonretroactivity, this Court does not adhere to the doctrine that an unconstitutional statute is void *ab initio*. *People v Smith*, 405 Mich 418, 432-433; 275 NW2d 466 (1979). In rejecting this doctrine, this Court in *Smith*, 405 Mich at 432, cited *Lemon v Kurtzman*, 411 US 192; 93 S Ct 1463; 36 L Ed 2d 151 (1973), which, for federal retroactivity purposes, departed from the view that an unconstitutional statute is a nullity *ab initio*. *Smith* also quoted *Chicot Co Drainage Dist v Baxter State Bank*, 308 US 371; 60 S Ct 317; 84 L Ed 329 (1940), for the proposition that a new constitutional rule does not always nullify past application of the old rule when the old rule was understood to have conformed with the Constitution at the time it was applied: " 'The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past

declined to apply new rules of criminal procedure to cases in which a defendant's conviction has become final." *Maxson*, 482 Mich at 392-393 (citing several examples of new rules of criminal procedure that this Court declined to apply retroactively under its version of the *Linkletter* test). With Michigan's predisposition against the retroactive application of new rules of criminal procedure firmly in mind—in that only the extraordinary new rule of criminal procedure will be applied retroactively under Michigan's test when retroactivity is not already mandated under *Teague*—we proceed to evaluate whether the rule in *Miller* satisfies this state test.

Michigan's test for retroactivity consists of three factors:

> "(1) the purpose of the new rule[]; (2) the general reliance on the old rule[;] and (3) the effect of retroactive application of the new rule on the administration of justice." [*Maxson*, 482 Mich at 393, quoting *Sexton*, 458 Mich at 60-61, citing *Hampton*, 384 Mich at 674 (second alteration in original).]

The first factor, the purpose factor, assesses the nature and focus of the new rule and the effect the rule is designed to have on the implementation of justice. See *People v Young*, 410 Mich 363, 366-367; 301 NW2d 803 (1981). Under this first factor, when a new rule "concerns the ascertainment of *guilt* or *innocence*, retroactive application may be appropriate." *Id*. at 367, citing *Hampton*, 384 Mich 669 (emphasis added). Conversely, "[w]hen the ascertainment of guilt or innocence is not at stake, prospective application is possible" because "the purposes of the rule can be effectuated by prospective application." *People v Markham*, 397 Mich 530,

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cannot always be erased by a new judicial declaration.' " *Smith*, 405 Mich at 432, quoting *Chicot Co*, 308 US at 374.

535; 245 NW2d 41 (1976). Consistent with this standard for when a rule should be applied only prospectively, "a new rule of procedure . . . which does not affect the integrity of the fact-finding process should be given [only] prospective effect." *Young*, 410 Mich at 367.

Carp contends that *Miller*, although not implicating his guilt or innocence, nonetheless, goes to the "integrity of the fact-finding process" because it is essential to evaluating a defendant's level of culpability when imposing a sentence. In support of this contention, he cites *McConnell v Rhay*, 393 US 2, 3-4; 89 S Ct 32; 21 L Ed 2d 2 (1968), in which pursuant to *Linkletter*, the United States Supreme Court retroactively applied a new rule of criminal procedure despite the new rule's being relevant only to the sentencing phase.[26] As Carp correctly observes, *McConnell*, in effecting its proretroactivity holding, stated that "the right being asserted relates to 'the very integrity of the fact-finding process.' " *Id*. at 3, quoting *Linkletter*, 381 US at 639.

Two considerations, however, leave us unpersuaded that this remark necessitates the conclusion that the first factor of Michigan's test favors the retroactive application of *Miller*. First, the new rule applied retroactively in *McConnell* addressed the right to counsel, a right with unique significance both within the context of the criminal proceeding[27] and within the context of

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[26] The new rule made retroactive in *McConnell* was set forth in *Mempa v Rhay*, 389 US 128; 88 S Ct 254; 19 L Ed 2d 336 (1967), and held that the Sixth Amendment right to counsel, including the appointment of counsel for indigent defendants, extended to the sentencing phase of a criminal trial. *McConnell*, 393 US at 2-3.

[27] The Sixth Amendment right to counsel has been described as a right "necessary to insure fundamental human rights of life and liberty" with "[t]he Sixth Amendment stand[ing] as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' " *Johnson v Zerbst*, 304 US 458, 462; 58 S Ct 1019; 82 L Ed 1461

the United States Supreme Court's retroactivity jurisprudence.[28] Given this extraordinary footing of the right to counsel, we read *McConnell*'s statement that "the *right* being asserted relates to 'the very integrity of the fact-finding process' " as concerning specifically the *right* to counsel rather than all new rules that may expand the fact-finding process at sentencing. For this reason, we do not understand *McConnell* as necessitating the view that, for retroactivity purposes under the *Linkletter* test, rules implicating the fact-finding process at sentencing must be placed on equal footing with rules implicating the fact-finding process for guilt or innocence.

Second, even if *McConnell* supported the expansive view that Carp attributes to it, that view is contrary to how Michigan law describes its *own* application of the *Linkletter* test. In every case to date in which this Court has applied the state retroactivity test, the "integrity of the fact-finding process" has always been referred to in the context of determining a defendant's "guilt or innocence." *Maxson*, 482 Mich at 393-394; *Sexton*, 458 Mich at 62; *Young*, 410 Mich at 367. To the extent that *McConnell* may have viewed the "fact-finding process"

(1938), citing *Palko v Connecticut*, 302 US 319, 325; 58 S Ct 149; 82 L Ed 288 (1937). In *Gideon*, 372 US at 344, the Sixth Amendment right to counsel was described as "fundamental and essential to fair trials," such that indigent criminal defendants facing felony charges are entitled to the appointment of counsel.

[28] As *McConnell* noted, rules extending "a criminal defendant's right to counsel at trial, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) ; at certain arraignments, *Hamilton* v. *Alabama*, 368 U. S. 52 [82 S Ct 157; 7 L Ed 2d 114] (1961) ; and on appeal, *Douglas* v. *California*, 372 U. S. 353 [83 S Ct 814; 9 L Ed 2d 811] (1963), have all been applied retroactively." *McConnell*, 393 US at 3. In fact, the right to counsel is such a uniquely fundamental right that *Gideon* remains "the only case that [the United States Supreme Court has] identified as qualifying under the [watershed rule of criminal procedure exception to nonretroactivity from *Teague*]." *Whorton*, 549 US at 419.

as continuing throughout sentencing, we respectfully disagree and decline to adopt such an expansive view for purposes of our separate and independent test for retroactivity. It reflects an understanding of retroactivity that is no longer subscribed to by the United States Supreme Court and an understanding to which this Court has never subscribed. There is utterly no obligation on our part to forever maintain the *Linkletter* test in accordance with every past federal understanding when the test is now defunct for federal purposes and this Court, although initially relying on *Linkletter* to formulate our state test for retroactivity, has added its own interpretations to that test. Instead, the general principle of nonretroactivity for new rules of criminal procedure, to which Michigan adheres and which informs this state's retroactivity analysis, is properly served, in our judgment, by applying retroactively only those new rules of procedure that implicate the guilt or innocence of a defendant. We acknowledge that there are circumstances in which our state test may sometimes apply a new rule retroactively in circumstances in which *Teague* would not apply, but we are not prepared to extend our test beyond the federal test to the degree urged upon us by Carp.

In declining to expand the scope of the first factor of Michigan's state test for retroactivity, we note again that although our state test is derived from *Linkletter*, nothing requires this Court to adopt each and every articulation of that test—one that is no longer adhered to by the United States Supreme Court itself. Our state test for retroactivity is supplemental to the current federal test set forth in *Teague*, and it is separate and independent of the former federal test set forth in *Linkletter*. See *Danforth*, 552 US at 289. As the *Teague* test replaced the *Linkletter* test for federal purposes, doubtlessly contracting the universe of new constitu-

tional rules that will be applied retroactively,[29] it should be unsurprising that this Court would decline to grant retroactive status to a new rule of criminal procedure affecting only the sentencing phase of a criminal case when such a permutation of the defunct test has never before been so applied in this state.[30]

From our holding that the first factor of our state test for retroactivity focuses on whether a new rule of procedure implicates a defendant's guilt or innocence, it is apparent that the first factor clearly militates against the retroactive application of *Miller*. As *Miller* alters only the process by which a court must determine a defendant's level of moral culpability for purposes of *sentencing*, it has no bearing on the defendant's legal culpability for the offense of which the defendant has been duly convicted.

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[29] See *Sawyer v Smith*, 497 US 227, 257-258; 110 S Ct 2822; 111 L Ed 2d 193 (1990) (Marshall, J., dissenting) ("The Court's refusal to allow Sawyer the benefit of *Caldwell* [*v Mississippi*, 472 US 320; 105 S Ct 2633; 86 L Ed 2d 231 (1985)] reveals the extent to which *Teague* and its progeny unjustifiably limit the retroactive application of accuracy-enhancing criminal rules. Prior to *Teague*, our retroactivity jurisprudence always recognized a difference between rules aimed primarily at deterring police conduct and those designed to promote the accuracy of criminal proceedings.").

[30] We recognize that the prosecutor in *Davis* and the Attorney General as an intervenor in *Carp* both assert that this Court should abandon Michigan's separate test for retroactivity and adopt *Teague* as our state test. We further recognize the anomalousness of this Court applying new federal rules retroactively pursuant to a standard that is more expansive than that which the United States Supreme Court has directed be applied by federal courts themselves. This anomalousness—at least as it applies to Michigan's retroactive application of new *federal* rules—is further heightened when, as in the instant case, (a) the federal rule contradicts the laws of our state as enacted by the Legislature in accordance with the will of the people of Michigan and (b) the Supreme Court has, for purposes of federal court application, specifically rejected the retroactivity test adopted by Michigan. See *Teague*, 489 US 288. This issue not having been the focal point of briefing or argument, we do not address it further in this case.

In light then of our conclusion that the first state factor clearly counsels against the retroactive application of *Miller*, we find it relevant here to address the interplay between the three factors of the test and the weight that must be given to each before we determine the effect of the second and third factors on *Miller*'s retroactive application. That a test consists of multiple factors does not logically signify that equal weight must be given to each. The United States Supreme Court, in applying the *Linkletter* test before it adopted the *Teague* test, observed that the second and third factors "have been regarded as having controlling significance 'only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity.' " *Michigan v Payne*, 412 US 47, 55; 93 S Ct 1966; 36 L Ed 2d 736 (1973), quoting *Desist v United States*, 394 US 244, 251; 89 S Ct 1030; 22 L Ed 2d 248 (1969). Deductively from this statement, if two of the three factors only control when the first factor does not "clearly favor" retroactivity or prospectivity, it follows that the first factor must be afforded more weight than either of the other two factors when the first factor *does* "clearly favor" retroactivity or prospectivity. We are persuaded by, and adhere to, *Payne*'s and *Desist*'s understanding regarding the heightened weight to be afforded the first factor when it strongly supports one side or the other of the retroactivity question.

Placing such an emphasis on the first factor is fully consistent with this Court's longstanding practice of dealing with the second and third factors "together." *Young*, 410 Mich at 367; *Hampton*, 384 Mich at 677. In this sense, the second and third factors will generally tend to produce a unified result that either favors or disfavors retroactivity. This is because the subject of the second factor (general reliance on the old rule) "will often have a profound effect on" the subject of the third

factor (administration of justice), given that the greater the reliance by prosecutors of this state on a rule in pursuing justice, the more burdensome it will generally be for the judiciary to *undo* the administration of that rule. *Sexton*, 458 Mich at 63-64; see also *Hampton*, 384 Mich at 677-678. In light of the weight to be afforded the first factor when it clearly preponderates against retroactive application, our unified consideration of the second and third factors would need to favor retroactive application to a substantial degree in order for *Miller* to satisfy the requirements for retroactive application under our state test.

Turning to the inquiry required to evaluate the second and third factors "together," the second factor—the reliance on the old rule—must be considered both from the perspective of prosecutors across the state when prosecutors faithfully abided by the constitutional guarantees in place at the time of a defendant's conviction, see *Adams v Illinois*, 405 US 278, 283-284; 92 S Ct 916; 31 L Ed 2d 202 (1972), and *Johnson v New Jersey*, 384 US 719, 731; 86 S Ct 1772; 16 L Ed 2d 882 (1996), as well as from the collective perspective of the 334 defendants who would be entitled to resentencing if the new rule were applied retroactively, see *Maxson*, 482 Mich at 394. Inherent in the question of reliance by prosecutors across the state is the extent to which the old rule received constitutional approval from the judiciary before the adoption of the new rule. See *Tehan v United States ex rel Shott*, 382 US 406, 417; 86 S Ct 459; 15 L Ed 2d 453 (1966). When the old rule is merely the result of a "negative implication" drawn by prosecutors, the prosecutors' good-faith reliance on the old rule is at its most minimal. *Brown v Louisiana*, 447 US 323, 335; 100 S Ct 2214; 65 L Ed 2d 159 (1980) (opinion by Brennan, J.). Similarly, when the old rule was of "doubtful constitutionality," the ability of prosecutors across

the state to rely on the old rule in good faith is diminished. *Id*. Conversely, when the old rule has been specifically approved by the courts as passing constitutional muster, prosecutors have their strongest argument for having relied on the old rule in good faith. *Tehan*, 382 US at 417. Moreover, when prosecutors relied in good faith on the old rule and did so for a lengthier period of time, reliance can be viewed as more significant and the second factor will tend to counsel against retroactive application. *Id*. As for defendants' reliance on the old rule, they must demonstrate not only that they relied on the old rule by taking or not taking a specific action, but that they "*detrimentally* relied on the old rule." *Maxson*, 482 Mich at 394 (emphasis added).

The inquiry into reliance will significantly affect any inquiry into the burden placed on the administration of justice because when prosecutors have relied on the *old* rule, they have presumably taken few, if any, steps to comply with the *new* rule. The greater the extent of their reliance, and the greater the extent to which the new rule constitutes a departure from the old rule, the more burdensome it becomes for prosecutors to take the steps necessary to comply with the new rule. Similarly, the greater the extent of the departure, the more difficult it becomes for courts to look back and attempt to reconstruct what outcome would have resulted had the new rule governed at the time a given defendant was sentenced. A burden is placed on the administration of justice in the form of time and expense to the judiciary in retroactively accommodating the new rule. Far more importantly, when a new rule is likely to be difficult to apply retroactively, a burden is placed on the administration of justice in the form of compromising the accuracy with which the new rule can be applied and the confidence the public may have regarding

judicial determinations in situations in which the new rule is applied to cases that became final many years or even decades earlier.

Applying these considerations in evaluating the second and third factors to *Miller*, it is apparent that these factors do not sufficiently favor the retroactive application of *Miller* so as to overcome the first factor's clear direction against its retroactive application. The old rule permitting life-without-parole sentences on the basis of the pre-*Miller* sentencing scheme established by the Legislature received in 1996 the specific approval of its constitutionality by our judiciary. *Launsburry*, 217 Mich App at 363-365. Further, nothing in United States Supreme Court caselaw called into any question life-without-parole sentences for any juvenile offenders until *Graham* was decided in 2010, and even then *Graham* was specifically limited in its breadth to juveniles who committed nonhomicide offenses.[31] *Graham*, 560 US at 82. Indeed, before *Roper* in 2005, United States Supreme Court precedent specifically held that it was constitutional to impose capital punishment on juveniles over the age of 16 convicted of homicide offenses. *Stanford v Kentucky*, 492 US 361, 380; 109 S Ct 2969; 106 L Ed 2d 306 (1989). Accordingly, at the time prosecutors across Michigan sought life-without-parole sentences for 302 of the 334 defendants who would gain a resentencing hearing if *Miller* were ap-

[31] Interestingly, we note that *none* of the 334 defendants who would receive resentencing under *Miller* if it were applied retroactively to cases that had become final before *Miller* was issued was sentenced after *Graham* was decided. Therefore, to whatever extent it might be argued that *Graham* weakened the constitutional foundation of the old rule permitting life-without-parole sentences for juvenile homicide offenders, the argument is of little relevance to the retroactive application of *Miller* regarding any juvenile defendants currently serving life-without-parole sentences in Michigan.

plied retroactively, the Eighth Amendment of the United States Constitution was affirmatively understood as permitting the imposition of not merely life without parole but also the imposition of capital punishment on juvenile first-degree-murder offenders.[32]

On the basis of this state of the law, prosecutors across Michigan entirely in good faith relied on the old rule whenever they sought life-without-parole sentences for juvenile homicide offenders. Considering the constitutional approval the old rule received from both our judiciary and the United States Supreme Court, as well as the length of time during which the old rule prevailed—dating back to our state's founding in 1837—the reliance on the old rule by Michigan prosecutors was significant and justified.[33]

Conversely, we note that this is not a situation in which it can fairly be said that, as a group, the 334

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[32] Even with respect to the 34 defendants sentenced post-*Roper*, there was no cause for prosecutors to believe that the decision had any significant bearing on their ability, on behalf of the people of Michigan, to constitutionally seek a sentence of life without parole or that it brought into question the decision in *Launsburry* upholding the imposition of life-without-parole sentences.

[33] Although *Maxson*'s analysis of the second factor focused exclusively on whether the defendants in that case had detrimentally relied on the old rule without considering the extent to which prosecutors had detrimentally relied on the old rule, *Maxson*'s approach to analyzing the second factor is not inconsistent with the approach we use today. When there are two relevant entities, concluding that one of these entities has or has not relied detrimentally on the old rule may be sufficient to reach a conclusion concerning the effect of the second factor on retroactivity. In *Maxson*, it was clear that the defendants' detrimental reliance on the old rule was insignificant so it was unnecessary to consider the extent to which prosecutors had relied on the old rule at issue in that case. Although the inverse is largely true here in that the detrimental reliance interests of prosecutors across this state are considerable, we have reviewed what is asserted to be Carp's and Davis's detrimental reliance on the old rule and see none. Once again, merely to act in accord with the old rule is not tantamount to detrimental reliance.

defendants who would be entitled to resentencing if the rule in *Miller* were applied retroactively have "relied" on the old rule to their "detriment." First, we find it difficult to understand, and Carp and Davis themselves fail to identify, exactly what adverse action the 334 defendants have taken, or opted not to take, in "reliance" on the old rule (except perhaps to recognize and abide by the old rule as the then extant law of this state).[34] If such "reliance," in the sense of merely having to comply with the then extant law, is viewed as

[34] The dissent similarly struggles to identify what action that would have benefited the 334 defendants was taken or not taken in "detrimental reliance" on the old rule. First, the dissent asserts that *trial courts* would have engaged in individualized sentencing hearings, but for the old rule. *Post* at 552. This, however, is an action that *courts*, not a defendant, would have taken, and essentially asserts nothing more than that *Miller* has altered the rules. Second, the dissent argues that defendants relied on the old rule by not seeking appellate review of their life-without-parole sentences. *Post* at 552. In making this argument, the dissent compares this case to *Maxson*, in which this Court suggested that a defendant's decision not to pursue an appeal could constitute an action that the defendant opted not to take in reliance on the old rule. *Maxson*, 482 Mich at 394-395. However, *Maxson* was addressing the retroactivity of *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005), "which held that indigent defendants who plead guilty to criminal offenses are entitled to appointed appellate counsel on direct appeal." *Maxson*, 482 Mich at 387. Accordingly, the old rule analyzed in *Maxson*, that indigent defendants who pleaded guilty to criminal offenses were not entitled to appointed appellate counsel on direct appeal, served as a direct impediment to a defendant's ability to file an appeal after pleading guilty. In these cases, the pre-*Miller* constitutionality of imposing life-without-parole sentences on juvenile homicide offenders by mandatory operation of law did nothing to hinder a defendant's ability to file an appeal challenging Michigan's then extant sentencing scheme or its personal application. Furthermore, as Michigan caselaw had specifically upheld the constitutionality of our pre-*Miller* sentencing scheme, *Launsburry*, 217 Mich App 358, it is unclear how defendants' failures to seek appellate review proved detrimental. While the dissent is obviously correct that their interests were not favored under the old rule to the extent they are under the new rule, that is not the equivalent of having "detrimentally relied" on the old rule.

sufficiently "detrimental" to satisfy the second state retroactivity factor, then it would almost always be the case that this factor would weigh heavily in favor of retroactivity, since it must be assumed that criminal defendants, or at least their counsel, would almost always rely on existing law in formulating their trial and appellate strategies. There is nothing "detrimental" about that reliance except that the law is not as hospitable to the interests of such defendants as they might like it to be. That the law might have been destined to become more hospitable in the future is of little relevance since it is only because of that development that the issue of retroactivity has arisen in the first place.

Second, even to the extent that any defendants can be said to have taken or foregone some action to their detriment in reliance on the old rule, they still can only be said to have "detrimentally" relied on the old rule if they can establish that they would have obtained a result more favorable to them under the new rule. *Maxson*, 482 Mich at 394-396. In this sense, defendants can only be said to have " 'detrimentally relied' on the old rule" if they "*suffered actual harm* from [their] reliance . . . ." *Id*. at 396. However, a majority of the 334 defendants who would receive resentencing hearings if the rule in *Miller* were applied retroactively were between 17 and 18 years of age when they committed their homicide offenses. Because *Miller* requires a sentencing court to give specific consideration to the age and the mental development of a juvenile offender before imposing a sentence of life without parole, when a juvenile most closely approaches the age of majority at the time the juvenile commits a homicide offense, *Miller* would seem least likely to counsel in favor of sentencing that juvenile with special leniency, given that in only as few as several months the juvenile would be ineligible

for any leniency at all.[35] In this sense, it is speculative at best to presume that a majority of Michigan's juvenile offenders serving life-without-parole sentences would gain relief in the form of a lesser sentence if they received a resentencing hearing pursuant to the retroactive application of *Miller*. Accordingly, juvenile defendants, as a class, are unable to demonstrate with any certainty under the state test that they *detrimentally* relied on the old rule to such an extent as to outweigh the state's reliance on the old rule.

As between defendants and the prosecutors of this state, it is further apparent that the *latter* have relied far more heavily on the old rule, have done so in good faith, and would have relied "detrimentally" on behalf of the people were *Miller* to be applied retroactively. In particular, in relying on the old rule, prosecutors did not for the purpose of sentencing have any cause at the time

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[35] In focusing on the age of the defendants who would receive resentencing if *Miller* were applied retroactively, we nowhere suggest that age is the exclusive factor that the trial court should consider in imposing a sentence on a juvenile homicide offender, and we agree with the dissent that *Miller* calls for a "multifaceted" approach to sentencing. Compare page 466 of this opinion with *post* 553 n 88. However, in light of the other factors that *Miller* instructs a trial court to consider, it seems apparent that a juvenile's age at the time of the offense will weigh relatively heavily at sentencing hearings. In most cases, a juvenile's age will reasonably correspond to his or her mental and emotional development as well as the ability to overcome a difficult family and home life. Additionally, as a juvenile approaches 18 years of age at the time of the offense, and may even turn 18 during the proceedings related to the offense, it follows that the "incompetencies associated with youth" will come to have increasingly less of an effect on the juvenile's ability to communicate with, and to assist, his or her attorneys in their legal preparations. Accordingly, while age is by no means the only factor to be considered in imposing a sentence pursuant to *Miller*, an offender's age is likely to be given significant weight in the court's deliberations and may well constitute the single best factor for ascertaining whether a *Miller*-benefited offender would actually gain relief if *Miller* were applied retroactively.

to investigate or present evidence concerning the aggravating or mitigating factors now required to be considered by *Miller*. If *Miller* were to be applied retroactively, prosecutors would be abruptly required to bear the considerable expense of having to investigate the nature of the offense and the character of the 334 juvenile offenders subject to *Miller*'s retroactive application. This task, if newly thrust upon prosecutors, would be all the more burdensome and complicated because a majority of the 334 defendants were sentenced more than 20 years ago and another 25% were sentenced between 15 and 20 years ago. And in many, if not most, of those instances, the prosecutor who initially tried the case would likely no longer be available for a resentencing hearing. That is, *Miller* makes many things relevant to the sentencing process that were simply not relevant at the time of the initial sentencing, and these things would have to be reconstructed, almost impossibly so in some cases, after many years, in order to sustain a criminal sentence that was viewed at the time as the culmination of a full and fair process by which justice was obtained in cases of first-degree murder. There would be considerable financial, logistical, and practical barriers placed on prosecutors to re-create or relocate evidence that had previously been viewed as irrelevant and unnecessary. This process would not, in our judgment, further the achievement of justice under the law because it would require in many instances that the impossible be done, and if it could not be, a heavy cost would be incurred by society in the form of the premature release of large numbers of persons who will not have fully paid their legal debt to society, many of whom as a result might well continue to pose a physical threat in particular to individuals living in our most vulnerable neighborhoods.

Miller requires trial courts to determine a defendant's moral culpability for the murder the defendant has committed by examining the defendant's character and mental development *at the time of the offense*. Even if the myriad evidence could somehow be obtained by the prosecutor, it is fanciful to believe that the backward-looking determination then required of the trial court could be undertaken with sufficient accuracy and trustworthiness so many years after the crime had been committed, the trial completed, and the defendant sentenced. Further, just as the prosecutor might no longer be available to represent the people's interest, neither might the sentencing judge. We are not confident that the justice achieved by a resentencing process taking place many years after the original trial and sentencing—many years after the victims of the homicide have become little more than historical footnotes to all but their immediate families—and presided over by a judge who can never entirely be situated like the judge who presided over the trial, can effectively replicate the justice achieved at the initial sentencing. Instead, we believe that the trial court's ability to travel back in time to assess a defendant's mental state of some 20 years earlier—evidence of which may not even have been gathered at the time—is limited; that the recollection of memories about aggravating and mitigating circumstances—evidence of which may again not even have been gathered at the time—is questionable; and that, as a result, public confidence in the integrity and accuracy of those proceedings will understandably be low.

For these reasons, we find that the second and third factors do not sufficiently favor the retroactive application of *Miller* so as to overcome the first factor counseling against the retroactive application of *Miller*. As a

result of this analysis, *Miller* is not entitled to retroactive application under Michigan's test for retroactivity.

D. CONSTITUTIONAL ISSUES

Defendants raise a series of constitutional challenges arguing that the Eighth Amendment of the United States Constitution or Const 1963, art 1, § 16, or both, categorically bars the imposition of a life-without-parole sentence on a juvenile homicide offender. We consider each challenge in turn.

1. FEDERAL CATEGORICAL BAR

Defendants assert that the Eighth Amendment of the United States Constitution[36] categorically bars the imposition of a sentence of life without parole on any juvenile homicide offender, regardless of whether the "individualization" of sentencing is performed before that sentence is imposed. The effect of the categorical rule sought by defendants would not only mandate resentencing for all juvenile defendants sentenced to life without parole under the pre-*Miller* sentencing scheme, but would also invalidate those portions of MCL 769.25 allowing the state to impose a life-without-parole sentence on particular juveniles following an individualized sentencing hearing in accordance with *Miller*. See MCL 769.25(2) through (7). Defendants ask this Court to read the United States Supreme Court's rulings in *Roper*, *Graham*, and *Miller* as necessarily foreshadowing the conclusion that the Eighth Amendment categorically bars life-without-parole sentences

[36] The Eighth Amendment of the United States Constitution reads:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. [US Const, Am VIII.]

for all juvenile offenders. However, the limited nature of each of these rulings does not, in our judgment, necessitate that conclusion. Moreover, the proportionality review employed by the United States Supreme Court in fashioning the rules in *Roper*, *Graham*, and *Miller* also does not support the categorical rule sought by defendants.

As noted earlier, the holding in *Roper* was specifically limited to capital punishment in that the "Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Roper*, 543 US at 578. Given that capital punishment was only "likened" to life without parole for a juvenile offender, *Miller*, 567 US at ___; 132 S Ct at 2463-2464, rather than deemed equivalent to life without parole for a juvenile offender, neither *Roper* nor *Roper* in conjunction with *Graham* and *Miller* suggests in any way that the Eighth Amendment must be read as invalidating the state's ability to impose a life-without-parole sentence on a juvenile homicide offender. Likewise, *Graham*'s holding was specifically limited so as to categorically bar only the imposition of life-without-parole sentences for juvenile offenders convicted of nonhomicide offenses. *Graham*, 560 US at 79. Accordingly, *Graham* also does not compel the invalidation of a state's ability to impose a sentence of life without parole on a juvenile homicide offender.

Turning lastly to *Miller*, its rule is specifically limited in that it counsels *against* the very categorical rule sought by defendants. As discussed earlier, *Miller* requires that an individualized sentencing hearing occur before a life-without-parole sentence may be imposed, but expressly "does not categorically bar a penalty" or "foreclose a sentencer's ability" to impose a life-without-parole sentence. *Miller*, 567 US at ___; 132 S Ct

at 2469, 2471. Defendants' proposed categorical rule would therefore read the Eighth Amendment as categorically barring precisely the very punishment that *Miller* declined to categorically bar and, in so doing, asserted was not categorically barred by the Eighth Amendment.

Defendants alternatively contend that, in light of the manner in which state legislatures reacted to *Miller* by adjusting sentencing schemes governing juvenile homicide offenders, it is *now*, pursuant to the proportionality review employed in *Roper*, *Graham*, and *Miller*, cruel and unusual punishment to impose a life-without-parole sentence on a juvenile homicide offender. Within the context of the Eighth Amendment, the United States Supreme Court has used a multipart test to determine if a punishment imposed on a juvenile offender is disproportionate:

> A court must begin by comparing the gravity of the offense and the severity of the sentence. "[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality" the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. If this comparative analysis "validate[s] an initial judgment that [the] sentence is grossly disproportionate," the sentence is cruel and unusual. [*Graham*, 560 US at 60, quoting *Harmelin*, 501 US at 1005 (Kennedy, J., concurring in part).]

Starting with the preliminary question whether "the gravity of the offense" is commensurate with "the severity of the sentence," *Graham*, 560 US at 60, we note that first-degree murder is almost certainly the gravest and most serious offense that an individual can commit under the laws of Michigan—the premeditated taking of an innocent human life. It is, therefore,

unsurprising that the people of this state, through the Legislature, would have chosen to impose the most severe punishment authorized by the laws of Michigan for this offense. Although the individualized sentencing process now required by *Miller* (and as a necessary response to *Miller* by MCL 769.25) may perhaps indicate that some juvenile offenders lack the moral culpability and mental faculties to warrant a life-without-parole sentence pursuant to the premises of *Miller*, when the contrary conclusions are drawn, as they presumably will be in some cases, a sentence of life without parole for first-degree murder will not "lead[] to an inference of gross disproportionality." *Id*. Accordingly, defendants have failed to demonstrate that the imposition of a life-without-parole sentence will satisfy the first part of the United States Supreme Court's test for proportionality. As the first part of this federal test is a *necessary* requirement for finding that a punishment is "disproportionate," defendants' facial challenge fails as they are consequently unable to demonstrate that the Eighth Amendment categorically bars the imposition of a life-without-parole sentence on juvenile homicide offenders.

Even if defendants had satisfied the first part of the federal test for disproportionality, however, they have also failed to satisfy the second part of the test, which compares the life-without-parole sentence defendants seek to invalidate "with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." *Id*. As for other offenders within the state of Michigan, defendants are correct to note that life without parole is the most severe punishment imposed by this state. This fact alone, however, does not persuade us that imposing a life-without-parole sentence on a juvenile homicide offender is disproportionate.

First, as noted in the first part of this test for proportionality, first-degree murder is almost certainly the gravest and most serious offense that can be committed under the laws of Michigan. As with juveniles, adult offenders who commit the offense of first-degree murder face the same sentence of life without parole. Because some juvenile offenders will possess the same mental faculties of an adult so that they are equally able to recognize the consequences of their crimes and form an unequivocal premeditated intent to kill in the face of the consequences, it is not categorically disproportionate to punish at least some juvenile offenders the same as adults.

Second, there are some nonhomicide offenses that may be viewed as less grave and less serious than first-degree murder and for which only adult offenders face a life-without-parole sentence in this state. For instance, an adult who commits successive first-degree criminal sexual conduct offenses against an individual under the age of 13 faces a sentence of life without parole. MCL 750.520b(2)(c). Accordingly, when the commission of a nonhomicide offense by an adult offender may result in the imposition of a life-without-parole sentence, it does not appear categorically disproportionate to impose a life-without-parole sentence on a juvenile offender for committing the gravest and most serious homicide offense.

Third, although this Court is required by *Graham* to assess the proportionality of a sentence of life without parole imposed on juveniles who commit first-degree murder, we would be derelict if we did not observe that the people of this state, acting through their Legislature, have already exercised their judgment—to which we owe considerable deference—that the sanction they have selected for juvenile first-degree-murder offenders

is, in fact, a proportionate sanction. We are not certain that there is a superior test for assessing a determination of proportionality than that a particular sanction is compatible with public opinion and sentiment. Nonetheless, because this Court is required to do so by *Graham*, we undertake to the best of our ability to exercise independent judgment in analyzing the criminal punishments authorized by our Legislature and assessing their propriety in the light of the crimes for which the Legislature has deemed them proportionate.

Turning to whether Michigan's sentencing scheme for juvenile first-degree-murder offenders is "disproportionate" to sentencing schemes used in other states, defendants have wholly failed to present relevant data demonstrating that Michigan is an outlier when it comes to permitting the imposition of life-without-parole sentences for juvenile first-degree-murder offenders, even on the assumption that being an "outlier" adversely affects our state's compliance with the United States Constitution. Defendants in their briefs cherry-pick six states in which sentencing schemes have been altered post-*Miller* to eliminate life-without-parole as a possible sentence for juvenile offenders. The fact that six states have eliminated life-without-parole sentences for juvenile offenders in response to *Miller* tells us next to nothing about how Michigan's choice to impose life-without-parole sentences on juveniles convicted of first-degree murder compares to sentencing schemes across the nation, and defendants have come nowhere close to satisfying their burdens in this regard.

What trend is demonstrated by the actions of these six states alone? How many states at the time of *Miller* imposed a sentence of life without parole on juvenile homicide offenders? How many of these states responded to *Miller* in a manner similar to that of

Michigan? What *is* apparent is that at the time of *Miller*, "26 States . . . [made] life without parole the mandatory (or mandatory minimum) punishment for some form of murder, and would apply the relevant provision to 14-year-olds . . . ." *Miller*, 567 US at ___ n 9; 132 S Ct at 2471 n 9. Another 15 states allowed for the discretionary imposition of life-without-parole sentences on juvenile offenders. *Id*. at ___ n 10; 132 S Ct at 2472 n 10. Combined therefore, 41 states exercised the authority under at least some circumstances to impose a life-without-parole sentence on a juvenile. If, as defendants assert, six of those states have departed from this practice by eliminating that sentence altogether, can it be concluded that life-without-parole sentences for juveniles are disproportionte when they remain an option of some kind in 35 states in total, or 70% of the states composing the Union?

In summary, we have no evidence that sustains defendants' burden of demonstrating that Michigan's statutory scheme is categorically disproportionate to those of other states. As defendants have failed to demonstrate that either part of the federal test for the constitutionality of punishments supports the conclusion that a life-without-parole sentence for juvenile homicide offenders is disproportionate, we decline to hold that the Eighth Amendment of the United States Constitution categorically bars that punishment.

2. STATE CATEGORICAL BAR

Defendants next contend that even if the Eighth Amendment does not categorically bar the imposition of sentences of life without parole on juvenile homicide offenders, Const 1963, art 1, § 16 does mandate such a categorical bar. Whereas the Eighth Amendment pro-

scribes the imposition of "cruel *and* unusual punishment*s*," Const 1963, art 1, § 16 states:

> Excessive bail shall not be required; excessive fines shall not be imposed; cruel *or* unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained. [Emphasis added.]

The textual difference between the federal constitutional protection and the state constitutional protection is of consequence and has led this Court to conclude that Article 1, § 16 provides greater protection against certain punishments than its federal counterpart in that if a punishment must be both "cruel" *and* "unusual" for it to be proscribed by the Eighth Amendment, a "punishment that is unusual but not necessarily cruel" is also proscribed by Article 1, § 16. *People v Lorentzen*, 387 Mich 167, 172; 194 NW2d 827 (1972).

This broader protection under Article 1, § 16 against punishments that are merely "unusual" has led this Court to adopt a slightly different and broader test for proportionality than that employed in *Graham*. See *id*. at 171-172; see also *People v Bullock*, 440 Mich 15, 31; 485 NW2d 866 (1992).[37] As set forth in *Lorentzen* and

[37] The inclusion of proportionality review under Article 1, § 16 has been the subject of significant disagreement. *Bullock*, 440 Mich at 46 (RILEY, J., concurring in part and dissenting in part) ("I believe that *People v Lorentzen* . . . , the principle case relied on by the majority to support its conclusion, was wrongly decided and that proportionality is not, and has never been, a component of the 'cruel or unusual punishment' clause of this state's constitution."); *People v Correa*, 488 Mich 989, 992 (2010) (MARKMAN, J., joined by CORRIGAN and YOUNG, JJ., concurring) ("[A]t some point, this Court should revisit *Bullock*'s establishment of proportionality review of criminal sentences, and reconsider Justice RILEY's dissenting opinion in that case."). However, because life without parole is not a categorically disproportionate sentence for a juvenile homicide offender, we find it unnecessary in this case to resolve whether proportionality review is rightly a part of the protection in Article 1, § 16 against "cruel

Bullock, the state test for proportionality assesses (1) the severity of the sentence imposed compared to the gravity of the offense, (2) the penalty imposed for the offense compared to penalties imposed on other offenders in the same jurisdiction, (3) the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states, and (4) whether the penalty imposed advances the penological goal of rehabilitation. *Bullock*, 440 Mich at 33-34, citing *Lorentzen*, 387 Mich at 176-181.

At the outset, we note that the *Lorentzen*/*Bullock* test bears a considerable resemblance to the federal test for proportionality because the first three factors combine to effect the same general inquiry as the two-part test employed in *Graham*. See *Bullock*, 440 Mich at 33 ("Our analysis in *Lorentzen* foreshadowed in a striking manner the three-pronged test later adopted by the United States Supreme Court in *Solem v Helm*, 463 US 277, 290-291; 103 S Ct 3001; 77 L Ed 2d 637 (1983)."). Our conclusion that none of the first three factors supports the inference that a life-without-parole sentence for a juvenile offender is disproportionate under the Eighth Amendment also bears on the first three inquires of the proportionality analysis under the *Lorentzen*/*Bullock* test. Accordingly, only the fourth factor of the *Lorentzen*/*Bullock* test remains to be assessed before weighing these factors and reaching a conclusion about the proportionality of a life-without-parole sentence for a juvenile homicide offender under Article 1, § 16 of our state constitution.

Concerning the fourth factor, we concur with the United States Supreme Court's assessment that a life-without-parole sentence for a juvenile does not serve

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or unusual punishment," instead assuming for the sake of argument that it has a place in an analysis under Article 1, § 16.

the penological goal of rehabilitation.[38] *Graham*, 560 US at 74. As stated in *Graham*, when life without parole is imposed on a juvenile, "[t]he penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society." *Id*. Accordingly, the fourth factor of the *Lorentzen*/*Bullock* test supports defendants' contention that a life-without-parole sentence for a juvenile offender is disproportionate. That said, with only one of the four factors supporting the conclusion that life-without-parole sentences are disproportionate when imposed on juvenile homicide offenders, defendants have failed to meet their burden of demonstrating that it is facially unconstitutional under Article 1, § 16 to impose that sentence on a juvenile homicide offender. While the language of the Michigan counterpart to the Eighth Amendment is at some variance from the latter, it is not so substantially at variance that it results in any different conclusion in its fundamental analysis of proportionality.

3. AIDING AND ABETTING

Davis argues that even if the Eighth Amendment does not categorically bar imposing sentences of life without parole on juvenile homicide offenders, it at

[38] In accepting this conclusion, this Court, as did the United States Supreme Court, speaks of "rehabilitation" exclusively within the context of a defendant reforming himself or herself for the purpose of reintegration into society. See *Graham*, 560 US at 74. This, however, is not to foreclose the ability of a person, however long the person is to be incarcerated, to rehabilitate himself or herself in the sense of fully comprehending the nature of the wrong, achieving a greater awareness of and commitment to the elements of moral behavior, attaining a sincere adherence to religious faith, or contributing in positive ways to those with whom the person interacts in whatever environment he or she has been placed.

least categorically bars imposing life-without-parole sentences on juvenile homicide offenders, such as himself, convicted of felony murder ostensibly on the basis of an aiding-and-abetting theory. At the outset of our analysis, we note that our Legislature has chosen to treat offenders who aid and abet the commission of an offense in exactly the same manner as those offenders who more directly commit the offense:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense. [MCL 767.39.]

Moreover, the Legislature has enacted a felony-murder statute, which treats the commission of a murder during the course of a robbery as first-degree murder. See MCL 750.316(1)(b).[39] These choices by the Legislature must be afforded great weight in light of the fact that *Lockett*, one of the capital-punishment cases relied on by the United States Supreme Court in forming the rule in *Miller*, specifically instructs:

> That States have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony-murder statutes is beyond constitutional challenge. [*Lockett*, 438 US at 602.]

Davis attempts to overcome this constitutional pronouncement in light of his own proposed categorical rule mandating a lesser maximum penalty for aiders and abettors by asserting that *Miller* and *Graham*

[39] We speak of the felony-murder statute in terms of the underlying felony being a robbery merely because the underlying felony in Davis's case was a robbery. The reasoning put forth in this part, however, would apply equally when the underlying felony is any one of the other felonies listed in MCL 750.316(1)(b).

combine to necessitate such a rule. He advances a two-part argument to this effect: (1) the rule in *Miller* requires individualized sentencing for juvenile offenders in an effort to account for "their lesser culpability," *Miller*, 567 US at ___; 132 S Ct at 2463, and (2) *Graham* has already determined that aiders and abettors are sufficiently less culpable that a sentence of life without parole is never constitutionally appropriate, see *Graham*, 560 US at 69.

Although the first part of this syllogism is undoubtedly accurate, the same cannot be said of the second part. *Graham* made two statements pertinent to the second part of Davis's argument:

> The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. . . .
>
> It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. [*Id*.]

In combination with *Miller*'s requirement that individualized sentencing account for a juvenile's "lesser culpability," it has been argued that a juvenile offender cannot be sentenced to life without parole when the defendant did not kill, intend to kill, or foresee that life would be taken as a result of the offense, even when the offense of which the offender was convicted was felony murder. Just such a contention was advanced by Justice Breyer in his concurrence in *Miller*, in which, addressing specifically the constitutionality of life-without-parole sentences for juvenile offenders convicted of felony murder on an aiding-and-abetting theory, he stated, "*Graham* dictates a clear rule: The only juveniles who may constitutionally be sentenced to life without parole are

those convicted of homicide offenses who 'kill or intend to kill.' " *Miller*, 567 US at ___; 132 S Ct at 2476 (Breyer, J., concurring).

Assuming for the sake of argument that some categorical rule of this nature is the necessary product of *Graham* and *Miller*,[40] it still does not follow that the rule pertains to and encompasses all instances in which a juvenile aids and abets a felony murder. As recognized by Justice Breyer himself, a juvenile who aids and abets a felony murder *may* have intended the death of any victim of the offense. *Id*. at ___; 132 S Ct at 2477 (indicating that on remand, the trial court would need to determine if the defendant, who was convicted of felony murder for aiding and abetting the commission of a robbery that resulted in a death, "did intend to cause the clerk's death"). Further, a juvenile who aids and abets a felony murder *may* have foreseen that a life might be taken as a result of his offense, but proceeded notwithstanding to engage in the underlying offense with indifference to this risk. Accordingly, when a juvenile can be convicted of felony murder on an aiding-and-abetting theory while either intending to kill or having foreseen the possibility that a life could be taken, any categorical rule gleaned from *Graham* pertaining to the limited situation in which a juvenile homicide offender lacked the intent to kill and did not foresee the possibility that a life could be taken will once again not *categorically* bar the imposition of a

[40] Although we assume for the sake of argument that such a categorical rule may exist, nothing in this opinion should be understood as actually accepting or adopting such a rule. To the contrary, we note that a categorical rule mandating that a subclass of aiders and abettors be treated differently with respect to what punishments can be imposed would run directly contrary to both the aforementioned statement in *Lockett* and MCL 767.39. Further, Justice Breyer in his concurrence spoke only for himself and one other justice.

sentence of life without parole for that offense.[41]

This conclusion is entirely consistent with, and arguably dictated by, the individualized sentencing process required by *Miller*. In seeking to assess a juvenile offender's moral culpability, *Miller* instructs trial courts to consider the " 'circumstances of the particular offense *and* the character and propensities of the offender.' " *Id*. at ___ n 9; 132 S Ct at 2471 n 9, quoting *Roberts*, 428 US at 333, and citing *Sumner*, 483 US 66 (emphasis added). A categorical rule altogether foreclosing a trial court from imposing a life-without-parole sentence on a juvenile convicted of felony murder on an aiding-and-abetting theory obviates the necessity for any evaluation of either the circumstances of the individual defendant's offense or the individual defendant's character. Such a categorical rule would permit a defendant to avoid a life-without-parole sentence for aiding and abetting a felony murder even if the defendant was closely nearing the age of 18 at the time of the offense, intended the death of the victim by instructing a coconspirator to fire the fatal shot, and had had previous encounters with the criminal justice system that demonstrated a lack of amenability to rehabilitation. Because it is not difficult to imagine such a defendant, and because imposing a life-without-parole sentence on

[41] To the extent that *Graham* and *Miller* might create a categorical rule prohibiting life-without-parole sentences for juveniles convicted of aiding and abetting a felony murder "who do not kill, intend to kill, or foresee that life will be taken," *Graham*, 560 US at 69, Davis would not be entitled to relief under that rule. Although the trial court concluded at sentencing that Davis was not the shooter, it did not make an explicit finding regarding Davis's intentions about the victim's death, and it made no findings indicative of whether he foresaw the potential that life would be taken as a result of the armed robbery in which he engaged. To go back and attempt to make these findings now would entail engaging in the broader individualized sentencing procedures called for by *Miller* that we have already determined today need not be engaged in retroactively.

that defendant would be warranted and entirely constitutional under *Miller*, we reject Davis's facial challenge and his contention that the Eighth Amendment categorically bars the imposition of a life-without-parole sentence on a juvenile convicted of felony murder on an aiding-and-abetting theory.[42]

4. RIPENESS

Eliason asserts that Const 1963, art 1, § 16 categorically bars the imposition of a sentence of life without parole on a juvenile homicide offender who is 14 years of age at the time of the offense. For Eliason's facial challenge to be ripe, there must be "a real and immediate threat . . . as opposed to a hypothetical one" that a sentence of life without parole will be imposed on him. *Conat*, 238 Mich App at 145, citing *Los Angeles v Lyons*, 461 US 95, 101-101; 103 S Ct 1660; 75 L Ed 2d 675

[42] This holding carries with it the conclusion that some juveniles convicted of felony murder on an aiding-and-abetting theory might be as morally culpable for their crimes as juveniles who commit premeditated first-degree murder and not simply as legally culpable. A juvenile convicted of felony murder on an aiding-and-abetting theory can be said to have committed as grave an offense as a juvenile who commits premeditated first-degree murder. Accordingly, for the purpose of Davis's challenge under Const 1963, art 1, § 16, the first two factors of the *Lorentzen*/*Bullock* proportionality test will be resolved in a fashion identical to how they were resolved for life-without-parole sentences generally. Concerning the third factor, Davis fails to present any data specific to how other jurisdictions sentence juveniles convicted of felony murder on an aiding-and-abetting theory, only putting forth a sampling of how a very few states now sentence juveniles convicted of first-degree murder generally. In the absence of evidence to the contrary, we are left to assume that a majority of other states hold aiders and abettors equally responsible for their offenses. Accordingly, the third factor also counsels against a finding of disproportionality. Because only the fourth factor of the *Lorentzen*/*Bullock* proportionality test, pertaining to rehabilitation, favors holding life-without-parole sentences for juveniles convicted of felony murder on an aiding-and-abetting theory unconstitutional, Davis's facial challenge under Article 1, § 16 fails as well.

(1983), and *Dep't of Social Servs v Emmanuel Baptist Preschool*, 434 Mich 380, 410; 455 NW2d 1 (1990) (CAVANAGH, J.). Put differently, in determining whether an issue is justiciably "ripe," a court must assess " 'whether the harm asserted has matured sufficiently to warrant judicial intervention.' " *Emmanuel Baptist*, 434 Mich at 412 n 48 (citation omitted). Inherent in this assessment is the balancing of "any uncertainty as to whether defendant[] will actually suffer future injury, with the potential hardship of denying anticipatory relief." *Id*. at 412, citing *Abbott Laboratories v Gardner*, 387 US 136, 148-149; 87 S Ct 1507; 18 L Ed 2d 681 (1967).

Eliason was 14 years of age at the time of his offense and was initially sentenced to life without parole. However, because Eliason's case is on direct review, he is entitled to resentencing pursuant to MCL 769.25(1)(b)(*ii*). Under MCL 769.25(9), the default sentence for a juvenile convicted of first-degree murder is a sentence of a term of years within specific limits rather than life without parole. A juvenile defendant will only face a life-without-parole sentence if the prosecutor files a motion seeking that sentence and the trial court concludes following an individualized sentencing hearing in accordance with *Miller* that such a sentence is appropriate. MCL 769.25(2) through (7).

Although the prosecutor has filed a motion seeking the imposition of a sentence of life without parole, it is no more than speculation whether the trial court will depart from the default sentence in response to the prosecutor's motion and impose a life-without-parole sentence, and it is not apparent that Eliason faces a "real and immediate" threat of receiving a life-without-parole sentence. Furthermore, because he will be facing a minimum sentence of "not less

than 25 years," MCL 769.25(9), to deny on ripeness grounds the relief Eliason seeks will cause him no legally cognizable hardship or harm. If a life-without-parole sentence is imposed at resentencing, Eliason will have more than ample time to appeal and assert either an as-applied or a facial constitutional challenge to his sentence before he completes the minimum possible sentence for his offense. Accordingly, in light of Eliason's being entitled to resentencing under MCL 769.25, his facial constitutional challenge to life-without-parole sentences for juvenile homicide offenders who are 14 years of age at the time of their offense is no longer justiciable.[43]

V. CONCLUSION

For these reasons, we hold that the rule set forth in *Miller* should not be retroactively applied under either the federal retroactivity test set forth in *Teague* or Michigan's separate and independent retroactivity test set forth in *Sexton* and *Maxson*. In so doing, we affirm the judgments of the Court of Appeals in *Carp* and *Davis* that *Miller* should not be applied retroactively. We further hold that neither the Eighth Amendment nor Const 1963, art 1, § 16 categorically bars the imposition of a sentence of life without parole on a juvenile first-degree-murder offender or a juvenile convicted of felony murder on the basis of an aiding-and-abetting theory. Finally, we hold that Eliason's facial constitutional challenge is no longer ripe and therefore remand his case for resentencing pursuant to MCL 769.25.

YOUNG, C.J., and ZAHRA and VIVIANO, JJ., concurred with MARKMAN, J.

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[43] As conceded by the parties at oral argument, Eliason's other issues on which this Court granted leave to appeal are moot as a result of the enactment of MCL 769.25.

KELLY, J. (*dissenting*). In a series of recent cases involving juvenile offenders,[1] the United States Supreme Court has established that "children are different" as a matter of constitutional law.[2] Specifically at issue here is the application of one of those recent cases, *Miller v Alabama*, to incarcerated juvenile offenders whose direct appeals were complete when the Supreme Court decided *Miller*. In *Miller*, the Supreme Court determined that, because certain juvenile homicide offenders have "diminished culpability" when compared with adult offenders, states cannot subject juvenile homicide offenders to mandatory nonparolable life sentences.[3] By doing so, the Court expanded the range of punishments that may be imposed on juvenile homicide offenders in states, like Michigan, that had previously mandated a nonparolable life sentence whenever a juvenile offender was convicted of first-degree murder in the circuit court. We conclude that *Miller* applies retroactively to cases appearing before us on collateral review, including in *People v Carp* and *People v Davis*, because it established a substantive rule of law. Alternatively, state law compels the retroactive application of *Miller*. Accordingly, we would reverse in *Carp* and *Davis* and remand those cases to the St. Clair Circuit Court and Wayne Circuit Court, respectively, for resentencing pursuant to MCL 769.25a.[4]

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[1] The phrase "juvenile offenders" throughout this opinion refers to the class of individuals who were convicted for crimes committed before reaching the age of 18.

[2] *Miller v Alabama*, 567 US ___; 132 S Ct 2455, 2470; 183 L Ed 2d 407 (2012). See also *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 1 (2005); *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010).

[3] *Miller*, 567 US at ___; 132 S Ct at 2464

[4] We would also remand *People v Eliason* to the Berrien Circuit Court for resentencing pursuant to MCL 769.25, as the majority does.

I. THE EIGHTH AMENDMENT APPLIED TO JUVENILE OFFENDERS

The Eighth Amendment of the United States Constitution prohibits the infliction of "cruel and unusual punishments"[5] and has a long history in American and English law predating the Bill of Rights. Similar protections were provided in various state constitutions,[6] and identical language appeared in the English Bill of Rights of 1689.[7] Even farther back in time, a prohibition of excessive punishments appeared in the Magna Carta.[8]

" 'The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.' "[9] For more than a century, the Supreme Court has main-

[5] The Cruel and Unusual Punishments clause has been incorporated to the states through the Fourteenth Amendment. See *Robinson v California*, 370 US 660; 82 S Ct 1417; 8 L Ed 2d 758 (1962). Additionally, Article 1, § 16 of the 1963 Michigan Constitution provides that "cruel or unusual punishment shall not be inflicted . . . ."

[6] For instance, the Virginia Declaration of Rights stated "[t]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." 5 Kurland & Lerner, The Founders' Constitution, p 373, quoting Virginia Declaration of Rights, § 9 (June 12, 1776).

[7] The English Bill of Rights of 1689 provided "[t]hat excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." 5 Kurland & Lerner, The Founders' Constitution, p 369, quoting the English Bill of Rights, 1 W & M, 2d sess, ch 2, § 10 (December 16, 1689).

[8] Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 Cal L Rev 839, 845-846 (1969) (The Magna Carta "clearly stipulated as fundamental law a prohibition of excessiveness in punishments[.]"). Caselaw further establishes "a common law prohibition against excessive punishments in any form," even if it remains unclear "[w]hether the principle was honored in practice . . . ." *Id*. at 847.

[9] *Atkins v Virginia*, 536 US 304, 311; 122 S Ct 2242; 153 L Ed 2d 335 (2002), quoting *Trop v Dulles*, 356 US 86, 100; 78 S Ct 590; 2 L Ed 2d 630 (1958) (opinion by Warren, C.J.).

tained that the Clause does not have a fixed meaning,[10] but instead "may acquire meaning as public opinion becomes enlightened by a humane justice."[11] One meaning the Supreme Court has developed over the last decade is that "children are constitutionally different from adults for purposes of sentencing."[12] In *Roper v Simmons*, the Court forbade imposition of the death penalty on juvenile offenders.[13] In *Graham v Florida*, the Court prohibited "the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."[14] Most recently, in *Miller v Alabama*, the Court struck down a sentencing scheme that provided a mandatory nonparolable life sentence for juvenile homicide offenders.[15]

In these rulings, the Court relied on three significant differences between juveniles and adults to conclude that juveniles have "diminished culpability" for their crimes and "greater prospects for reform."[16]

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[10] See *Weems v United States*, 217 US 349, 373; 30 S Ct 544; 54 L Ed 793 (1910) ("[I]f we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history."); *id*. ("[O]ur contemplation cannot be only of what has been but of what may be.").

[11] *Id*. at 378. More recently, the Court has explained that the clause " 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' " *Atkins*, 536 US at 311-312, quoting *Trop*, 356 US at 101 (opinion by Warren, C.J.).

[12] *Miller*, 567 US at ___; 132 S Ct at 2464.

[13] *Roper*, 543 US at 578.

[14] *Graham*, 560 US at 82.

[15] *Miller*, 567 US at ___; 132 S Ct at 2460.

[16] *Id.* at ___; 132 S Ct at 2464. The Court cited research developments in science and social science that show " 'fundamental differences between juvenile and adult minds'—for example, in 'parts of the brain involved in behavior control.' " *Id*. at ___; 132 S Ct at 2464, quoting *Graham*, 560 US at 68. Specifically, the Court cited a paper by Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence*, which explains that there are two components to the diminished culpability of

> First, children have a " 'lack of maturity and an underdeveloped sense of responsibility,' " leading to recklessness, impulsivity, and heedless risk-taking. Second, children "are more vulnerable . . . to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]."[17]

These differences between juveniles and adults "diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes."[18] In this respect, *Miller* relied heavily on *Graham*, explaining that *Graham* "insist[ed] that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole."[19] Because an offender's age " 'is relevant to the Eighth Amendment,' . . . 'criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.' "[20]

Not only is age relevant in establishing an offender's culpability for the crime, as already explained in this opinion, but it is also relevant in determining whether punishment for a crime is sufficiently comparable in

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adolescents: the brain development that continues to occur during adolescence and psychosocial factors limiting adolescents' emotional maturity, such as "(a) susceptibility to peer influence, (b) attitudes toward and perception of risk, (c) future orientation, and (d) the capacity for self-management." Steinberg & Scott, *Less Guilty by Reason of Adolescence*, 58 Am Psychologist 1009, 1012 (2003).

[17] *Miller*, 567 US at ___; 132 S Ct at 2464, quoting *Roper*, 543 US at 569-570 (citations omitted; alterations in original).

[18] *Miller*, 567 US at ___; 132 S Ct at 2465.

[19] *Id.* at ___; 132 S Ct at 2465.

[20] *Id*. at ___; 132 S Ct at 2466, quoting *Graham*, 560 US at 76.

severity to an identical sentence given to an adult offender. Sentencing a juvenile offender to a nonparolable life sentence is " 'especially harsh' " given that the offender "will almost inevitably serve 'more years and a greater percentage of his life in prison than an adult offender.' "[21] Indeed, it "cannot be ignored" that "[a] 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only."[22] As a result, the Supreme Court compared this "ultimate penalty" for juvenile offenders to the death penalty, which is the ultimate penalty for adult offenders, rather than to nonparolable life sentences for adult offenders.[23]

In particular, the Supreme Court questioned the ability of mandatory penalties to take into account the unique circumstances of youth: "mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it."[24] In imposing the harshest penalty available on a juvenile offender, then, "a sentencer misses too much if he treats every child as an adult."[25] As a result, the Supreme Court required "that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing"[26] a nonparolable life sentence:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark

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[21] *Miller*, 567 US at ___; 132 S Ct at 2466, quoting *Graham*, 560 US at 70.

[22] *Graham*, 560 US at 70-71.

[23] *Miller*, 567 US at ___; 132 S Ct at 2466.

[24] *Id*. at ___; 132 S Ct at 2467.

[25] *Id*. at ___; 132 S Ct at 2468.

[26] *Id*. at ___; 132 S Ct at 2471.

> features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.[27]

The Supreme Court invalidated *any* "sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."[28]

It is undisputed—and cannot be disputed—that *Miller* applies to all cases that were pending on direct appeal when the decision was issued on June 25, 2012, and that it applies to all juvenile offenders going forward.[29] What is in dispute in *Carp* and *Davis* is whether *Miller* applies to offenders whose direct appeals were

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[27] *Id*. at ___; 132 S Ct at 2468 (citations omitted).

[28] *Id*. at ___; 132 S Ct at 2469.

[29] "When a decision of this Court results in a 'new rule,' that rule applies to all criminal cases still pending on direct review." *Schriro v Summerlin*, 542 US 348, 351; 124 S Ct 2519; 159 L Ed 2d 442 (2004). A case becomes final on direct review "for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Caspari v Bohlen*, 510 US 383, 390; 114 S Ct 948; 127 L Ed 2d 236 (1994). Moreover, the Legislature recognized this when it enacted new procedures for sentencing juvenile offenders in compliance with *Miller*. See MCL 769.25, added by 2014 PA 22. As a result, we would remand *Eliason* to the

completed before June 25, 2012. After having filed motions for relief from judgment in their respective cases, defendants Raymond Carp and Cortez Davis now appear before this Court, presenting that very issue.[30] On this question, to which we now turn, *Miller* was silent[31] and courts across the country are divided.[32]

Berrien Circuit Court for resentencing pursuant to MCL 769.25, as the majority does, because that case was still pending on direct review when *Miller* was decided.

[30] See MCR 6.501 *et seq*.

[31] For the reasons explained later in this opinion, the fact that *Miller* failed to categorically bar imposition of a nonparolable life sentence for juvenile offenders does not require the conclusion that *Miller* is not retroactive. We similarly deem inconclusive as evidence of retroactivity the fact that the Supreme Court did not distinguish *Miller* from a companion case appearing before the Supreme Court on collateral review. See *Miller*, 567 US at ___; 132 S Ct at 2461-2462, 2475; *Jackson v Norris*, 2013 Ark 175; 426 SW3d 906 (2013) (applying *Miller* in that companion case). Although the Supreme Court indicated in *Teague v Lane* that "implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review," *Teague v Lane*, 489 US 288, 316; 109 S Ct 1060; 103 L Ed 2d 334 (1989) (opinion by O'Connor, J.), it has only inconsistently followed that approach. See *Chaidez v United States*, 568 US ___; 133 S Ct 1103; 185 L Ed 2d 149 (2013) (holding that *Padilla v Kentucky*, 559 US 356; 130 S Ct 1473; 176 L Ed 2d 284 (2010), did not apply retroactively notwithstanding the fact that *Padilla* appeared before the Supreme Court on collateral review).

[32] For example, state appellate courts in California, *In re Rainey*, 224 Cal App 4th 280; 168 Cal Rptr 3d 719; ___ P3d ___ (2014); Illinois, *People v Davis*, 2014 Ill 115595; 379 Ill Dec 381; 6 NE3d 709 (2014); Iowa, *State v Ragland*, 836 NW2d 107 (Iowa, 2013); Massachusetts, *Diatchenko v Dist Att'y*, 466 Mass 655; 1 NE3d 270 (2013); Mississippi, *Jones v State*, 122 So 3d 698 (Miss, 2013); Nebraska, *State v Mantich*, 287 Neb 320; 842 NW2d 716 (2014); and Texas, *Ex parte Maxwell*, 424 SW3d 66 (Tex Crim App, 2014), have all ruled in favor of *Miller*'s retroactivity. In contrast, state appellate courts in Alabama, *Williams v State*, ___ So 3d ___ (Ala Crim App, 2014); Louisiana, *State v Tate*, La 2012-2763; 130 So 3d 829 (November 5, 2013); Minnesota, *Chambers v State*, 831 NW2d 311 (Minn, 2013); and Pennsylvania, *Commonwealth v Cunningham*, 81 A3d 1 (Pa, 2013), have ruled that *Miller* is not retroactive. Additionally, the appel-

II. RETROACTIVITY UNDER FEDERAL LAW

A. ANALYSIS

In *Teague v Lane* and its progeny, the United States Supreme Court has explained when its new rules are retroactive under federal law and thereby apply to cases on collateral review.[33] The threshold inquiry is whether the Supreme Court has, in fact, issued a new rule of law. A new rule has been issued and the *Teague* analysis proceeds if "the precise holding[s]" in the Supreme Court's previous cases did not "dictate the result" of the case being analyzed.[34]

Once the reviewing court determines that the Supreme Court issued a new rule of law in the case being analyzed, the reviewing court must then determine whether the new rule is a substantive rule or a procedural rule:

> New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or

late courts in Florida have reached opposite conclusions on the question of retroactivity. *Falcon v State*, 111 So 3d 973 (Fla Dist Ct App, 2013) (concluding that *Miller* did not apply retroactively), lv gtd 137 So 3d 1019 (Fla, 2013); *Toye v State*, 133 So 3d 540 (Fla Dist Ct App, 2014) (concluding that *Miller* applied retroactively).

[33] *Teague*, 489 US 288. Although the lead opinion in *Teague* was not supported in whole by a majority of the court, the *Teague* retroactivity framework has subsequently been adopted by a majority of the Court. *Penry v Lynaugh*, 492 US 302; 109 S Ct 2934; 106 L Ed 2d 256 (1989), overruled in part on other grounds by *Atkins*, 536 US 304. In *Penry*, the majority also determined that the *Teague* framework applied to capital punishment cases. Because sentencing a juvenile offender to a nonparolable life sentence is the "ultimate penalty for juveniles," *Miller*, 567 US at ___; 132 S Ct at 2466, the *Teague* framework similarly applies to nonparolable life sentences for juvenile offenders.

[34] *Saffle v Parks*, 494 US 484, 490; 110 S Ct 1257; 108 L Ed 2d 415 (1990).

> persons covered by the statute beyond the State's power to punish. Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' " or faces a punishment that the law cannot impose upon him. *Bousley* [*v United States*, 523 US 614, 620; 118 S Ct 1604; 140 L Ed 2d 828 (1998), quoting *Davis v United States*, 417 US 333, 346; 94 S Ct 2298; 41 L Ed 2d 109 (1974)].
>
> New rules of procedure, on the other hand, generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.[35]

A rule is procedural if it "regulate[s] only the manner of determining the defendant's culpability" or if it "allocate[s] decisionmaking authority."[36] On the other hand, "[a] decision that modifies the elements of an offense is normally substantive rather than procedural," including, for example, a decision stating that "a certain fact [is] essential to the death penalty . . . ."[37] Finally, if the new rule is determined to be procedural, then it applies retroactively only if it satisfies the two requirements of a watershed rule of criminal procedure: (1) it must be necessary to prevent an impermissibly large risk of an inaccurate conviction, and (2) it must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.[38] One such watershed rule of criminal procedure was articulated in *Gideon v Wain-*

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[35] *Summerlin*, 542 US at 351-352 (most citations omitted).

[36] *Id*. at 353 (emphasis omitted).

[37] *Id*. at 354.

[38] *Whorton v Bockting*, 549 US 406, 417-418; 127 S Ct 1173; 167 L Ed 2d 1 (2007), citing *Summerlin*, 542 US at 356.

wright,[39] which requires the appointment of counsel for any indigent defendant charged with a felony.[40]

B. APPLICATION

It is uncontested that *Miller* is a new rule, and we agree with the majority's conclusion that "*Miller* imposed a hitherto-absent obligation on state and lower federal courts to conduct individualized sentencing hearings before imposing a sentence of life without parole on a juvenile homicide offender."[41]

We disagree, however, with the majority's conclusion that *Miller* is best characterized as a procedural ruling such that it applies retroactively to cases on collateral review only if it is a watershed rule of constitutional procedure. Admittedly, the distinction between rules of procedure and rules of substance "is not necessarily always a simple matter to divine."[42] Generally, a substantive rule "place[s] particular conduct or persons covered by the statute beyond the State's power to punish,"[43] while a procedural rule "regulate[s] only the manner of determining the defendant's culpability . . . ."[44]

State legislatures have the "substantive power to define crimes and prescribe punishments,"[45] subject to

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[39] *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).

[40] *Whorton*, 549 US at 419 (stating that *Gideon* was a watershed rule of constitutional procedure within the meaning of *Teague*).

[41] *Ante* at 473. While *Miller* applied principles contained in several of the Court's Eighth Amendment precedents, the "precise holding[s]" of those precedents did not "dictate the result" of *Miller*. See *Saffle*, 494 US at 490.

[42] *People v Carp*, 298 Mich App 472, 512; 828 NW2d 685 (2012), citing *Robinson v Neil*, 409 US 505, 509; 93 S Ct 876; 35 L Ed 2d 29 (1973).

[43] *Summerlin*, 542 US at 352.

[44] *Id*. at 353 (emphasis omitted).

[45] *Jones v Thomas*, 491 US 376, 381; 109 S Ct 2522; 105 L Ed 2d 322 (1989).

constitutional limitations. The Supreme Court articulated one such limitation in *Miller*: after *Miller*, state legislatures no longer can *mandate*, like the Michigan Legislature did,[46] that a juvenile offender convicted of first-degree murder in the circuit court receive a nonparolable life sentence.[47] In *Graham*, the Supreme Court "recognized the severity of sentences that deny convicts the possibility of parole"[48] when it categorically barred a state from imposing a nonparolable life sentence (whether discretionary or mandatory) on a juvenile nonhomicide offender. While *Miller* does not prohibit a sentencer from imposing a nonparolable life sentence on a juvenile homicide offender in the appropriate case, the Supreme Court categorically barred mandatory nonparolable life sentences for such offenders.

After *Miller*, if a state chooses to permit the sentencing of juveniles to nonparolable life,[49] then the state must provide some procedure that requires the sentencer to consider the particular facts and circumstances of the crime and the offender. The Court of Appeals and, to some extent, the majority have placed particular importance on a single line in *Miller*: that the decision "mandates only that a sentencer follow a certain process . . . before imposing a particular pen-

[46] See MCL 750.316 (stating that first-degree murder shall be punished by imprisonment for life); MCL 769.1(1) (stating that a juvenile convicted of first-degree murder shall be sentenced "in the same manner as an adult"); MCL 791.234(6)(a) (stating that someone sentenced to life imprisonment for first-degree murder "is not eligible for parole").

[47] Indeed, the majority acknowledges that "[i]t thus seems certain as a result of *Miller* that a considerable number of juvenile defendants who would previously have been sentenced to life without parole for the commission of homicide offenses will have a lesser sentence meted out." *Ante* at 473.

[48] *Graham*, 560 US at 70.

[49] Michigan has recently done so. 2014 PA 22.

alty."[50] However, the mere fact that *Miller* mandates "a certain process," or has procedural implications, does not transform the decision itself into a procedural decision. To the contrary, *Miller* invalidated *an entire "sentencing scheme"* that "mandate[d] life in prison without possibility of parole for juvenile offenders."[51]

The majority claims that the distinction between the "categorical bar" of a penalty and the "noncategorical bar" of a penalty "defines the critical element of the retroactivity analysis in *Teague*."[52] This distinction, however, is not dispositive to the *Teague* analysis, which focuses on whether the decision is substantive or procedural, not on whether it is categorical or noncategorical. By elevating the categorical/noncategorical distinction in the way it does, the majority muddles the *Teague* analysis to state that noncategorical bars *must* be procedural in nature. Even if all categorical bars are substantive, it does not logically follow that all noncategorical bars must be procedural.[53] Rather, for the reasons stated later in this opinion, the fact that *Miller* did not categorically bar nonparolable life sentences for juvenile offenders does not negate the substantive import of its decision to invalidate mandatory nonparolable life sentences as applied to juvenile offenders.

The substantive nature of *Miller*'s holding becomes clearer upon considering that it did not invalidate mandatory sentencing schemes as applied to adult

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[50] *Miller*, 567 US at ___; 132 S Ct at 2471.

[51] *Id*. at ___; 132 S Ct at 2469 (emphasis added).

[52] *Ante* at 487 n 16.

[53] The division among our nation's courts with regard to whether this proposition is correct or incorrect suggests that our nation's jurisprudence would benefit from a clarification of the substantive/procedural distinction.

offenders.[54] Rather, in *Miller*, the Supreme Court made one fact—the age of the offender at the time of the offense—determinative regarding whether a state or the federal government can *mandate* the imposition of a nonparolable life sentence.[55] As a result, *Miller* did not alter "*only* the manner of determining the defendant's culpability,"[56] but instead also altered the range of punishments that *must* be available to impose on a juvenile offender.

After *Miller*, the offender's age at the time of the offense determines which of two sentencing schemes applies to the offender—that is, whether the offender is subject to a mandatory nonparolable life sentence (because the offender is an adult) or whether the sentence must take into account the offender's age and characteristics of youth, as well as the circumstances of the offense (because the offender is a juvenile).[57] While previously, in Michigan, juvenile offenders convicted of first-degree murder in the circuit court were subject to only one possible punishment—life imprisonment without the possibility of parole—after *Miller*, the prosecution must specifically request a nonparolable life sentence, rather than a term of years, after which the court must hold a hearing to consider the offender's characteristics and the circumstances of the offense before

[54] In Michigan, for instance, first-degree murder remains punishable by life in prison without the possibility of parole. MCL 750.316; MCL 791.234(6).

[55] In *Summerlin*, the Supreme Court explained that a decision making "a certain fact essential to the death penalty" is a substantive rule of law within the *Teague* framework. *Summerlin*, 542 US at 354.

[56] *Summerlin*, 542 US at 353 (emphasis altered).

[57] Someone who is convicted of first-degree murder committed as an adult in Michigan is still subject to the mandatory penalty of life in prison without the possibility of parole, MCL 750.316; MCL 791.234(6)(a), while a juvenile offender is no longer subject to the same mandatory sentence. MCL 769.25.

deciding whether to impose a nonparolable life sentence or a term of years.[58] As a result, age affects the range of sentences that can be imposed on someone convicted of first-degree murder in Michigan. It produces a class of persons subject to a different range of sentences than was previously mandated and thus reflects a substantive rule of law that applies retroactively under the *Teague* framework.

The majority analyzes what it deems the "form and effect" of *Miller* and concludes differently. Under its rationale, *Miller* is not retroactive in large part because the Supreme Court did not categorically bar a sentence as applied to a class of individuals, which it did in *Roper* and *Graham*. Rather, juvenile offenders sentenced to nonparolable life have been given a punishment that is within the power of the state to impose. The majority thus determines that *Miller* is more similar to cases involving the individualized imposition of the death penalty, which, the majority asserts, are cases involving new procedural rules.

The majority is insightful, to a point, by comparing *Miller* with *Woodson v North Carolina*, which struck down a sentencing scheme that mandated the death penalty upon conviction of certain offenses.[59] Indeed, after *Woodson*, the Supreme Court requires an individualized sentencing procedure if a state chooses to impose the

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[58] It is particularly relevant that *Miller* left considerable discretion for states to craft procedural mechanisms for ensuring the protection of a juvenile defendant's Eighth Amendment rights. The Legislature exercised such discretion in response to *Miller*, 2014 PA 22, adding MCL 769.25.

[59] *Woodson v North Carolina*, 428 US 280; 96 S Ct 2978; 49 L Ed 2d 944 (1976). See also *Sumner v Shuman*, 483 US 66; 107 S Ct 2716; 97 L Ed 2d 56 (1987), which similarly struck down a sentencing scheme that mandated the death penalty upon conviction of certain offenses committed while serving a nonparolable life sentence.

death penalty.[60] *Woodson* also illustrates the problem with the majority's method of distinguishing procedural from substantive holdings. The majority claims that substantive holdings "produce a single invariable result, or a single effect, when applied to *any* defendant in the class of defendants to whom the rule is pertinent," while procedural holdings "produce a range of results, or have multiple possible effects, when applied to *different* defendants in the class of defendants to whom the rule is pertinent."[61] In requiring an individualized procedure before a state can impose the death penalty, however, *Woodson* placed a particular punishment beyond the power of the state to *mandate*. So too did *Miller* place a particular punishment beyond the power of the state to mandate. The majority's distinction fails to give appropriate import to these decisions that involve more than simply the creation of particular procedural rights.

While *Woodson* required a state to provide *some* sort of procedural mechanism before it could impose capital punishment, it only offered minimal guidance on what procedures are required and, specifically, on who should decide whether an individual was eligible to receive the death penalty. After *Woodson*, some states listed aggravating factors that rendered an offense eligible for the death penalty. The Supreme Court subsequently held, in *Ring v Arizona*, that the Sixth Amendment right to a jury trial requires a jury to determine the presence or absence of the aggravating factors that qualify an offender as death-eligible.[62]

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[60] If the Supreme Court had definitively held *Woodson* to be a procedural ruling, then it would be difficult to distinguish *Miller*. However, if the Supreme Court has not ruled that *Woodson* is retroactive, as the majority posits, then neither has it ruled that *Woodson* is *only prospective*.

[61] *Ante* at 465.

[62] *Ring v Arizona*, 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002).

In *Schriro v Summerlin*, the Supreme Court determined that *Ring* was procedural, and therefore not retroactive, because the aggravating factors at issue there remained "subject to the procedural requirements the Constitution attaches to trial of elements."[63] The prototypical procedural decision merely "allocate[s] decisionmaking authority."[64] Unlike *Ring*, *Miller* does more than merely allocate decision-making authority. While *Ring* only "altered the range of *permissible methods* for determining whether a defendant's conduct is punishable by death,"[65] *Miller* went beyond that and altered the range of *punishments* available to a juvenile homicide offender by requiring that a state's mandatory minimum punishment be something less than nonparolable life. Indeed, it does not simply allocate decision-making authority but *establishes that authority in the first instance*. The majority implicitly recognizes this by observing that, as *Ring* shifted the decision-making authority for imposing capital punishment from the judge to the jury, *Miller* shifted the decision-making authority from one branch of government (the legislative) to another (the judiciary).[66] Put simply, *Miller* involved not just who exercises the decision-making authority for imposing a punishment, but *what* punishments must be considered.

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[63] *Summerlin*, 542 US at 354.

[64] *Id*. at 353.

[65] *Id.* (emphasis added). Contrary to the majority's claim, *ante* at 484 n 14, *Ring* did not invalidate Arizona's entire capital punishment sentencing scheme because both before and after *Ring* the same substantive punishments were available for offenders in Arizona. Rather, it shifted decision-making authority *within* that sentencing scheme from the judge to the jury. By contrast, in *Miller*, the Supreme Court invalidated *any* sentencing scheme that mandated a nonparolable life sentence by requiring the sentencer to consider some additional sentence—whether parolable life, a term of years (as the Michigan Legislature chose), or both.

[66] *Ante* at 484-485.

The majority glosses over the substantive import of this distinction, and in doing so ignores the fact that, both before and after *Ring*, there existed the possibility for a punishment less than death, while only after *Miller* does there exist the possibility for a juvenile homicide offender to receive a punishment less than nonparolable life.[67] While *Miller* indisputably contains a procedural component, its decision to expand the range of punishments that may be imposed on juvenile offenders convicted of homicide squarely places *Miller* in the category of substantive decisions.[68] No longer can Con-

[67] Interestingly, the majority suggests that Justice Breyer's concurring opinion in *Miller*, had it received majority support, would be deemed a substantive rule and thus would apply retroactively. *Ante* at 468 n 6. Justice Breyer would have conditioned the state's ability to impose a nonparolable life sentence on whether the individual homicide offender " 'kill[ed] or intend[ed] to kill' " the victim. *Miller*, 567 US at ___; 132 S Ct at 2475 (Breyer, J., concurring), quoting *Graham*, 560 US at 69 (alterations in original). But both Justice Breyer's concurrence and Justice Kagan's majority opinion condition the imposition of a nonparolable life sentence on an assessment of a particular defendant's culpability for a homicide offense and allow only a subset of individuals convicted of first-degree murder to be eligible for a nonparolable life sentence. Accordingly, the distinction that the majority creates between the majority and concurring opinions in *Miller* is without a difference and counsels in favor of applying *Miller* retroactively: while previously no limitation existed before a state could impose a nonparolable life sentence as punishment for a homicide offense, now an offender's individual culpability in the homicide must be assessed. The *Miller* majority's individualized procedure contains additional factors that govern whether a defendant may be punished with nonparolable life, and Justice Breyer's proposed individualized procedure would work in the same manner. Each invalidates the substantive, mandatory punishment that certain states imposed for juvenile offenders convicted of homicide.

[68] The majority claims that "[w]e are bound to abide by" the Supreme Court's understanding of "when a new rule 'alters the range' of available punishments," and suggests that this applies *only* when the rule " 'place[s] particular conduct or persons covered by the statute *beyond the State's power to punish.*' " *Ante* at 479, quoting *Summerlin*, 542 US at 352 (alteration in original). However, *Summerlin*'s description of a substantive rule is inclusive and not exclusive, and the majority over-

gress or a state legislature constitutionally choose to adopt a sentencing scheme that mandates the imposition of a nonparolable life sentence on juvenile homicide offenders.[69]

Indeed, if *Miller* were merely a procedural decision, the Supreme Court would not have examined—and found wanting—the penological aims of a state legislature's substantive policy choice to impose a mandatory nonparolable life sentence on juvenile homicide offenders. In fact, in *Miller*, the Court explained that *none* of the permissible penological aims—retribution, deterrence, incapacitation, and rehabilitation—warrant mandatory nonparolable sentences for juvenile offenders.[70] Similarly, in *Atkins v Virginia*, the Supreme Court

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states the Supreme Court's position when it forecloses, on the basis of that statement in *Summerlin*, the possibility that a substantive decision is one that "makes a previously unavailable lesser punishment available to the sentencer . . . ." *Ante* at 479.

[69] To the majority, a rule that "merely expands the range of possible punishments that may be imposed on the defendant" is procedural because, in theory, the state still has the power to punish a juvenile offender with a nonparolable life sentence. *Ante* at 483 (emphasis omitted). However, this distinction is misplaced because the Supreme Court nevertheless placed a substantive limitation on a state's policy decisions: after *Miller* the state no longer has the power to mandate a nonparolable life sentence as punishment for a crime committed by a juvenile offender.

[70] For instance, retribution as a penological rationale "relates to an offender's blameworthiness" and, accordingly, " 'the case for retribution is not as strong with a minor as with an adult.' " *Miller*, 567 US at ___; 132 S Ct at 2465, quoting *Graham*, 560 US at 71 (citation and quotation marks omitted). Deterrence is similarly limited because " 'the same characteristics that render juveniles less culpable than adults'—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment" before committing a crime. *Miller*, 567 US at ___; 132 S Ct at 2465, quoting *Graham*, 560 US at 72 (citation and quotation marks omitted). Incapacitation "would require 'mak[ing] a judgment that [the offender] is incorrigible'—but 'incorrigibility is inconsistent with youth.' " *Miller*, 567 US at ___; 132 S Ct at 2465, quoting *Graham*, 560 US at 72-73 (citation and quotation marks omitted) (first

examined the penological justifications for imposing the death penalty on mentally handicapped individuals and found those justifications lacking.[71]

Nevertheless, *Atkins* acknowledged that states are provided with considerable discretion to fashion procedures to determine whether an offender must be excluded from consideration of the death penalty:

> Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in *Ford v. Wainwright* with regard to insanity, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."[72]

Miller likewise provided states with considerable discretion to determine how a juvenile offender is to be adjudged sufficiently culpable as an individual to warrant imposition of a nonparolable life sentence.[73] In

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alteration in original). See also Steinberg & Scott, *Less Guilty by Reason of Adolescence*, 58 Am Psychologist at 1014 ("Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood . . . ."). Nor can a nonparolable life sentence "be justified by the goal of rehabilitation" because it "forswears altogether the rehabilitative ideal" and "makes an irrevocable judgment about that person's value and place in society." *Graham*, 560 US at 74. See also Steinberg & Scott, *Less Guilty by Reason of Adolescence*, 58 Am Psychologist at 1015 (stating that because the criminal behavior of juvenile offenders, "is quite different from that of typical adult criminals," the diagnosis of antisocial personality disorder is not made before the age of 18).

[71] *Atkins*, 536 US at 321 ("We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty.").

[72] *Id*. at 317, quoting *Ford v Wainwright*, 477 US 399, 405, 416-417; 106 S Ct 2595; 91 L Ed 2d 335 (1986) (citation omitted) (alterations in original).

[73] If, for instance, the Supreme Court were to hold in a subsequent decision that the Sixth Amendment right to a jury trial requires a jury to determine a juvenile offender's culpability for purposes of imposing a

other words, after *Atkins*, a court must make an individual determination of whether an offender's mental capacity precludes consideration of the death penalty.[74] After *Miller*, so too must a court make an individual determination of whether a juvenile offender's youth and attendant characteristics preclude consideration of a nonparolable life sentence.[75] That *Atkins* required states to provide additional procedural safeguards to ensure that they complied with the substantive limitations of the Eighth Amendment does not negate its substantive nature,[76] just as *Miller*'s requirement of new procedural safeguards does not negate its substantive nature. In other words, neither *Atkins* nor *Miller* defined precisely the class of offenders precluded from a particular punishment; rather, fact-finders must examine *individual* culpability to determine whether a particular offender is eli-

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nonparolable life sentence, then that hypothetical future holding would be considered procedural rather than substantive. See *Summerlin*, 542 US 348.

[74] This individual determination, made under state law, also shows the weakness of the majority's "form and effect" interpretation of *Teague*, which requires a substantive decision to have uniform effect. Because *Atkins* left states with considerable discretion to define mental retardation, a person whose mental capacity precludes consideration of the death penalty in one state could nevertheless be subject to the death penalty in a different state. The majority struggles to fit *Atkins* within its "form and effect" interpretation—particularly given that the state's exercise of its discretion both in *Miller* and *Atkins* is to ensure that only culpable offenders are subject to the ultimate punishment available to juvenile offenders and adults, respectively.

[75] Furthermore, just as "some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards," *Atkins*, 536 US at 317, some characteristics of youth likewise undermine the existing procedural protections in our justice system, including the right to the effective assistance of counsel, *Miller*, 567 US at ___; 132 S Ct at 2468 (suggesting that a juvenile offender may be prejudiced because of "his incapacity to assist his own attorneys").

[76] *In re Holladay*, 331 F3d 1169, 1172 (CA 11, 2003) (holding that *Atkins* applies retroactively).

gible for that punishment. The broad deference thus afforded to states in the adjudication of the individualized hearings required under *Atkins* and *Miller* only reinforces the substantive nature of those holdings.

In the end, the majority strains to place *Miller* in a procedural box into which it will not comfortably fit. *Miller* is based on the substantive differences between juveniles and adults and the potentially reduced culpability of juveniles for the crimes that they commit. While there are procedural implications to the decision—as *Miller* itself acknowledged—the "form and effect" of the opinion, to use the majority's phrase, is that the Eighth Amendment places a substantive limitation on how states can punish juvenile offenders. Accordingly, we would hold that *Miller* applies retroactively under federal law.

Even if we were to agree with the majority that *Miller* announced a new rule of criminal procedure, which we do not, an alternative basis supports our conclusion that *Miller* should apply retroactively. That is, as a separate and independent matter, we would hold that *Miller* applies retroactively under state law. It is to that analysis that we now turn.

III. RETROACTIVITY UNDER MICHIGAN LAW

A. ANALYSIS

This Court has consistently asserted that three factors are relevant in determining whether a new rule of criminal procedure should be applied retroactively under state law, even if such a new rule of criminal procedure does not apply retroactively under federal law:

> (1) the purpose of the new rules; (2) the general reliance on the old rule[;] and (3) the effect of retroactive application of the new rule on the administration of justice.[77]

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[77] *People v Sexton*, 458 Mich 43, 60-61; 580 NW2d 404 (1998).

The county prosecutors involved in these cases and the Attorney General argue that this Court should reverse this existing caselaw and rule that the retroactivity analysis under Michigan law is identical to the retroactivity analysis under federal law as articulated in *Teague* and its progeny. They claim that our caselaw is outdated because it applies the test for retroactivity that the Supreme Court abandoned in *Teague*.[78] The Supreme Court, however, has explicitly recognized that *Teague*'s approach to retroactivity incorporates federalism and comity concerns that "are unique to *federal* habeas review of state convictions."[79] Therefore, "[i]f anything, considerations of comity militate in favor of allowing state courts to grant habeas relief to a broader class of individuals than is required by *Teague*."[80] To this end, we duly concluded only six years ago that "a state court may use a different test to give broader effect to a new rule of criminal procedure established by the United States Supreme Court."[81] There is no reason to abandon that approach now.

B. APPLICATION

As stated, the first factor that a reviewing court must consider in assessing a new rule's retroactivity under state law is the purpose of the new rule. "Under the 'purpose' prong, a law may be applied retroactively when it 'concerns the ascertainment of guilt or innocence[,]' however, 'a new rule of procedure . . . which

[78] See *Linkletter v Walker*, 381 US 618, 626; 85 S Ct 1731; 14 L Ed 2d 601(1965).

[79] *Danforth v Minnesota*, 552 US 264, 279; 128 S Ct 1029; 169 L Ed 2d 859 (2008).

[80] *Id*. at 279-280.

[81] *People v Maxson*, 482 Mich 385, 392 n 3; 759 NW2d 817 (2008). See also *id*. at 404-405 (CAVANAGH, J., dissenting).

does not affect the integrity of the fact-finding process should be given prospective effect.' "[82] While sentencing procedures do not concern the ascertainment of guilt or innocence for the underlying offense, sentencing is a fact-finding process that allows the sentencer to ascertain an offender's culpability for the offense.[83] Indeed, *Miller* mandates a *new* fact-finding process to determine whether a nonparolable life sentence is appropriate in a particular case. As a result, this factor supports the retroactive application of *Miller*.

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[82] *Maxson*, 482 Mich at 393, quoting *Sexton*, 458 Mich at 63 (citation and quotation marks omitted).

[83] See *McConnell v Rhay*, 393 US 2, 3-4; 89 S Ct 32; 21 L Ed 2d 2 (1968) (stating that sentencing relates to the integrity of the fact-finding process under *Linkletter*). The majority reads *McConnell* narrowly on the ground that *McConnell* implicated the right to counsel during the sentencing process. However, it did so precisely because the sentencing process *is* part of the fact-finding process. Indeed, this Court's own jurisprudence involving sentencing describes the sentencing process as requiring the sentencing court to make "factual determination[s]." See, e.g., *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003) (citations and quotation marks omitted). The fact that this Court has not yet had the opportunity to analyze the sentencing process in the context of retroactivity does not prevent the principles that we have articulated from applying in this context.

Contrary to the majority's claim, it is irrelevant that the Supreme Court has abandoned the pre-*Teague* framework in determining the application of this state's independent retroactivity jurisprudence. Indeed, saying that this Court has "no obligation . . . to forever maintain the *Linkletter* test in accordance with every past federal understanding," *ante* at 500, classifying the foundational caselaw of Michigan's retroactivity test as "defunct," *ante* at 500, and stating that "only the extraordinary new rule of criminal procedure," whatever that may mean, "will be applied retroactively under Michigan's test when retroactivity is not already mandated under *Teague*," *ante* at 497 comes perilously close to deciding to maintain the principles underlying this state's traditional retroactivity framework *only* when *Teague* and its progeny militate in favor of retroactivity. We would not turn Michigan's retroactivity framework into such a parchment barrier. See Federalist No. 48 (James Madison) (Wright ed, 2002), p 343.

The second factor "examines whether individual persons or entities have been 'adversely positioned . . . in reliance' on the old rule."[84] Detrimental reliance on the old rule can apply to defendants who have "suffered harm as a result of that reliance" when they would have pursued an appeal that "would have resulted in some form of relief."[85] In these cases, defendants were adversely positioned in reliance on the old rule because the sentencing judges did not have discretion to provide a sentence other than nonparolable life and because, until *Miller*, there was no basis in existing caselaw to appeal this lack of discretion.[86] Moreover, because the Supreme Court stated that imposition of nonparolable life sentences would be "uncommon"[87] after *Miller*, it is likely that many of the juvenile offenders already serving nonparolable life sentences would have, in fact, been sentenced to a term of years if they had received a sentencing hearing pursuant to *Miller*. As a result, this

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[84] *Maxson*, 482 Mich at 394 (citation omitted).

[85] *Id*. at 394, 396 (emphasis omitted).

[86] Indeed, Davis's sentencing judge sought to sentence him to a term of years instead of a nonparolable life term and was overturned on the prosecution's appeal. This fact alone illustrates how defendants as a class were adversely positioned in reliance on the old rule—after *Miller*, every defendant is entitled to "some form of relief," i.e., an individualized sentencing hearing that allows the sentencer to consider a punishment less than nonparolable life. *Maxson*, 482 Mich at 396 (emphasis omitted). Unlike in *Maxson*, we cannot assume that juvenile offenders did not appeal their nonparolable life sentences "because of factors unrelated to, and existing before, the old rule." *Id*. Instead, we must assume that any failure to appeal occurred simply because the old rule provided no judge with discretion to deviate from a nonparolable life sentence. That Michigan caselaw upheld the constitutionality of our pre-*Miller* sentencing scheme, see *People v Launsburry*, 217 Mich App 358; 551 NW2d 460 (1996), further supports defendants' detrimental reliance on the old rule because it reduced the likelihood that a mandatory nonparolable life sentence would have been overturned on appeal.

[87] *Miller*, 567 US at ___; 132 S Ct at 2469.

factor also supports the retroactive application of *Miller*.[88] Nevertheless, this prong is not dispositive: a reviewing court must balance the detrimental reliance on the old rule "against the other . . . factors, as well as against the fact that each defendant . . . has received all the rights under the law to which he or she was entitled at the time."[89]

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[88] It bears repeating *Miller*'s statements that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be *uncommon*" and that only the "*rare* juvenile offender" will commit a crime that "reflects irreparable corruption." *Id*. at ___; 132 S Ct at 2469 (emphasis added) (citations and quotation marks omitted). As a result, the majority's claim that it is "speculative at best" to presume that juvenile offenders will gain relief under *Miller*, is indeed questionable. *Ante* at 509.

Furthermore, contrary to the majority's assertion that chronological age at the time of the offense "will weigh relatively heavily at sentencing hearings," *ante* at 509 n 35, a juvenile offender's chronological age is only one relevant consideration in determining whether the offender deserves a "sentence of life (and death) in prison." *Miller*, 567 US at ___; 132 S Ct at 2468. Indeed, under *Miller*, a sentencer must consider the offender's chronological age, mental and emotional development, family and home environment, and potential for rehabilitation, along with the circumstances of the offense, which include the individual offender's role in the crime and whether familial and peer pressures may have affected the juvenile. *Id*. at ___; 132 S Ct at 2468. Simply stated, under *Miller*, a sentencer must "examine *all* these circumstances *before* concluding that life without any possibility of parole [is] the appropriate penalty." *Id*. at ___; 132 S Ct at 2469 (emphasis added). The majority, however, places "significant weight" on a juvenile's chronological age at the time of the offense. *Ante* at 509 n 35. By stating that a juvenile who nears the age of majority at the time of the offense is "least likely" to be afforded "special leniency," *ante* at 508, that a juvenile "may even turn 18 during the proceedings related to the offense," *ante* at 509 n 35, that a nonparolable life sentence is "increasingly likely to be permissible" to the extent the offender's age nears the age of majority, *ante* at 470 n 9, and that age "may well constitute the single best factor" for determining culpability, *ante* at 509 n 35, the majority makes generalizations that ignore *Miller*'s multifaceted and holistic examination of the offender's individual characteristics.

[89] *Maxson*, 482 Mich at 397. The majority concludes that this second factor "must be considered both from the perspective of prosecutors across the state when prosecutors faithfully abided by the constitutional

Indeed, applying the third factor takes into account this reliance on the old rule by examining whether applying the new rule retroactively would undermine the state's "strong interest in finality of the criminal justice process . . . ."[90] Nevertheless, this factor does not counsel against retroactivity in the way the majority asserts it does. Simply put, applying *Miller* retroactively would not affect the finality of convictions in this state. Rather, it would only require an individualized resentencing process for the relatively small class of prisoners sentenced to nonparolable life for homicides that they committed while juveniles.[91]

The majority concludes that requiring a sentencing hearing for offenders whose direct appeals are complete would be "burdensome and complicated," if not "almost

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guarantees in place at the time of a defendant's conviction," and "from the collective perspective of the 334 defendants who would be entitled to resentencing if the new rule were applied retroactively." *Ante* at 503. However, that principle is not found in this Court's traditional caselaw regarding retroactivity, and the authoring justice's own examination of retroactivity in *People v Maxson* did not engage in such an additional inquiry. See *Maxson*, 482 Mich at 394-397. Indeed, as *Maxson* acknowledged, our traditional caselaw regarding retroactivity requires us to balance the other factors "against the fact that each defendant . . . has received all the rights under the law to which he or she was entitled at the time." *Id*. at 397. The majority's application of our retroactivity caselaw gives the state's reliance interests undue weight by factoring those interests twice—once as part of the second factor and again as part of the third factor. The majority has not pointed to any reasons that would support revisiting the authoring justice's examination of retroactivity in *Maxson* in the six years since it was decided.

[90] *Maxson*, 482 Mich at 397.

[91] If *Miller* resentencing hearings were to be evenly divided among the circuit court bench, each circuit judge would receive, on average, two additional sentencing hearings. That is hardly a strain on the state's judicial resources. This is in stark contrast to the potential of "guilty-pleading defendants whose convictions [had] become final [to] inundate the appellate process with new appeals" that, in part, prompted a majority of this Court to reject the retroactivity of *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005). *Maxson*, 482 Mich at 398.

impossibl[e]. . . ."[92] Setting aside the majority's doubt regarding the possibility of reconstructing the evidence required to conduct such a hearing, *Miller*'s goal is to determine, as best as possible, a juvenile offender's ability to reform.[93] A sentencing hearing under *Miller*—particularly one conducted many years or even decades after the original offense—will assist in determining whether an offender "pose[s] a physical threat . . . to individuals living in our most vulnerable neighborhoods"[94] and, consequently, is irreparably corrupt.[95] This is particularly true in Michigan, where the Legislature has decided that a hearing conducted pursuant to *Miller* may take into account changed circumstances, including post-arrest conduct.[96] Accordingly, the majority errs by asserting that it is "fanciful" to believe that *Miller* can effectively be applied retroactively or that applying *Miller* retroactively will inevitably result in the "premature release of large numbers of persons" who "continue to pose a physical threat . . . ."[97]

Because each of these factors supports retroactive application of *Miller* under state law, we would hold that

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[92] *Ante* at 510. The law, and particularly judicial proceedings, are frequently burdensome and complicated. That the Constitution sometimes *requires* burdensome and complicated proceedings should not impede our duty to ensure that constitutional rights are enforced.

[93] The majority's emphasis on reconstructing the circumstances of the crime and the impulsiveness of the juvenile offender's activity is misplaced. As a result, the majority misinterprets the hearing called for under *Miller* as entirely backward-looking. *Miller*'s goal is to ensure that the sentencing court considers the evidence that it has available to it in deciding whether an individual offender has the ability to reform.

[94] *Ante* at 510.

[95] See *Miller*, 567 US at ___; 132 S Ct at 2469.

[96] See MCL 769.25(6) (allowing the sentencing court to consider at the sentencing hearing under *Miller* "any other criteria relevant to its [sentencing] decision, including the individual's record while incarcerated").

[97] *Ante* at 510-511.

independent state law grounds exist to apply *Miller* retroactively.

IV. CONCLUSION

For the reasons stated in this opinion, we respectfully dissent from the majority's decision not to apply *Miller v Alabama* retroactively under either federal or state law. Instead, we would reverse the Court of Appeals in *Carp* and *Davis* and remand to the St. Clair Circuit Court and Wayne Circuit Court, respectively, for resentencing pursuant to MCL 769.25a.[98] Because *Miller* struck down sentencing schemes that applied mandatory nonparolable life sentences to juvenile homicide offenders, it altered the range of sentences that may be imposed on a juvenile homicide offender and effected a substantive change in the law. The majority has ruled that not all juvenile offenders will receive the benefit of *Miller*'s decision to foreclose a state from mandating a nonparolable life sentence, notwithstanding the Supreme Court's assertion that only the "*rare* juvenile offender" will commit a crime that "reflects irreparable corruption" punishable by a nonparolable life sentence.[99] As a result, although *Miller* held that "children are different" as a matter of constitutional law,[100] today's decision ensures that, merely because of the timing of a conviction and appeal, some children are more different than others.

CAVANAGH and MCCORMACK, JJ., concurred with KELLY, J.

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[98] As previously indicated, we would also remand *Eliason* to the Berrien Circuit Court for resentencing pursuant to MCL 769.25, as the majority does.

[99] *Miller*, 567 US at ___; 132 S Ct at 2469 (emphasis added) (citations and quotation marks omitted).

[100] *Id.* at ___; 132 S Ct at 2470.

PEOPLE v DOUGLAS

Docket No. 145646. Argued January 15, 2014 (Calendar No. 3). Decided July 11, 2014.

Jeffery Alan Douglas was convicted of first-degree criminal sexual conduct (victim under the age of 13) and second-degree criminal sexual conduct (victim under the age of 13) following a jury trial in Lenawee Circuit Court, Margaret M. S. Noe, J. The charges arose from statements by his daughter, KD, that defendant had made her touch his penis on one occasion and perform fellatio on him on a separate occasion. Defendant appealed, challenging the admission of certain testimony and claiming ineffective assistance of counsel. The Court of Appeals, DONOFRIO, P.J., and STEPHENS, J. (RONAYNE KRAUSE, J., concurring), held that defendant was denied the effective assistance of counsel during both the pretrial and trial proceedings and that the cumulative effect of the trial errors denied him a fair trial. The Court of Appeals vacated defendant's convictions and sentences and remanded the case to the trial court for reinstatement of a plea offer made by the prosecution before trial. The Court of Appeals ordered that if defendant refused to accept the plea offer, he was entitled to a new trial. 296 Mich App 186 (2012). The Supreme Court granted the prosecution's application for leave to appeal. 493 Mich 876 (2012).

In an opinion by Justice MCCORMACK, joined by Chief Justice YOUNG and Justices KELLY and ZAHRA, the Supreme Court *held*:

A new trial was warranted in light of errors by both the trial court and defense counsel at trial, but the Court of Appeals erred by concluding that the prosecution's prior plea offer had to be reinstated.

1. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Hearsay is inadmissible except as provided by the Michigan Rules of Evidence. The rules provide several categorical exceptions to the general bar on the admission of hearsay. Under MRE 803A, a statement describing an incident that included a sexual act performed with or on the declarant by the defendant is admissible to the extent that it corroborates testimony given by the declarant

during the same proceeding if certain criteria are met. However, if the declarant made more than one corroborative statement about the incident, only the first is admissible under MRE 803A. During the trial, defendant objected to the admission of statements made by KD during a forensic interview. The statements came into evidence through a video recording of that interview and the testimony of Jennifer Wheeler, the person who conducted the interview. KD's disclosure of the alleged fellatio during the forensic interview was not her first corroborative statement regarding that incident because KD had already disclosed that incident to her mother. Accordingly, MRE 803A did not permit the admission of KD's disclosure of the alleged fellatio during the forensic interview. MRE 803(24) permits the admission of a hearsay statement not covered by any other exception if the statement demonstrates circumstantial guarantees of trustworthiness equivalent to the categorical exceptions, is relevant to a material fact, is the most probative evidence of that fact reasonably available, and serves the interests of justice by its admission. KD's statement to Wheeler during the forensic interview was not the most probative evidence of the alleged fellatio reasonably available. Rather, the best evidence of KD's out-of-court disclosure of the alleged fellatio was the statement made to her mother before the forensic interview. To conclude otherwise would contravene the express preference in MRE 803A for first corroborative statements. In addition, the disclosure during the forensic interview lacked alternative indicia of trustworthiness. The trial court, therefore, abused its discretion by admitting KD's statements made during the forensic interview regarding the alleged fellatio. In a trial in which the evidence essentially presents a one-on-one credibility contest between the victim and the defendant, hearsay evidence may tip the scales against the defendant and result in harmful error. This might be even more likely when the hearsay statement was made by a young child. This case involved a pure credibility contest, and Wheeler's testimony and the video recording of the forensic interview were not harmlessly cumulative. Instead, this hearsay evidence added clarity, detail, and legitimacy to KD's in-court testimony and more probably than not tipped the scales against defendant such that the reliability of the verdict against him was undermined and a new trial was warranted.

2. It is improper for a witness to comment or provide an opinion on the credibility of another person while testifying at trial. Several witnesses in this case, including Wheeler, violated this well-established principle, but defense counsel failed to object. To be constitutionally effective, counsel's performance must meet an objective standard of reasonableness. There was no sound

strategy in counsel's failure to object to the vouching testimony. Given the centrality of KD's credibility to the prosecution's case, the lack of evidence beyond her allegations, and the nature of the testimony offered by the witnesses in question, it is reasonably probable that but for the deficiencies in counsel's performance, the outcome of the trial would have been different. Defendant, therefore, was also entitled to a new trial on the basis of counsel's ineffective assistance at trial.

3. When the alleged prejudice resulting from counsel's ineffectiveness is that the defendant rejected a plea offer and stood trial, the defendant must show that but for the ineffective advice of counsel there is a reasonable probability that he or she would have accepted the plea and that the prosecution would not have withdrawn it in light of intervening circumstances, that the court would have accepted its terms, and that the conviction or sentence, or both, under the terms of the offer would have been less severe than under the judgment and sentence that were in fact imposed. In this case, before trial, defendant was presented with two plea offers: the first, made before the preliminary examination, would have required defendant to plead guilty to attempted criminal sexual conduct, which carries a maximum penalty of five years' imprisonment; the second plea offer, made just before trial, would have required defendant to plead guilty to fourth-degree criminal sexual conduct, which carries a maximum penalty of two years' imprisonment. Defendant rejected both offers. Counsel never informed defendant that he faced a 25-year mandatory minimum prison sentence if convicted of first-degree criminal sexual conduct at trial. Instead, counsel mistakenly advised defendant that a conviction at trial would result in a potential maximum sentence of 20 years' imprisonment and that defendant would likely have to serve 5 to 8 years in prison before being eligible for parole. The trial court determined that the misinformation provided by counsel did not affect defendant's decision to reject the plea offers in light of defendant's protestations of innocence. The record supports the trial court's conclusion that had defendant been properly advised of the consequences of conviction at trial, it was not reasonably probable that he would have accepted one of the plea offers. Because there was no clear error in the trial court's factual findings, nor any legal error in its analysis, there was no basis to reverse the trial court's conclusion that relief was not warranted for counsel's ineffective assistance at the pretrial stage. The Court of Appeals erred by holding that defendant was entitled to reinstatement of the plea offer.

Court of Appeals' decision granting defendant a new trial affirmed; Court of Appeals' decision ordering the reinstatement of a prior plea offer reversed; case remanded for further proceedings.

Justice VIVIANO, joined by Justices CAVANAGH and MARKMAN, concurring in part and dissenting in part, agreed with the majority that a new trial was warranted and that defense counsel provided ineffective assistance during the pretrial stage of the proceedings, but did not agree with Part IV of the majority opinion, in which the majority concluded that defendant was not prejudiced as a result of defense counsel's ineffective assistance during the pretrial stage. Justice VIVIANO would have held that defendant had established that he was prejudiced, ordered the prosecution to reoffer its first plea offer, and let the trial court exercise its discretion as to whether to accept defendant's plea if defendant offered a plea to the court. During the hearing examining defendant's claim of ineffective assistance of counsel, defendant indicated that without knowing that he was facing a 25-year mandatory minimum sentence, he would not have accepted any plea offer that required him to register as a sex offender, but consistently maintained that he would have responded differently to the prosecution's plea offers if he had known about the mandatory minimum sentence that he was facing. Further, the predictive value of a defendant's pretrial behavior decreases as the magnitude of the defense attorney's error increases. In this case, defense counsel's error was significant, making it more likely that defendant would have behaved differently absent defense counsel's errors. To establish prejudice, a defendant must establish a reasonable probability that the outcome of the plea-bargaining process would have been different. This does not require a showing by preponderance of the evidence. Instead, it requires evidence sufficient to undermine a reviewing court's confidence that the defendant would have rejected a plea offer. In view of the magnitude of defense counsel's error and defendant's conduct and testimony, the trial court clearly erred by finding that there was no reasonable probability that defendant would have accepted one of the prosecution's plea offers. In order to restore the parties as much as possible to the position they were in before the ineffective assistance of counsel, Justice VIVIANO would have remanded the case to the trial court and ordered the prosecution to reoffer its first plea offer.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *R. Burke Castleberry, Jr.*, Prosecuting Attorney, and *Jonathan L. Poer*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Valerie R. Newman* and *Marilena David-Martin*) for defendant.

MCCORMACK, J. The defendant, Jeffery Douglas, was convicted by a jury of first-degree and second-degree criminal sexual conduct in connection with the alleged sexual abuse of his then-three-year-old daughter, KD. Before us is whether the Court of Appeals erred in concluding that, as a result of evidentiary errors at trial and the ineffective assistance of counsel during both the pretrial and trial stages of the case, the defendant is entitled to a new trial and to the reinstatement of a plea offer he rejected. We agree with the Court of Appeals that a new trial is warranted in light of the errors by both the court and defense counsel at trial. We hold, however, that the Court of Appeals erred in concluding that the prosecution's prior plea offer must be reinstated, as we see no reversible error in the trial court's determination to the contrary. Accordingly, we affirm the Court of Appeals in part, reverse in part, and remand for proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL OVERVIEW

KD is the biological daughter of the defendant and Jessica Brodie. The defendant and Brodie lived together for approximately seven years, during which time KD was born. The couple separated at the end of March 2008. Around that time, the defendant and Brodie each filed domestic violence charges against the other, which were ultimately dismissed. Upon the recommendation of Children's Protective Services (CPS), KD went to live with the defendant in May 2008; KD was 3½ years old at the time. The defendant and KD lived with the

defendant's mother for approximately one month, and then lived with his current wife (then his girlfriend) from June 2008 until January 2009. At that point, KD went to live with Brodie and spent alternating weekends with the defendant. In May 2009, the defendant married his current wife and the couple announced her pregnancy shortly thereafter.

In June 2009, the instant allegations of sexual abuse surfaced: namely, that the defendant had made KD perform fellatio on him while he and KD were living with his mother approximately a year earlier, and that the defendant had made KD touch his penis on a separate, prior occasion. According to Brodie, KD spontaneously disclosed the alleged fellatio to her while the two were in the car together. As a result, Brodie moved up KD's preexisting appointment with her therapist, who in turn contacted CPS after speaking with KD. CPS opened an investigation and, together with local police, arranged for a forensic interview of KD at Care House, a social services center committed to the prevention of child abuse. During that interview, KD discussed the alleged fellatio and touching.

The defendant was thereafter charged with one count of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a), and one count of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a); CPS also filed a petition to initiate child protective proceedings. KD and Brodie testified at a preliminary examination. Prior to that hearing, the prosecution discussed with defense counsel the possibility of a plea to one count of attempted CSC, which the defendant rejected. The case proceeded to trial in March 2010. Shortly beforehand, the prosecution extended a second plea offer to the defendant for one count of fourth-

degree criminal sexual conduct (CSC-IV), MCL 750.520e, which the defendant also rejected.

At trial, the prosecution presented testimony from KD (by then five years old), Brodie, and certain individuals involved in the underlying investigation of the case: Detective Sergeant Gary Muir, who testified, in relevant part, to the content of a recorded telephone conversation between the defendant and Brodie; State Police Trooper Larry Rothman, who testified regarding two interviews he had conducted with the defendant in connection with the allegations; CPS worker Diana Fallone, who testified regarding her investigation of the allegations and decision to commence child protective proceedings; and forensic interviewer Jennifer Wheeler, who was qualified as an expert and, over the defendant's objection, testified to the content of her interview with KD. The jury was also shown a video recording of that interview, again over the defendant's objection.

The defendant testified in his own defense, denying any wrongdoing. The defendant also presented testimony from his mother, with whom he and KD were living at the time the fellatio was alleged to have occurred, and from his current wife. The defendant's theory at trial was that the allegations of abuse had been fabricated by Brodie out of spite toward the defendant and his new wife, and that Brodie had coached KD accordingly.

The jury convicted the defendant as charged. As he had throughout the pretrial and trial stages of the case, the defendant maintained his innocence at sentencing. The trial court initially sentenced the defendant to concurrent prison terms of 85 to 360 months and 38 to 180 months for the CSC-I and -II convictions, respectively. After the defendant's term of incarceration be-

gan, however, the Department of Corrections notified the court, and the court in turn notified the parties, that the defendant had not been sentenced in accordance with MCL 750.520b(2)(b), which requires a 25-year mandatory minimum sentence for his conviction of CSC-I. Neither the court, the prosecution, nor defense counsel appear to have been aware of this mandatory minimum before receiving this correspondence, and the defendant had not been informed of it at any point prior. The parties then filed competing motions: the prosecution, to modify the sentence in accordance with the mandatory minimum; the defendant, for reinstatement of the prosecution's second pretrial plea offer, for a new trial, and for a *Ginther*[1] hearing, claiming evidentiary errors at trial and ineffective assistance of counsel at the pretrial and trial stages.

On September 9, 2010, the trial court held a hearing on the motions, at which the defendant and his trial counsel testified; the court thereafter granted the prosecution's motion to modify the sentence and denied the defendant's requests for relief. The testimony received at the hearing and the court's subsequent ruling on the motions focused predominantly on the pretrial advice the defendant had received from counsel regarding the prosecution's plea offer and the consequences of a conviction at trial, and to what extent any errors in that advice affected the defendant's decision to reject the offer.

The defendant appealed, and the Court of Appeals reversed, concluding that the defendant was entitled both to a new trial and to reinstatement of the prosecution's plea offer. *People v Douglas*, 296 Mich App 186; 817 NW2d 640 (2012). The Court of Appeals found numerous evidentiary errors at trial, committed by

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

both the court and defense counsel, that undermined the reliability of the jury's verdict and warranted a new trial. Namely, the Court of Appeals held that the trial court erred in admitting, through Wheeler's testimony and the video recording, KD's out-of-court statements during the forensic interview regarding the alleged abuse. It further held that defense counsel was ineffective both for failing to object to certain inadmissible testimony from Brodie, Muir, and Fallone that bolstered KD's credibility, and for failing to impeach KD at trial with her preliminary examination testimony. The Court of Appeals also concluded that the defendant was entitled to relief on his claim of ineffective assistance of counsel at the pretrial stage, in light of the incorrect advice counsel provided in connection with the prosecution's plea offer. Accordingly, the Court of Appeals ordered that, upon remand, the prosecution must reoffer that plea to the defendant.[2]

The prosecution then sought leave to appeal in this Court, challenging both the award of a new trial to the defendant and the requirement that the prosecution's prior plea offer be reinstated. We granted leave to appeal in order to review these issues. *People v Douglas*, 493 Mich 876 (2012).

II. STANDARD OF REVIEW

A trial court's decision to admit evidence will not be disturbed absent an abuse of discretion, which occurs when the court "chooses an outcome that falls outside the range of principled outcomes." *People v Musser*, 494 Mich 337, 348; 835 NW2d 319 (2013). If the court's

[2] Judge Amy RONAYNE KRAUSE issued a concurring opinion, agreeing with all but one of the majority's conclusions. Based on the record before the trial court, she concluded that the admission of Brodie's testimony concerning KD's initial disclosure did not provide a basis for relief.

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." *Id*., quoting *People v Krueger*, 466 Mich 50, 54; 643 NW2d 223 (2002).

Whether the defendant received the effective assistance of counsel guaranteed him under the United States and Michigan Constitutions is a mixed question of fact and law. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012), citing *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). This Court reviews for clear error the trial court's findings of fact in this regard, and reviews de novo questions of constitutional law. *Id*.

III. THE DEFENDANT'S ENTITLEMENT TO A NEW TRIAL

We turn first to the Court of Appeals' determination that the defendant is entitled to a new trial. We agree that such relief is warranted. This conclusion stems from errors made by both the trial court and defense counsel in the handling of evidence presented through three witnesses for the prosecution: forensic interviewer Wheeler, Detective Sergeant Muir, and CPS worker Fallone. As set forth below, the trial court erred in twice admitting the out-of-court statements made by KD to Wheeler during her forensic interview regarding the alleged fellatio; furthermore, defense counsel's performance was constitutionally deficient in permitting Muir, Fallone, and Wheeler to offer inadmissible testimony vouching for KD's credibility. The trial court's error and defense counsel's deficient performance were each sufficiently prejudicial to require a new trial.

A. THE EVIDENCE AT TRIAL

1. THE PROSECUTION'S CASE-IN-CHIEF

With no physical evidence of or third-party witnesses to the alleged abuse, the prosecution built its case around the credibility of KD's in-court and out-of-court statements, and the unreliability of the defendant's denials. The prosecution's first witness was five-year-old KD, who testified that she sucked the defendant's "peepee" and touched it with her hand. She initially denied that his "peepee" touched any part of her body when she sucked it, including her mouth, but later indicated that she touched it once with her hands, and once with her mouth. She also expressed uncertainty regarding what she meant by "peepee." As to the alleged fellatio, KD indicated that it happened while she and the defendant were alone in a bedroom at the defendant's mother's house, that the defendant was awake and lying on a bed, and that he asked her to do it. KD testified that she told Brodie this while at Brodie's house, and that she told Brodie the truth; she denied telling anyone but Brodie, but also indicated that she talked about it with "Jennifer" and "Tara" (whom the record indicates to be Wheeler and KD's therapist, respectively). She affirmed that she also told Brodie that milk came out of the defendant's "peepee" and, when asked if she told Brodie that the "milk" tasted like cherry,[3] KD replied that it tasted like "peepee and regular milk." As to the alleged touching, KD could not

[3] Defense counsel asked this question during his brief cross-examination of KD. At the preliminary examination, KD initially testified that the "milk" that came out of the defendant's "peepee" tasted like cherry, but then said it tasted like "regular milk." Defense counsel did not otherwise refer to or use KD's preliminary examination testimony during his examination of her at trial.

remember when it happened, but said she touched the defendant's "peepee" with her stepsister.

The prosecution next called Brodie, who testified that in early June 2009, KD "spontaneous[ly]" told her that "I sucked my daddy's peepee until the milk came out, and my daddy said, oh yeah, that's how you do it." Contrary to KD's testimony, Brodie indicated that this happened while she was driving in the car with KD to pick up her fiancé. When asked by Brodie, KD said this happened in the office at the defendant's mother's house. When asked if KD ever told her that the milk tasted like cherry, Brodie replied that KD said that at the preliminary examination but had never told her that. Brodie testified that she then moved up KD's therapy appointment in light of the disclosure and, when CPS thereafter became involved, took KD to Care House for a forensic interview. Brodie denied that she told KD what to say; she also denied that she held any animosity toward the defendant or his new wife, or that she threatened either of them or their relationship with KD at any point prior to KD's disclosure.

Detective Sergeant Muir then testified about his role in the investigation of these allegations. In particular, Muir testified that, after KD's forensic interview, he asked Brodie to make a telephone call to defendant regarding the allegations. Muir recounted that Brodie told the defendant "[t]hat [KD] had said that she had sucked on her dad's peepee and stuff came out," and that, when the defendant responded that he did not know why KD would say that, Brodie replied, "I know my daughter don't lie; why is she making these allegations then; was there anything that happened that, y'know, she might have seen or observed that would cause her to say this happened?" Muir further testified that Brodie and the defendant discussed an incident

when the defendant woke up to KD touching his penis; the defendant indicated he had told Brodie this at the time, which she did not recall, and also that he had told KD "it was a bad thing to do." Defense counsel did not object to any of this testimony.

The prosecution then presented expert testimony from Wheeler regarding KD's forensic interview at Care House. Before Wheeler took the stand, defense counsel objected that KD's out-of-court statements during the forensic interview were inadmissible hearsay, arguing in particular that they did not meet certain requirements of MRE 803A's categorical hearsay exception. The trial court overruled the objection. Wheeler testified about her background and experience as a child forensic interviewer, which included "thousands" of such interviews, and was qualified as an expert in that field. After describing Care House (which she characterized as a "neutral location") and the general protocol used for child forensic interviews, Wheeler discussed her interview with KD. She testified that KD told her that "[m]y daddy made me suck his peepee," and that "[o]ne time we sucked it, and one time we touched it," repeating these statements throughout her testimony and using body diagrams from the interview—including one labeled with the defendant's name—to illustrate them. She also testified that KD told her that the alleged fellatio happened at the house of the defendant's mother, with just her and the defendant in the room; that KD "pointed to her mouth" when asked "what did he make you suck it with"; and that KD told her the "milk" tasted like "peepee milk," and not like cherry. Wheeler further testified that KD told her it tasted "yuk" and it went down her throat. Wheeler considered whether there had been a misunderstanding, but determined there was not because KD was "very clear" about what happened. The prosecutor then

asked Wheeler for her opinion regarding the truthfulness of KD's statements. After defense counsel objected, the prosecutor rephrased, asking whether Wheeler believed KD had been coached to tell her these things; without objection, Wheeler opined that KD had not. Wheeler thereafter reaffirmed that she believed KD had not been coached by Brodie, but rather "was being truthful with [her]" during the interview. Again, defense counsel did not object.

After Wheeler, the prosecution called CPS worker Diana Fallone, who testified that, in her capacity at CPS, she investigates complaints of abuse and neglect and that she performed such an investigation here. Fallone testified that, after interviewing Brodie and observing KD's forensic interview, she filed a petition to commence child protective proceedings based on KD's allegations. She testified that, if she thought a child were lying, she would not seek such a petition, and that she would have to substantiate that the allegations did in fact occur before seeking a petition. Fallone then testified that, based on her investigation in the instant case, she found that KD's "allegations had been substantiated." She further testified that, "based on the disclosures made at Care House, there was no indication that [KD] was coached or being untruthful[.]" Defense counsel did not object to this testimony.

Trooper Rothman then testified that he interviewed the defendant twice about the allegations. Rothman testified that, when he mentioned the alleged fellatio to the defendant during the first interview, defendant denied that it happened but became more nervous as the interview went on, which Rothman typically takes as a sign of untruthfulness. Rothman further testified that, during the second interview, he asked the defendant if he remembered a time when KD sucked his

penis and the defendant responded that he did not remember that; he also asked the defendant if KD did suck his penis, and the defendant said he did not remember. The defendant told Rothman that one time when KD was approximately two, he was sleeping in the nude and woke up to find her touching his penis, which he told her not to do. The defendant also mentioned to Rothman another time when he awoke and KD and her stepsister were in his bed. In both instances the defendant stated that the children were not there when he fell asleep. Rothman was never able to substantiate the suggestion that the stepsister was involved in any touching of the defendant, and acknowledged that the stepsister, in an interview, said it did not happen.

The prosecution closed its case in chief by showing the jury the video recording of Wheeler's forensic interview with KD. The defendant renewed his prior objection to these out-of-court statements under MRE 803A, which was again overruled. Consistent with Wheeler's prior testimony, the video showed KD telling Wheeler that she sucked the defendant's "peepee" one time and touched it one time, with both KD and Wheeler repeating these statements throughout the interview. Likewise, the video showed Wheeler eliciting from KD, through further questioning and redirection, additional details regarding the alleged fellatio, echoing and expanding upon Wheeler's testimony to that effect. Lastly, the video showed Wheeler questioning KD about the separate touching incident. KD said that this happened on a different day and with her stepsister, and that the defendant told them both to "quit touching."

2. THE DEFENDANT'S CASE-IN-CHIEF

As with the prosecution, the defense focused on the credibility of KD's accounts of the alleged abuse, at-

tempting to undermine their reliability and to impugn Brodie's motives in connection with them. The defendant first called his mother, who testified that the defendant and KD lived with her for a two-week period and that, during that time, KD slept with her every night and the defendant slept in the office. She further testified that she did not leave her house during that two-week period and that the defendant was never alone with KD there. The defendant's current wife then testified that the allegations against the defendant came right after they got married and found out they were having a baby. She also testified that Brodie was jealous, was angry with her, and would make constant phone calls to the defendant arguing over KD.

The defendant testified last, and denied the allegations. He testified that on one occasion, when he was living with Brodie and KD was two, he awoke to KD touching his penis when he was sleeping in the nude; he did not know what she touched him with, did not put her in the bed or know how she got there, and would not have slept in the nude if he had known she was going to be there. He "freaked out" and told KD that "it's a big no, no, you can't do that." He then told Brodie, and "there was no big concern about it" because "[i]t was a two-year-old exploring." The defendant also testified that, on another occasion, KD and her stepsister came into the bedroom and woke him up by jumping on the bed; he was sleeping in the nude at the time, but was under the covers. The defendant explained that his relationship with Brodie ended "[v]ery badly." He testified that he initially received custody of KD in the spring of 2008 because the CPS worker investigating the domestic violence charges between him and Brodie concluded that Brodie was the aggressor, and because Brodie had made a statement to the effect that if she could not have KD, no one would. He further testified

that KD stopped living with him in January 2009 because of issues with Brodie, who would call KD several times a night crying and would tell KD that she did not have to listen to the defendant's wife. KD was very upset during this time, and so the defendant agreed to let her stay with Brodie to see if that would make things easier on her. The defendant testified that he first learned of the instant allegations of abuse right after he and his wife returned from their honeymoon. He testified that he denied the allegations of abuse when Rothman first interviewed him about them. When Rothman asked him again during their second interview whether KD had performed oral sex on him until he ejaculated, the defendant shook his head no, in disgust; when Rothman then asked whether the defendant could remember that happening, the defendant responded that he could not remember anything like that ever happening.

B. ERRONEOUS ADMISSION OF HEARSAY FROM FORENSIC INTERVIEW

1. ADMISSIBILITY OF HEARSAY UNDER MRE 803A AND MRE 803(24)

We start with the trial court's admission, over the defendant's objection, of KD's out-of-court statements during the forensic interview, which came into evidence through both the testimony of Wheeler and the video recording of that interview. The parties do not dispute that these statements constitute hearsay under MRE 801(c), "offered in evidence to prove the truth of the matter asserted." The prosecution contends, however, that this hearsay was properly admitted under MRE 803A's categorical hearsay exception. MRE 803A "codified the common-law 'tender years exception,' " *People v Gursky*, 486 Mich 596, 607; 786 NW2d 579 (2010), and provides, in relevant part:

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant . . . is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
>
> (1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
>
> (4) the statement is introduced through the testimony of someone other than the declarant.
>
> If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

According to the defendant, KD's statements to Wheeler during the forensic interview fail to meet many of MRE 803A's criteria: they were not spontaneously made; they were made over a year after the alleged incidents of abuse, and there has been no showing that this delay was caused by "fear or other equally effective circumstance"; and they do not reflect the first out-of-court statements made by KD corroborating her trial testimony concerning the alleged abuse. Only the last of these challenges was advanced in the defendant's objection to this evidence at trial, rendering the others unpreserved for our review. See, e.g., *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001) ("To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal."). We need not reach these unpreserved issues, however, because we find the defendant's preserved challenge dispositive.

As noted, we will not disturb a trial court's decision to admit evidence unless that decision "falls outside the range of principled outcomes." *Musser*, 494 Mich at 348. Such circumstances are present here. As the defendant argued, and the prosecution conceded before the trial court, KD's disclosure of the alleged fellatio to Wheeler was not her first corroborative statement regarding that incident; rather, Brodie testified that KD previously disclosed that incident to her, which led to KD's interview with Wheeler. As a result, MRE 803A does not permit admission of KD's disclosure of the alleged fellatio during the forensic interview.

The prosecution notes that KD's disclosure to Wheeler of the separate touching incident was her first corroborative statement to that effect. Even if so,[4] it does not render KD's disclosure of the alleged fellatio to Wheeler any more admissible under MRE 803A, which permits only the first corroborative statement as to each "incident that included a sexual act performed with or on the declarant by the defendant." Though the statute does not define the term "incident," it is commonly understood to mean "an occurrence or event," or "a distinct piece of action, as in a story." *Random House Webster's College Dictionary* (2001). There is no dispute here that the alleged fellatio and touching were distinct occurrences or events, separated by at least a number of months, taking place under different circumstances, and bearing no particular relation to one another be-

[4] The defendant contends that this was not, in fact, KD's first disclosure of the alleged touching, and seeks to expand the record to support this claim. The defendant, however, did not raise this challenge below, and while KD's trial testimony suggests that she may have discussed this incident with her therapist, the present record contains no further information to that effect. For the purposes of resolving the instant appeal, we need not reach this dispute, but the parties remain free to litigate it on retrial.

yond the parties involved. KD's disclosure of the fellatio incident to Wheeler does not become admissible under MRE 803A simply because her first disclosure of the touching incident followed shortly after it.[5]

Accordingly, KD's disclosure of the alleged fellatio to Wheeler falls outside the plain scope of MRE 803A's hearsay exception and was improperly admitted under that rule. The prosecution, however, argues on appeal that KD's out-of-court statements were nonetheless admissible under MRE 803(24)'s residual hearsay exception, citing *People v Katt*, 468 Mich 272, 290; 662 NW2d 12 (2003), in support. Like the Court of Appeals, we are not persuaded. As this Court has summarized,

> To be admitted under MRE 803(24), a hearsay statement must: (1) demonstrate circumstantial guarantees of trustworthiness equivalent to the categorical exceptions, (2) be relevant to a material fact, (3) be the most probative evidence of that fact reasonably available, and (4) serve the interests of justice by its admission. [*Id*. at 290.]

The requirements of this residual exception "are stringent and will rarely be met, alleviating concerns that [it] will 'swallow' the categorical [hearsay] exceptions through overuse." *Id*. at 289.

Applying this standard in *Katt*, this Court held that a child's disclosure of sexual abuse to a CPS worker, though inadmissible under MRE 803A because it was not the child's first corroborative statement concerning the abuse, was nonetheless admissible under MRE 803(24). That result is not warranted here. First, KD's disclosure of the alleged fellatio to Wheeler was not "the most probative evidence of that fact reasonably avail-

[5] Likewise, KD's disclosure of the touching incident to Wheeler does not become any less admissible under MRE 803A simply because her disclosure of the alleged fellatio incident fails that rule's first-corroborative-statement requirement.

able." *Katt*, 468 Mich at 290. This is "essentially . . . a 'best evidence' requirement," which "is a high bar and will effectively limit use of the residual exception to exceptional circumstances." *Id*. at 293 (quotation marks and citation omitted). In this case, the "best evidence" of KD's out-of-court disclosure of the alleged fellatio was the statement made to Brodie prior to the forensic interview with Wheeler. To conclude otherwise would contravene MRE 803A's express preference for first corroborative statements, and the rationale underlying it. See *id*. at 296 ("[T]he tender-years rule prefers a child's first statement over later statements" because, "[a]s time goes on, a child's perceptions become more and more influenced by the reactions of the adults with whom the child speaks."). MRE 803(24)'s residual exception cannot be used to "swallow" MRE 803A's categorical one in this fashion. *Id*. at 289. The testimony at issue in *Katt* did not present this same risk; while the child had previously disclosed the abuse to his mother, that first corroborative statement was not available or presented at trial. See *id*. at 295, 296. Not so here, and nothing in *Katt* indicates that Wheeler's testimony regarding KD's disclosure was properly admitted in addition to Brodie's.

Similarly, unlike the testimony in *Katt*, KD's disclosure to Wheeler does not "demonstrate circumstantial guarantees of trustworthiness equivalent to" those required under MRE 803A, such that it merits admission despite its failure to meet those requirements. "To be admitted, residual hearsay must reach the same quantum of reliability as categorical hearsay; simply, it must do so in different ways." *Id*. at 289-290. Thus, if a statement is "deficient in one or more requirements of a categorical exception, those deficiencies must be made up by alternate indicia of trustworthiness," discerned

from "the 'totality of the circumstances' surrounding [the] statement." *Id*. at 289, 291.

Here, Wheeler's testimony regarding KD's disclosure of the fellatio incident does not satisfy MRE 803A's categorical hearsay exception because it was not her first corroborative statement; its spontaneity and delayed nature have also been questioned under that rule. The prosecution notes that the disclosure is nonetheless sufficiently trustworthy under MRE 803(24) because it, like the disclosure in *Katt*, was made in the course of a properly administered forensic interview. *Katt*, however, is again distinguishable, and does not support this conclusion. While the disclosure in *Katt* occurred during a properly administered forensic interview, that interview was intended to address unrelated concerns regarding potential physical abuse by the child's mother. During the interview, the child spontaneously said that the defendant, his father, did "nasty stuff" to him and then disclosed numerous instances of sexual abuse. No investigation regarding such abuse had begun, and neither the child's mother nor the interviewer knew that the interview would include this subject. Given the clear spontaneity of the disclosure, the lack of any motive to lie on the part of the mother or child, and the interviewer's questioning methods, this Court concluded that the disclosure possessed "circumstantial guarantees of trustworthiness equivalent to the categorical exceptions." *Id*. at 296.

Similar circumstantial guarantees were lacking here. The specific purpose of Wheeler's interview of KD was to investigate her prior disclosure of the alleged fellatio—a fact known to both Wheeler and Brodie before the interview—and Brodie's motives in connection with KD's disclosure and interview were strongly disputed. Indeed, concern that KD's statements were

improperly influenced by Brodie not only animates the defendant's challenges to their spontaneity and delay under MRE 803A, but also informs their inadmissibility under that rule's first corroborative statement requirement. See *Katt*, 468 Mich at 296. While the interviewing methods used by Wheeler may bear on the extent of this concern, we do not conclude, and *Katt* does not indicate, that they were alone sufficient to cure it. Nor do we see how these methods, or any other circumstances of this case, afforded KD's disclosure to Wheeler "alternative indicia of trustworthiness" such that it should be deemed any more admissible under MRE 803(24)'s residual exception than it is under MRE 803A's categorical one.

2. PREJUDICE FROM ERRONEOUSLY ADMITTED HEARSAY

Accordingly, we conclude that the trial court abused its discretion by admitting KD's out-of-court statements to Wheeler regarding the alleged fellatio. We further conclude that this preserved error more probably than not undermined the reliability of the verdict against the defendant, warranting relief. *Musser*, 494 Mich at 348. In reaching this conclusion, we consider " 'the nature of the error in light of the weight and strength of the untainted evidence.' " *Id*., quoting *Krueger*, 466 Mich at 54. In particular, as this Court has recognized,

> In a trial where the evidence essentially presents a one-on-one credibility contest between the victim and the defendant, hearsay evidence may tip the scales against the defendant, which means that the error is more harmful. This may be even more likely when the hearsay statement was made by a young child, as opposed to an older child or adult. [*Gursky*, 486 Mich at 620-621 (footnote omitted), citing *People v Straight*, 430 Mich 418, 427-428; 424 NW2d 257 (1988); *People v Smith*, 456 Mich 543, 555 n 5; 581 NW2d 654 (1998).]

See also *People v Anderson*, 446 Mich 392, 407 n 37; 521 NW2d 538 (1994) ("While credibility contests are not uncommon in criminal sexual conduct cases, the wrongful admission of corroborating testimony 'on either side could tip the scales' and result in harmful error."), quoting *People v Gee*, 406 Mich 279, 283; 278 NW2d 304 (1979) (citations omitted).

This case presented the jury with a pure credibility contest; there were no third-party witnesses to either instance of alleged abuse, nor any physical evidence of it.[6] As such, the prosecution's case hinged heavily on KD's credibility in her accounts of the alleged abuse, particularly the fellatio. With regard to the alleged fellatio, the only accounts properly before the jury were KD's testimony at trial, and Brodie's testimony regarding KD's prior disclosure of it to her.[7] The credibility of these accounts, and Brodie's motives and influence in connection with them, were the focus of the defense and a central issue at trial. As a result of the court's error, however, the prosecution was not limited to this evidence, and instead the jury was permitted to hear from KD twice more: first, through the hearsay testimony offered by Wheeler, and then again through the video recording of KD's forensic interview.

The prosecution characterizes this evidence as harmlessly cumulative of KD's in-court testimony, pointing to our observations in *Gursky* that "where a hearsay

[6] Of course, such corroborative evidence is not necessary for the defendant to be convicted of the charged offenses, see MCL 750.520h, but its absence is properly considered when evaluating the prejudicial effect of the court's erroneous admission of KD's out-of-court statements to Wheeler. See *Musser*, 494 Mich at 363.

[7] We assume for the purposes of this analysis, without deciding, that Brodie's account of KD's disclosure was properly admitted. This in no way forecloses the defendant's ability to challenge its admissibility on retrial.

statement is not offered and argued as substantive proof of guilt, but rather offered merely to corroborate the child's testimony, it is more likely that the error will be harmless," and that "[w]here the declarant himself testifies and is subject to cross-examination, the hearsay testimony is of less importance and less prejudicial." *Gursky*, 486 Mich at 620-621. As we also cautioned in *Gursky*, however, " 'the fact that the statement [is] cumulative, standing alone, does not automatically result in a finding of harmless error,' " but is only one consideration to be accounted for when evaluating the prejudicial effect of the erroneously admitted hearsay. *Id*. (citation omitted). Thus, such cumulative hearsay testimony is more likely to be harmless where, unlike here, there is other evidence to corroborate the allegations beyond the declarant's statements; meanwhile, the likelihood of harm may only increase where, as here, the declarant was a young child and the case was a pure credibility contest. *Id*.

Based on the evidence presented in this case, we cannot conclude that Wheeler's testimony and the video recording of the forensic interview were harmlessly cumulative; this hearsay evidence not only corroborated by echo KD's in-court testimony, but added clarity, detail, and legitimacy to it. KD's account of the fellatio at trial, while incriminating, left ample room for reasonable doubt; it betrayed uncertainty on fundamental details, was inconsistent in certain respects with Brodie's corroborative testimony, and was clouded by the strongly disputed motives of Brodie. The evidence of KD's disclosures to Wheeler, however, did much to alleviate this doubt. Rather than simply Brodie corroborating KD's testimony, there now too was Wheeler, an expert no less, with no apparent partiality, repeating, clarifying, and more fully articulating KD's general allegations. The video recording of the forensic inter-

view provided further reinforcement still, as the jury was able to watch KD herself testify again, this time at greater length, with the assistance of Wheeler's expert questioning, and not subject to cross-examination, of course. This video confirmed Wheeler's rendition of KD's statements, repeated them more times over, and elaborated upon them, adding further detail to the graphic scene the prior testimony had sketched.

The resulting prejudice is unsurprising. Wheeler's testimony and the video recording of KD's forensic interview left the jury with a much fuller, clearer, and more inculpatory account of the alleged fellatio than that which was properly admitted through KD and corroborated by Brodie. That this elucidation and reinforcement came through Wheeler, presented as a neutral and authoritative source in this pure credibility contest, only heightened the likelihood of its prejudice.

The prosecution contends that any prejudice was immaterial in light of the defendant's tacit admissions, pointing in particular to his failure to offer an outright denial to Trooper Rothman of the allegations of fellatio, saying instead that he did not remember anything of that sort happening. At trial, the defendant admitted to giving this response, but characterized his choice of words as responsive to Trooper Rothman's specific question; according to the defendant, when Rothman asked if the fellatio did, in fact, occur, he denied it. While the jury certainly may have factored this testimony into its assessment of the defendant's credibility, we, like the Court of Appeals, do not find it, or the other untainted evidence offered at trial, sufficiently powerful to restore confidence in the jury's verdict in light of the trial court's error. Rather, we conclude that KD's erroneously admitted statements during the forensic interview more probably than not "tipped the scales" against

the defendant such that the reliability of the verdict against him was undermined and a new trial is warranted. See, e.g., *Gursky*, 486 Mich at 621; *Straight*, 430 Mich at 427-428; *Anderson*, 446 Mich at 407 n 37.

C. INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

We find this relief likewise warranted by defense counsel's mishandling of inadmissible testimony offered by Wheeler, Fallone, and Muir vouching for KD's credibility. As noted, Fallone testified that, based on her investigation, she found that KD's "allegations had been substantiated" and that, "based on the disclosures made at Care House, there was no indication that [KD] was coached or being untruthful[.]" As the Court of Appeals held, this testimony violated the well-established principle that "it is improper for a witness or an expert to comment or provide an opinion on the credibility of another person while testifying at trial." *Musser*, 494 Mich at 349. See, e.g., *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007) ("It is generally improper for a witness to comment or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury."). Wheeler likewise violated this principle when she offered her expert conclusions that KD had not been coached by Brodie but rather was being truthful with her. See *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995) (affirming that "an expert may not vouch for the veracity of a victim").[8]

[8] The prosecution claims this testimony was no different than testimony that KD's behavior was consistent with that of a victim of sexual abuse, and thus was properly admitted under *Peterson*. We disagree. In *Peterson*, this Court recognized that an expert may offer testimony that a particular child's specific behavior is consistent with that of a sexually abused child if the defendant either "raises the issue of the particular child victim's post-incident behavior" or "attacks the child's credibility"

Similarly, Muir testified that, when Brodie confronted the defendant with KD's allegations, the defendant denied them, leading Brodie to respond that "I know my daughter don't lie; why is she making these allegations then." The Court of Appeals found this testimony constituted inadmissible hearsay that improperly vouched for KD's credibility. There is no dispute that Brodie's out-of-court statements did not fall under any hearsay exception and, to the extent they were offered for their truth, they were not properly admitted. The prosecution, however, contends that Muir did not offer these statements for their truth, but only to provide context to the defendant's half of the conversation, which was properly admitted under MRE 801(d)(2)(A).[9] Even if so, we do not find Brodie's commentary on KD's credibility any more admissible. Muir properly testified to the defendant's out-of-court denial of the allegations Brodie put to him; Brodie's statement that "I know my daughter don't lie" did not provide any meaningful context to this denial and could have easily been omitted "without harming the probative value of

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by "highlight[ing] behaviors exhibited by the victim that are also behaviors within [the child sexual abuse accommodation syndrome] and allud[ing] that the victim is incredible because of these behaviors." *Peterson*, 450 Mich at 373-374 & n 13. Correspondingly, the scope of such expert testimony is limited to the specific behavior at issue. *Id*. at 374 n 13. Setting aside that Fallone did not testify as an expert, neither her nor Wheeler's testimony fits these criteria. The defendant had not put at issue or attacked KD's credibility on the basis of any particular behavior contemplated in *Peterson*, nor was Wheeler or Fallone explaining how any such behavior was consistent with that of an abused child. Rather, they directly and conclusively opined that KD's allegations in the instant case were true and trustworthy. Such testimony does not fall not within the carefully circumscribed circumstances identified in *Peterson*, but instead remains subject to the general prohibition on testimony "vouch[ing] for the veracity of a victim," which *Peterson* also affirmed. *Id*. at 352.

[9] MRE 801(d)(2)(A) provides, "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . the party's own statement . . . ."

[the] defendant's statements." *Musser*, 494 Mich at 356. Furthermore, any minimal contextual value this statement may have added was substantially outweighed by the risk that the jury would take the statement for its truth—a risk of particular significance in the context of a case such as this. See *id*. at 357-358 (explaining that, "especially in child-sexual abuse cases," "a trial court should be particularly mindful that when a statement is not being offered for the truth of the matter asserted and would otherwise be inadmissible if a witness testified to the same at trial, there is a danger that the jury might have difficulty limiting its consideration of the material to its proper purpose" of providing context to the defendant's responses) (quotation marks and alteration marks omitted).

Despite the plainly inadmissible nature of the testimony from Fallone and Muir, defense counsel did not object. And while defense counsel initially, and successfully, opposed the prosecution's attempt to elicit an expert conclusion from Wheeler regarding the veracity of KD's statements, he thereafter inexplicably permitted that testimony without objection. We agree with the Court of Appeals that, as a result, the defendant was denied the effective assistance of counsel. To be constitutionally effective, counsel's performance must meet an "objective standard of reasonableness." *Trakhtenberg*, 493 Mich at 51. In showing this standard has not been met, "a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy." *Id*. at 52, citing *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 674 (1984). The strategy, however, in fact must be sound, and counsel's decisions as to it objectively reasonable; "a court cannot insulate the review of counsel's performance by calling it trial strategy." *Id*.

We see no sound strategy in counsel's failure to object to the vouching testimony offered by Wheeler, Fallone, and Muir. As defense counsel affirmed at the *Ginther* hearing, his trial strategy was to demonstrate that KD was not believable, that her testimony had been tainted by Brodie, and that she had told different stories to different people throughout the investigative process. In fact, he also testified that, consistent with this strategy, he would have objected to any opinions offered that KD was being truthful. Wheeler's and Fallone's testimony that KD was telling the truth, and Muir's recounting of Brodie's statements to that same effect, directly contravened this strategy. Defense counsel offered, and we see, no strategic reason to permit this inadmissible testimony to pass without objection here.[10]

We further conclude that, but for these deficiencies in counsel's performance, "there is a reasonable probability that the outcome of [the defendant's trial] would have been different." *Trakhtenberg*, 493 Mich at 51. As already discussed, the prosecution's case hinged wholly on the credibility of KD's allegations, making defense counsel's success in undermining that credibility all the more critical. Rather than pursuing this strategy vigilantly, defense counsel permitted Wheeler, Fallone, and Muir—three figures of apparent authority and impartiality, with direct involvement in and knowledge of the investigation leading to the defendant's prosecution—to present testimony improperly reaching the key factual issue before the jury: whether KD was telling the truth. Wheeler's and Fallone's commentary was especially prejudicial in this regard—the former

[10] The trial court, for its part, did not address this evidence when rejecting the defendant's claim of ineffective assistance of counsel at trial; rather, the only finding it made as to defense counsel's trial performance was a brief reference to the decision whether to call KD's stepsister as a witness for the defense.

offering the jury an expert opinion regarding KD's credibility in the instant case, and the latter offering the jury her, and CPS's, professional assessment of the veracity and substantiation of KD's complaints. We cannot overlook the influence such testimony may have in a case such as this. See *Musser*, 494 Mich at 357-358 (noting that, "given 'the reliability problems created by children's suggestibility,' " this Court "has condemned opinions related to the truthfulness of alleged child-sexual-abuse complainants" because the jury in such credibility contests "is often 'looking to "hang its hat" on the testimony of witnesses it views as impartial' "), quoting *Peterson*, 450 Mich at 371, 376.[11] Given the

[11] According to the prosecution, no prejudice inured from Fallone's testimony because it stated nothing beyond what could be obviously inferred from her presence as a witness for the prosecution, citing *Dobek*, 274 Mich App at 71, in support. We disagree with this proposition, and do not read *Dobek* to support it. In that case, a police officer testified that he had no concern that the child-complainant was lying in her statements to him regarding the alleged sexual abuse at issue; this testimony was not objected to and occurred on redirect examination, after defense counsel had asked on cross-examination whether the officer's observation that the complainant appeared uncomfortable was consistent with how individuals who are lying may appear. The defendant claimed prosecutorial misconduct in eliciting this testimony. The court of appeals rejected that claim, as it could not "conclude that the prosecutor proceeded with the questioning and elicited the testimony in bad faith, especially considering that defendant opened the door on the matter." *Id*. The court additionally noted that, "[a]ssuming plain error [in the testimony's admission], defendant has not established prejudice, actual innocence, or damage to the integrity of the judicial proceedings" as to this unpreserved error because, "[g]iven that [the officer] was called as a witness by the prosecutor and that a criminal prosecution against defendant was pursued, the jurors surely understood that [the officer] believed that the victim was telling the truth even without the disputed testimony." *Id*.

Dobek thus held that certain erroneously admitted vouching testimony did not warrant relief because it was elicited in direct response to defense counsel's questioning on the topic and was reviewed for prejudice

centrality of KD's credibility to the prosecution's case, the lack of evidence beyond her allegations, and the nature of the testimony offered by Wheeler, Fallone, and Muir, we believe it reasonably probable that, but for this testimony, the outcome of the defendant's trial may have been different. See *Musser*, 494 Mich at 363-364.[12]

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under a significantly more deferential standard than is applicable here. *Dobek* does not suggest that Fallone's mere presence on the stand as a witness for the prosecution cures any prejudice caused by her testimony vouching for KD, nor does it cast doubt upon our conclusion that, but for counsel's ineffectiveness as to the testimony of Wheeler, Fallone, and Muir, there was a reasonable probability that the outcome of the defendant's trial would have been different.

[12] In addition to the mishandling of Wheeler's, Fallone's, and Muir's testimony, the Court of Appeals also found defense counsel ineffective for failing to impeach KD with certain inconsistencies between her trial testimony and her preliminary examination testimony, noting that there was "no logical reason" for not doing so. We disagree. As defense counsel explained at the *Ginther* hearing, his strategy with KD at trial, as a very young and sympathetic witness, "was to get her on and off the stand as quick as possible." Defense counsel made a similar point to the jury during his closing argument, explaining that he did not press KD on the stand regarding certain details because "[t]here's just things that a child doesn't need to go through, and there's just no good way to do things like that." Furthermore, although, as the dissent observes, certain portions of KD's preliminary examination testimony were potentially damaging to her credibility, other portions were potentially supportive of it, corroborating her trial testimony. Thus, while we agree with the Court of Appeals that KD's preliminary examination testimony contained material with which defense counsel could have attempted to impeach her at trial, we find it objectively reasonable for him to have concluded, given the circumstances, that the risks of this attempt outweighed its potential benefits.

The Court of Appeals also concluded that defense counsel performed deficiently by failing to object to KD's disclosures to Brodie and Wheeler on the basis of their delayed nature. Just as we need not reach the merits of that objection here, our disposition of this appeal does not require us to determine whether counsel was ineffective for failing to pursue it. We note, however, that the timing of KD's disclosures supported the defendant's theory that Brodie fabricated them out of spite; defense counsel thus may have chosen not to object to KD's disclosures on the basis of delay so as not to encourage the development of a record at trial that might provide alternate explanations for that delay. We are thus not

D. CONCLUSION

We thus conclude that the defendant is entitled to a new trial as a result of both the trial court's erroneous admission of KD's statements regarding the alleged fellatio during her forensic interview, and defense counsel's ineffective assistance with respect to the testimony of Wheeler, Fallone, and Muir. This case put before the jury serious and disturbing allegations, heavily contested facts and motives, and a singular, difficult choice: whether to believe KD or the defendant. The trial court's and defense counsel's errors each bore directly and significantly upon this choice. For the reasons discussed, we find the prejudicial effect of each of these errors too strong, and the untainted evidence too weak, to conclude that the jury's verdict against the defendant remains sufficiently reliable to stand. We therefore affirm the Court of Appeals' conclusion that the defendant is entitled to a new trial.

Because we do not find them necessary to this award of relief, we do not reach a number of the defendant's unpreserved evidentiary challenges: namely, whether KD's disclosures of the alleged touching and fellatio incidents to Wheeler were inadmissible under MRE 803A because they were not spontaneously made, as well as whether those disclosures, and KD's disclosure of the alleged fellatio to Brodie, were inadmissible under that rule because there was no demonstration of "fear or equally effective circumstance" excusing their substantial delay. The parties remain free to litigate these issues on retrial. We take this opportunity to note, however, that we agree with the observations in Judge RONAYNE KRAUSE's concurring opinion in the Court of Appeals that, when evaluating whether a delay in

convinced that defense counsel's failure to object on this basis was constitutionally ineffective, given how it dovetailed with his trial strategy.

disclosure is excusable under MRE 803A, courts should bear in mind that "MRE 803A(3) requires any circumstance that would be similar *in its effect* on a victim as fear in inducing a delay in reporting, not a circumstance that is necessarily similar *in nature* to fear," and that "[n]othing in the rule even requires that any 'other equally effective circumstance' must have been affirmatively created by the defendant." *Douglas*, 296 Mich App at 211 (RONAYNE KRAUSE, J., concurring).[13] We need not set forth a list of circumstances that are similar to fear in their effect on a child, as the determination whether such circumstances exist should be done by the trial court on a case-by-case basis. We likewise express no opinion as to whether such circumstances are present in this case—indeed, we agree with the sentiment expressed by Judge RONAYNE KRAUSE and shared by the Court of Appeals majority that the present record is "disappointing" in that regard—but leave the development and determination of that issue to the trial court in the first instance, if and when the issue is put before it.

IV. THE DEFENDANT'S ENTITLEMENT TO REINSTATEMENT OF PLEA OFFER

While we agree with the Court of Appeals that the defendant is entitled to a new trial, we disagree that he is entitled to relief on the basis of his counsel's deficient performance at the pretrial stage. Although during the

[13] Indeed, prior to the enactment of the rules of evidence, this Court recognized that circumstances similar to fear in their effect on a child were sufficient to excuse a delayed disclosure under the common-law "tender years exception," which, as previously noted, MRE 803A codified. See *People v Baker*, 251 Mich 322, 326; 232 NW 381 (1930) (finding delay in the child's disclosure of abuse by her father excused in that case because the abuse coupled with the father's "admonition to her not to tell [were] as effective to promote delay as threats by a stranger would have been").

plea-bargaining process counsel indisputably misadvised the defendant of the consequences he faced if convicted at trial, the trial court did not reversibly err in determining that the defendant has not shown prejudice as a result of counsel's deficient performance.

Before trial, the defendant was presented with two plea offers: the first, made before the preliminary examination, was for the defendant to plead guilty to attempted CSC, carrying a five-year maximum penalty; the second, made just before trial, was for the defendant to plead guilty to CSC-IV, carrying a two-year maximum penalty. As to the first offer, counsel advised the defendant that the plea would likely entail jail rather than prison time; as to the second, that the defendant would serve ten months in county jail and would have to register as a sex offender. The defendant rejected both offers. There is no disagreement that counsel never informed the defendant that he faced a 25-year mandatory minimum prison sentence if convicted of CSC-I at trial. See MCL 750.520b(2)(b). Instead, counsel mistakenly advised the defendant that a conviction at trial would result in a potential maximum sentence of 20 years in prison, and that he would likely have to serve approximately five to eight years before being eligible for parole. Counsel also informed the defendant that a conviction for any CSC offense would require that he register as a sex offender.

According to the defendant, counsel's failure to properly advise him of the 25-year mandatory minimum sentence, as well as of certain consequences of sex-offender registration, denied him the effective assistance of counsel; as a result, the defendant contends, he is entitled to reinstatement of the prosecution's second plea offer. As at trial, a defendant is entitled to the effective assistance of counsel in the plea-bargaining

process. *Lafler v Cooper*, 566 US ___, ___; 132 S Ct 1376, 1384; 182 L Ed 2d 398 (2012). A defendant seeking relief for ineffective assistance in this context must meet *Strickland*'s familiar two-pronged standard by showing (1) "that counsel's representation fell below an objective standard of reasonableness," and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at ___; 132 S Ct at 1384. In demonstrating prejudice, the "defendant must show the outcome of the plea process would have been different with competent advice." *Id*. at ___; 132 S Ct at 1384. Where, as here, the alleged prejudice resulting from counsel's ineffectiveness is that the defendant rejected a plea offer and stood trial,

> a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. [*Id*. at ___; 132 S Ct at 1385.]

The defendant has the burden of establishing the factual predicate of his ineffective assistance claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). And as already noted, a trial court's factual findings in that regard are reviewed for clear error and cannot be disturbed unless "the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *Armstrong*, 490 Mich at 289. See MCR 2.613(C).

Here, after hearing testimony from the defendant and defense counsel at the *Ginther* hearing, the trial court rejected the defendant's claim of ineffective assistance. The court found that the defendant, at the time he rejected the prosecution's second plea offer, believed that a conviction at trial would result in a 20-year maximum prison sentence, supervised to no contact with his children for 20 years, and registration as a sex offender. The court reasoned that, although the defendant thought he faced a 20-year maximum sentence rather than a 25-year mandatory minimum one if convicted, this misinformation made "no difference" in light of the defendant's proclamations of "his innocence in the face of plea bargains that were offered." The Court of Appeals reversed this determination, finding counsel's performance deficient and rejecting the trial court's conclusion that the defendant did not suffer prejudice as a result, explaining that (1) "there is a significant difference between the possibility of a 20-year term with the likelihood of serving a much shorter sentence and the certainty of serving a 25-year minimum term"; (2) defense counsel testified at the *Ginther* hearing that he would have "absolutely pressed" the defendant to accept the plea had counsel known of the 25-year mandatory minimum at the time; (3) the defendant likewise testified that he would have accepted that plea with the correct sentencing information, even if it meant limited to no contact with his children; and (4) the defendant testified that that his decision to reject the plea offer was also affected by counsel's mistaken advice that he would not be permitted to reside with his children for as long as he was required to register as a sex offender.

We agree with the Court of Appeals that counsel's mistaken advice regarding the sentence the defendant faced at trial fell below an objective standard of reason-

ableness.[14] See, e.g., *Padilla v Kentucky*, 559 US 356, 370; 130 S Ct 1473; 176 L Ed 2d 284 (2010) (noting "the critical obligation of counsel to advise the client of the advantages and disadvantages of a plea agreement") (quotation marks omitted); *People v Corteway*, 212 Mich

[14] The Court of Appeals did not expressly determine whether counsel performed deficiently in advising the defendant of the consequences of sex-offender registration; it did, however, note that "[a]lthough defense counsel advised defendant in this case that he would be required to register as a sex offender, counsel erroneously informed defendant that his registration would preclude him from living with his children for the duration of his registry, or 20 years." *Douglas*, 296 Mich App at 208 n 6. In light of our determination that the defendant has not carried his burden of showing prejudice as a result of counsel's claimed errors at the pretrial stage, we need not reach this question here. We note, however, that the record leaves considerable doubt as to whether counsel provided ineffective assistance regarding this aspect of his advice. According to the defendant, counsel incorrectly advised him that such registration would preclude him from living with or seeing his children for 20 years, a consequence which he believed would attach regardless of whether he accepted a plea or went to trial. According to defense counsel, however, he advised the defendant that sex-offender registration was mandatory for 25 years and he "had several conversations with [the defendant] . . . about the terrible things that happen[] to somebody that's on the sex offenders' list as it relates to their relationship with their children." Namely, counsel advised the defendant that "his relationship with his children would be severely jeopardized with a CSC conviction," that "his contact with his children could be severely restricted, particularly if . . . he was on probation or parole," and that if "he was convicted in Lenawee County of a CSC charge involving one of his daughters, it was going to be very difficult to achieve any type of visitation with any of his other children" as there was a "real likelihood" that CPS would open an investigation and restrict the defendant's ability to live or have unsupervised contact with any of his three children (including KD, but also the daughter he had with his wife and his wife's daughter from a prior relationship). While defense counsel indicated a connection between these consequences and the defendant's registration as a sex offender, it is not apparent that he advised the defendant that they arose directly from or would necessarily last the duration of that registration. Nor is it apparent that he otherwise misadvised the defendant as to the nature of these consequences, their relationship to sex-offender registration, or how they might inform the defendant's decision whether to accept a plea or go to trial.

App 442, 446; 538 NW2d 60 (1995) (explaining that counsel must provide advice during plea negotiations that is sufficient to allow the defendant "to make an informed and voluntary choice between trial and a guilty plea"). We likewise agree that the difference between a required 25-year mandatory minimum sentence and a possible 20-year maximum one might potentially affect an individual's decision whether to accept a plea or go to trial. The trial court, however, did not conclude otherwise; rather, it found that this difference would not have affected this particular defendant's decision to reject the pleas in this case in light of his protestations of innocence. We do not see reversible error in this determination.

In concluding otherwise, the Court of Appeals made no mention of the role that the defendant's belief in his innocence may have played in his decision to go to trial, despite its prominent place in the trial court's reasoning, and instead focused on certain testimony offered by defense counsel and the defendant that knowledge of the 25-year mandatory minimum would have affected their treatment of the prosecution's plea offer. Review of that testimony in full, however, paints a different picture. First, contrary to the Court of Appeals' characterization, defense counsel did not testify that he would have "absolutely pressed" the defendant to accept the prosecution's plea offer had he known of the 25-year mandatory minimum at the time. Rather, counsel stated that, "[i]f there was a do-over on this, I would have absolutely pressed [the defendant] and insisted he take the deal . . . because we lost at trial, and the consequences are he's now looking at 25 years in prison." When asked what he would have done differently had he only known about the mandatory minimum, however, and not the ultimate outcome of the trial, defense counsel was much more equivocal in his

response, saying simply that he "would have made sure [the defendant] understood how long 25 years was." Counsel further testified that his and the defendant's position had always been that the defendant would plead to nothing that would result in placing the defendant on the sex-offender registry, in part because the defendant was concerned about losing contact with his children, but also because he found the type of behavior to which he would be pleading "disgusting and offensive and [he] would never engage in" it.[15] Correspondingly, defense counsel testified that the defendant has always maintained his innocence, a claim that defense counsel believed. This is consistent with defense counsel's earlier representation to the trial court at the defendant's sentencing hearing, in which he indicated that the defendant has "made it perfectly clear," from arraignment and "consistently since," that "he did not commit this crime," and that the defendant "has made it clear that he turned down numerous plea bargains because he was basing his decision . . . upon his innocence."

Meanwhile, the defendant, as the Court of Appeals noted, testified that he would have accepted a plea had he known of the 25-year mandatory minimum, and also suggested that he would have been more inclined to accept a plea had he not mistakenly believed that sex-offender registration would prohibit him from living with his children for its duration. As noted, it is questionable that the defendant's misconceptions regarding the consequences of sex-offender registration were caused by any deficient performance on counsel's

[15] Defense counsel also testified that he told the defendant that pleading guilty would require an admission of the acts to which he pled and also completion of sex offender therapy, which would likewise require such an admission.

part. In any event, the full body of the defendant's testimony undermines the credibility of his assertions that either these misconceptions or the misinformation regarding the sentence he faced at trial meaningfully influenced his decision to reject the prosecution's plea offer. For instance, the defendant testified that the only way he would have taken a plea was if he knew of the 25-year mandatory minimum, and that he still would have taken the plea even if it meant limited to no contact with his children for a period of time. He also testified, however, that he would not have accepted any plea that required sex-offender registration because he was innocent and because it would affect his relationship with his children. The defendant further testified that he probably would not have accepted a plea that required any jail time and that, in deciding to reject the prosecution's plea offer, the minimum sentence he faced at trial did not matter because he was innocent, he did not commit the crime, and he did not think he would lose. This testimony is confusing at best, and casts significant doubt upon what circumstances, if any, would have led the defendant to accept a plea. It certainly betrays no clear error in the trial court's discernment of the common thread running throughout both the defendant's and his counsel's testimony: that the defendant rejected the prosecution's plea offers because he was innocent of the charges, was not a sex offender, and was not interested in pleading guilty to repugnant acts that he did not commit.[16]

As a result, we are not "left with a definite and firm conviction that the trial court made a mistake" in

[16] The prosecution urges that the defendant cannot show prejudice as a matter of law in light of his maintenance of innocence, because Michigan does not authorize the acceptance of guilty pleas under such circumstances. Our analysis here neither reaches nor endorses this position; rather, we simply conclude that, under the facts of this case, the

finding that the defendant has failed to show prejudice stemming from his counsel's deficient performance, *Armstrong*, 490 Mich at 289; rather, the record amply supports the conclusion that, even had the defendant been properly advised of the consequences he faced if convicted at trial, it was not reasonably probable that he would have accepted the prosecution's plea offer. See *Lafler*, 566 US at ___; 132 S Ct at 1384-1385.[17] There is

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trial court did not clearly err in evaluating how this particular defendant's belief in his innocence affected his decision to reject the plea offers put before him.

[17] The dissent raises two primary objections to this conclusion, neither of which we find convincing. First, the dissent avers that we have "mischaracteriz[ed the] defendant's posttrial testimony" in our analysis and that the defendant, as reflected by select portions of that testimony, "consistently maintained that he would have responded differently to the prosecution's offers if he had known about the mandatory minimum sentence he was facing." Simply put, the dissent finds a coherence in the defendant's assertion of prejudice that our review of his testimony in full, along with that of his counsel, does not support. We fail to see any mischaracterization in our summary of that testimony, or any consistency in it that we have overlooked. The dissent may find the defendant's testimony more credible than the trial court did, but that of course is not the relevant inquiry. We review the trial court's factual findings for clear error, and in so doing must give due "regard . . . to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). Neither the record nor the dissent's impression of it reveals any basis for disregarding this "special opportunity" and finding clear error in the trial court's evaluation of the defendant's testimony.

Similarly, the dissent believes that we have "give[n] too little weight to the magnitude of defense counsel's error" in our analysis, because "[e]ven the most stubborn defendant would at least consider pleading guilty upon learning that he was about to stand trial on a charge for which the statutory minimum sentence was 25 years in prison." We share the dissent's appreciation of the magnitude of defense counsel's error in this case, and likewise recognize the influence such an error might have on an individual's decision whether to accept a plea of the sort offered here. At issue, however, is the effect of counsel's error on this particular defendant, not some hypothetical one. This question, as the dissent observes, is inherently counterfactual, but nonetheless one on which the

no indication that the trial court failed to duly consider the record in making its determination, including the terms of the plea available to the defendant, the consequences the defendant faced in rejecting that plea, the defendant's understanding of the plea and those consequences, and the defendant's motivations for assuming the risks of trial. Because we see no clear error in the trial court's factual findings, nor any legal error in its analysis, we find no basis to reverse the trial court's conclusion that relief is not warranted for the defendant's claim of ineffective assistance at the pretrial stage. We reverse the Court of Appeals on this point and hold that the defendant is not entitled to reinstatement of the prosecution's plea offer.[18]

V. CONCLUSION

For the foregoing reasons, we conclude that the defendant is entitled to a new trial, but is not entitled to reinstatement of the prosecution's plea offer. Accordingly, we affirm the judgment of the Court of Appeals in part, reverse in part, and remand for proceedings consistent with this opinion. In addition, we deny as moot the defendant's motion to expand the record.

YOUNG, C.J., and KELLY and ZAHRA, JJ., concurred with MCCORMACK, J.

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trial court can and did ably develop a complete record, and we see no reversible error in the court's assessment of it. We cannot agree with the dissent that this assessment should have instead been dictated by the trial court's—or our own—abstract belief of what "[e]ven the most stubborn defendant" might have done, "no matter how [the] defendant actually behaved" in this case.

[18] This, of course, does not foreclose the prosecution from choosing to reoffer this or another plea to the defendant on remand.

VIVIANO, J. (*concurring in part and dissenting in part*). I agree with the majority and the Court of Appeals that a new trial is warranted.[1] I also agree with the majority and the Court of Appeals that defense counsel provided ineffective assistance of counsel during the pretrial stage. However, I write separately because I do not agree with the portion of Part IV of the majority opinion in which the majority concludes that defendant was not prejudiced as a result of defense counsel's ineffective assistance of counsel during the pretrial stage and thus is not entitled to reinstatement of the prosecution's plea offer. Instead, I would hold that defendant has established that he was prejudiced and thus is entitled to have the prosecution's first plea offer reinstated.

I. "PREJUDICE" UNDER *LAFLER*

To prevail on his *Lafler*[2] claim, "defendant must show that but for the ineffective advice of counsel there is a reasonable probability" that:

1) the plea offer would have been presented to the court, i.e.,

(a) the defendant would have accepted the plea, and

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[1] However, unlike the majority, I agree with the Court of Appeals that defense counsel was ineffective for failing to impeach KD at trial with her testimony from the preliminary examination. At the preliminary examination, KD testified that her mouth never touched defendant's penis, that her mother "wanted [her] to tell you people [she] sucked it" and that "milk" came out of it, and that her mother wanted her to "tell a lie that [she] didn't know anything about." Given that defense counsel's "trial strategy was to demonstrate that KD was not believable, that her testimony had been tainted by [her mother], and that she had told different stories to different people throughout the investigative process," *ante* at 586, I simply cannot agree with the majority that counsel's failure to offer this impeachment evidence did not fall below an objective standard of reasonableness.

[2] *Lafler v Cooper*, 566 US ___; 132 S Ct 1376, 1385; 182 L Ed 2d 398 (2012).

(b) the prosecution would not have withdrawn it in light of intervening circumstances;

(2) the court would have accepted its terms, and

(3) the conviction or sentence, or both, under the offer's terms would have been less severe than the punishment ultimately faced.

A. PREJUDICE COMPONENT 1a: WOULD DEFENDANT HAVE ACCEPTED THE PLEA OFFER?

The majority defers to the trial court's finding that the failure to advise defendant about the mandatory minimum would not have changed the outcome of defendant's decision. In the majority's view, the "full body" of defendant's testimony at the posttrial *Ginther* hearing undermines the credibility of defendant's claim that misinformation regarding the sentence he faced upon conviction "meaningfully influenced his decision to reject the prosecution's plea offer."[3]

I disagree. On direct examination at the *Ginther* hearing, counsel recognized that defendant had consistently maintained his innocence and rejected plea offers before trial, so counsel asked defendant, "How could you enter a guilty plea to an offense if you maintained your innocence?" Defendant responded unequivocally: "Like I said, the only way that I would've really done it is if I would've known that I was facing that 25-year minimum." In case this statement was not already clear enough, counsel then asked "Are you saying that if you had known you were looking at 25 years, you would have entered a plea?" To which defendant replied, "Yes."

It is true that, on cross-examination, the prosecutor asked, "Okay, so there is no plea bargain you could have

[3] *Ante* at 597.

been offered that would've required you to be on the sex offender registry that you would have accepted; is that true?" Defendant responded, "Correct." But if read in context, it becomes clear that what defendant was saying was that, *without knowing that he was facing a 25-year mandatory minimum sentence*, he would not have accepted any plea that would have required him to register as a sex offender. As a follow-up to the above question, the prosecutor asked, "But now you're telling this Court that you . . . would've taken a plea bargain because you wouldn't want to go to prison for 25 years, but you rejected one, in fact two, knowing that you could go to prison for 20 years; is that true?" Defendant replied, "Correct, and the reason was because I wasn't told that that would be the minimum of 20 years." Hence, defendant consistently maintained that he would have responded differently to the prosecution's offers if he had known about the mandatory minimum sentence he was facing.

In addition to mischaracterizing defendant's post-trial testimony, I believe the majority gives too little weight to the magnitude of defense counsel's error. Suppose a defense attorney mistakenly told a client that, if she went to trial, she would be risking a 20-year maximum sentence upon conviction, when in fact the maximum sentence was 21 years in prison. In that case, the attorney would clearly have performed deficiently by giving the client false legal information, but the false information would have been fairly close to the truth. In such a case, defense counsel's advice would have been so close to being accurate that it is hard to imagine that counsel's slight error would have made a difference in the plea-bargaining process.

But as the magnitude of a defense attorney's error grows, it seems more and more likely that the outcome of

the plea-bargaining process would have been different absent counsel's mistake, no matter how a defendant actually behaved on the basis of constitutionally deficient advice. In other words, the predictive value of a defendant's pretrial behavior decreases as the significance of a defense attorney's error increases. Consider a case in which a defense attorney told a client that she was facing a 2-year maximum term, when in fact the statutory maximum term was life in prison without the possibility of parole. The error there would be so great that the error itself would seem to create a reasonable probability that the outcome of the trial process would have been different, even if the defendant steadfastly maintained her innocence before trial. Big differences in information are more likely to generate big changes in behavior.

In this case, defendant's attorney did not make a small error. The applicable sentencing statute clearly states that defendant's offense was punishable "by imprisonment for life or any term of years, but not less than 25 years."[4] Yet, defense counsel missed this information. The result was that, on the morning of trial, defendant rejected the prosecution's final plea offer of one count of CSC-IV on the belief that he could receive a sentence of five to eight years in prison if the jury convicted him, or 20 years' imprisonment in the worst-case scenario. In reality, the best possible sentence he could hope for upon conviction was five years more than his perceived worst-case scenario. Likewise, his actual worst-case scenario (i.e., the statutory maximum) was not 20 years, but *life in prison*. Thus, defense counsel's error was significant.

The trial court minimized this error by noting that there was only a 5-year gap between the 20-year maximum that defendant mistakenly thought he was facing

[4] MCL 750.520b(2)(b).

and the actual 25-year minimum he was facing. But comparing those two numbers is like comparing apples and oranges. It makes more sense to compare the mistaken maximum (20 years) and the actual maximum (life), and to compare the mistaken estimated sentence (5 to 8 years) with the actual minimum sentence that defendant was facing (at least 25 years). These comparisons more vividly show the significance of defense counsel's error.

The question becomes whether, in view of the magnitude of defense counsel's error *and* defendant's conduct and testimony, the trial court clearly erred when it determined that there was no "reasonable probability" that defendant would have accepted one of the prosecution's plea offers. "Reasonable probability" is a term of art in the domain of criminal procedure. "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[5] In the context of trial error, a showing of "reasonable probability" does not require a defendant to show that "the defendant would more likely than not have received a different verdict[.]"[6] Instead, the question is whether, absent error, a defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence."[7] Similarly, in the context of a *Lafler* claim, I do not believe a defendant must show that it is more likely than not that he or she would have accepted an offer absent the errors of defense counsel. Instead, I believe that a defendant must produce evidence sufficient to undermine a reviewing court's confidence that the defendant would have rejected a plea offer.

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[5] *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

[6] *Kyles v Whitley*, 514 US 419, 434; 115 S Ct 1555; 131 L Ed 2d 490 (1995).

[7] *Id*.

In this case, I believe the trial court clearly erred by finding there was no "reasonable probability" that defendant would have accepted one of the prosecution's plea offers. Even the most stubborn defendant would at least consider pleading guilty upon learning that he was about to stand trial on a charge for which the statutory minimum sentence was 25 years in prison. This is especially true where, as here, defense counsel informed defendant that his likely sentence upon conviction would be only 5 to 8 years, approximately one-fifth of the minimum term required by statute. This is an error so significant that I believe defendant's actual pretrial behavior has marginal predictive value.[8] In view of these facts as well as defendant's testimony at the posttrial *Ginther* hearing, I am left with the "definite

[8] I agree with the majority that the court must consider "the effect of counsel's error on this particular defendant, not some hypothetical one." *Ante* at 598. I disagree, however, that this can be accomplished without resort to hypotheticals. Predicting human behavior has long been the province of psychologists and philosophers; only more recently, in cases like this one, have courts undertaken the task of determining what a person would have done under a hypothetical set of facts—in this case, the trial court had to determine what the defendant would have done had he known he was actually facing a 25-year minimum sentence. This requires, at best, an informed prediction, and at worst "retrospective crystal-ball gazing posing as legal analysis." *Missouri v Frye*, ___ US ___; 132 S Ct 1399, 1413; 182 L Ed 2d 379 (2012) (Scalia, J., dissenting). Unlike most work done by trial judges, this inquiry did not require the judge to make factual findings about something that happened in the past. Rather, the trial judge had to answer a hypothetical question—something that courts are not particularly well-suited to do.

It is precisely because of the counterfactual nature of the inquiry that the magnitude of the error should be given more prominence in the analysis. When beginning the difficult task of predicting human behavior, it is important that a trial court consider how drastically the actual pretrial history in a case varies from the hypothetical scenario that the court is considering. Otherwise, the court will risk compounding the errors of a constitutionally deficient attorney by holding his or her client accountable for how the client behaved on the basis of erroneous legal advice.

and firm conviction" that the trial court made a mistake by concluding, "In the face of a plea of innocence, it makes no difference [what advice defendant received]." Instead, I believe defendant has met his burden of producing evidence sufficient to undermine a reviewing court's confidence that he would have rejected the prosecution's offers even if his attorney had provided reasonable advice. Therefore, I believe he has established the first component of the prejudice prong under *Lafler*.

B. PREJUDICE COMPONENT 1b: WOULD THE PROSECUTION HAVE WITHDRAWN THE OFFER IN LIGHT OF INTERVENING CIRCUMSTANCES?

The prosecution made its first offer—a plea to attempted CSC, which is a felony carrying a 5-year maximum term of imprisonment—before defendant's preliminary examination. Defendant rejected the offer. After the preliminary examination, the prosecution presented defendant with an even more favorable offer on the morning of trial—a plea to one count of CSC-IV, which is a statutory misdemeanor with a maximum term of two years in prison. Therefore, the intervening circumstances between the prosecution's initial offer and the beginning of trial in this case suggest that the prosecution only grew *more* willing to accept defendant's plea and avoid trial. In other words, the intervening circumstances decreased the likelihood that the prosecution would have withdrawn its offer.

C. PREJUDICE COMPONENT 2: WOULD THE COURT HAVE ACCEPTED THE TERMS OF THE PLEA OFFER?

The second component of *Lafler*'s prejudice prong concerns whether the court would have accepted the terms of the plea deal. Looking at the events that transpired before trial, I can find nothing to suggest

that the trial court would have rejected a guilty plea by defendant if he had offered one. Hence, I believe defendant has established that the court would have accepted his plea if it had been offered.

D. PREJUDICE COMPONENT 3: WOULD THE CONVICTION OR SENTENCE HAVE BEEN LESS SEVERE THAN THE PUNISHMENT ULTIMATELY FACED?

As the majority notes, the prosecution made two plea offers: "[T]he first, made before the preliminary examination, was for the defendant to plead guilty to attempted CSC, carrying a five-year maximum penalty; the second, made just before trial, was for the defendant to plead guilty to CSC-IV, carrying a two-year maximum penalty."[9] Defendant was actually convicted of CSC-I, which carries a 25-year minimum sentence and a maximum penalty of life in prison.[10] He was eventually sentenced to a minimum term of 25 years. Thus, both offers would obviously have resulted in convictions and prison terms that were less severe.

II. REMEDY UNDER *LAFLER*

In *Lafler*, the Supreme Court did not articulate a bright-line rule regarding how to remedy an instance of ineffective assistance during the plea-bargaining process. Instead, it explained:

> In some situations it may be that resentencing alone will not be full redress for the constitutional injury. If, for example, an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial, or *if a mandatory sentence confines a judge's sentencing discretion after trial*, a resentencing based on the conviction at trial may not suffice. . . . In these circumstances,

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[9] *Ante* at 591.

[10] MCL 750.520b(2)(b).

> *the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal*. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.[11]

This paragraph suggests that when, as in this case, a mandatory minimum sentence confined the trial court's discretion after conviction, the appropriate role for an appellate court in providing a *Lafler* remedy is not to dictate a specific conviction outcome. Instead, a reviewing court should aim, as closely as possible, to restore the parties to the same position they were in before the plea-bargaining process was corrupted by defense counsel's ineffective assistance. This is no easy task, for as the Supreme Court stated in *Lafler*, "The time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer, *but that baseline can be consulted* in finding a remedy . . . ."[12]

With reference to that prerejection baseline, I would remand this case to the trial court and order the prosecution to reoffer its first offer, one count of attempted CSC, to defendant. This would restore the parties as much as possible to the position they were in before any ineffective assistance on the part of counsel.[13]

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[11] *Lafler*, 566 US at ___; 132 S Ct at 1389 (emphasis added; citations omitted).

[12] *Id*. at ___; 132 S Ct at 1389 (emphasis added). The quoted sentence ends with the phrase "that does not require the prosecution to incur the expense of conducting a new trial." In *Lafler*, the defendant received a constitutionally fair trial, so the Court was able to let his conviction stand. In this case, however, defendant did not receive a fair trial, so this Court cannot order a remedy that preserves defendant's trial conviction.

[13] This remedy is also consistent with this Court's disposition of *People v McCauley*, 493 Mich 872 (2012). In that case, this Court ordered the prosecution to reinstate a plea offer despite the defendant's trial testimony that he was innocent.

To be clear, I would not order the trial court to accept defendant's plea if defendant were to accept the prosecution's offer. Just as in *Lafler*, I would leave "open to the trial court how best to exercise [its] discretion in all the circumstances of the case."[14]

III. CONCLUSION

Again, I agree with the majority that defendant is entitled to a new trial and that his attorney's pretrial advice was constitutionally deficient. However, I would hold that defendant has shown that he was prejudiced by his attorney's deficient counsel, and I would order the prosecution to reinstate its first plea offer in order to remedy this constitutional violation.

CAVANAGH and MARKMAN, JJ., concurred with VIVIANO, J.

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[14] *Lafler*, 566 US at ___; 132 S Ct at 1391.

PEOPLE v BYNUM

Docket No. 147261. Argued April 2, 2014 (Calendar No. 3). Decided July 11, 2014.

Levon L. Bynum was charged in the Calhoun Circuit Court with first-degree murder, two counts of assault with intent to murder, carrying a concealed weapon, and felony-firearm following a shooting that had occurred outside a party store in Battle Creek. Bynum and some of the others present were alleged to be members of the Boardman Boys gang, whose territory (or "turf") bordered the party store. Bynum claimed that he acted in self-defense. Tyler Sutherland, an officer in the Battle Creek Police Department's Gang Suppression Unit, was proffered at trial as an expert witness on gangs, gang membership, and gang culture with a particular expertise about Battle Creek gangs. He had also prepared a PowerPoint presentation about gangs and gang culture that connected Bynum to the Boardman Boys and showed how Battle Creek gangs appropriated symbolism from nationally organized gangs. Defense counsel offered general objections to the testimony. The court, Conrad J. Sindt, J., allowed Sutherland's testimony and PowerPoint presentation, concluding that the evidence was relevant to prove Bynum's motive for shooting the victims. Defense counsel did not specifically object to any of this testimony after the initial, general objection to Sutherland's testimony, and the jury found Bynum guilty as charged. Bynum's appellate defense counsel subsequently moved for a new trial, arguing the ineffective assistance of trial counsel for failing to object to Sutherland's testimony as improper propensity evidence. The court rejected the ineffective-assistance claim because it was satisfied that trial counsel's objections had preserved the claimed error in Sutherland's testimony. The court also held that the expert witness testimony was appropriate. Bynum appealed. The Court of Appeals, BORRELLO, P.J., and M. J. KELLY, J. (BOONSTRA, J., dissenting), reversed Bynum's convictions in an unpublished opinion per curiam, issued April 18, 2013 (Docket No. 307028). The Supreme Court granted the prosecution's application for leave to appeal. 495 Mich 891 (2013).

In an opinion by Justice KELLY, joined by Justices CAVANAGH, MARKMAN, ZAHRA, MCCORMACK, and VIVIANO, the Supreme Court *held*:

If the prosecution presents evidence to show that the crime at issue was gang-related, expert testimony about gangs, gang membership, and gang culture may be admitted as relevant under MRE 402 and of assistance to the trier of fact to understand the evidence or determine a fact in issue under MRE 702. The prosecution may use an expert to identify the significance of certain evidence such as symbols, clothing, or tattoos that by itself would not be understood by the average juror to be connected with gangs or gang-related violence. MRE 404(a), however, precludes testimony that is specifically used to show that on a particular occasion, a gang member acted in conformity with character traits commonly associated with gang members.

1. With regard to the admission of expert witness testimony, MRE 702 requires the trial court to determine that the expert testimony will assist the trier of fact to understand the evidence or determine a fact in issue. If the average juror does not need that aid, the proffered testimony is inadmissible because it merely deals with a proposition that is not beyond the ken of common knowledge. In addition, MRE 402 provides that evidence that is not relevant is inadmissible. Finally, MRE 404(a) provides that evidence of a person's character or character traits is not admissible to prove action in conformity with that character or those traits on a particular occasion.

2. MRE 402 and MRE 702 require a trial court to act as a gatekeeper of gang-related expert testimony and determine whether that testimony is relevant and will assist the trier of fact to understand the evidence. Evidence regarding a defendant's gang membership is relevant and can assist the trier of fact when there is factual evidence that the crime at issue is gang-related. Expert testimony about gang membership is ordinarily of little value to a fact-finder unless there is a connection between gang membership and the crime at issue. Identifying whether a crime is gang-related, however, might require an expert to establish the significance of seemingly innocuous matters (such as clothing, symbolism, and tattoos) as features of gang membership and gang involvement. Expert testimony that the crime was committed in rival gang territory might also be necessary to show why the defendant's presence in that area was motivated by his gang affiliation. That is, understanding the connection between the crime and gang activity is sometimes beyond the ken of common knowledge, and the relevance of gang-related expert testimony might be established by factual evidence that at first glance does

not indicate gang motivations, but provides the gang-crime connection when coupled with expert testimony. In the context of gang-related violence, expert testimony regarding general characteristics of gang culture may be admitted for an appropriate purpose, such as helping to elucidate a gang member's motive for committing a gang-related crime. The testimony must otherwise meet the rules of evidence before it can be admitted, however, and MRE 404(a) limits the extent to which a witness may opine about a defendant's gang membership. An expert may not testify that on a particular occasion a gang member acted in conformity with character traits commonly associated with gang members because that testimony would attempt to prove a defendant's conduct simply because he or she is a gang member.

3. Sutherland testified that the shootings occurred on disputed gang territory and connected Bynum and the other shooters to the Boardman Boys. The location of the crimes, when combined with evidence that multiple gang members were involved in the crimes, provided sufficient factual evidence to conclude that expert testimony regarding gangs, gang membership, and gang culture would be relevant and helpful to the jury in this case.

4. The prosecution argued that Sutherland's testimony was proper evidence of motive. Even if expert testimony about gang culture may be introduced, however, MRE 404(a) precludes the expert from providing evidence of a gang member's character to prove action in conformity with gang membership. A gang expert may testify that a gang protects its turf through violence as an explanation of why a gang member might be willing to commit apparent random acts of violence against people whom the gang member believes pose a threat to that turf. Sutherland did so in discussing aspects of gang culture generally, and that testimony was proper under MRE 404(a). Sutherland also opined, however, that Bynum acted in conformity with his gang membership with regard to the specific crimes in question. In particular, Sutherland used Bynum's gang membership and the character traits associated with that membership to describe what he saw on a surveillance video that recorded the incident. In so doing, his testimony suggested Bynum's guilt in the underlying crime. In contrast to his otherwise admissible general testimony about aspects of gang culture, Sutherland exceeded the limitations of expert testimony when he opined that he believed that Bynum and others went to the party store waiting for someone to give the Boardman Boys the chance to protect their turf. That testimony was an opinion that Bynum acted in conformity with the character traits commonly associated with gang members on a particular occasion, in violation of MRE 404(a).

5. Although there was overwhelming evidence that Bynum participated in the shooting that led to the victim's death and his self-defense theory was not particularly persuasive, the evidence of Bynum's premeditation was not overwhelming. As a result, it is likely that, had the jury not heard the propensity evidence or been told by an expert that Bynum and his friends went to the store with the intent to shoot someone, it would have found that the prosecution had not proved beyond a reasonable doubt that Bynum premeditated. Moreover, Sutherland's testimony further weakened Bynum's self-defense claim by suggesting that Bynum's propensity for violence meant that he intended to shoot someone at the party store on the night of the shooting. The error seriously affected the fairness, integrity, or public reputation of judicial proceedings because it inevitably led the jury to find on the basis of his membership in a gang and the asserted character trait that he was therefore prone to violence that Bynum premeditated the murder. Therefore, Bynum is entitled to relief.

6. The prosecution argued that any evidentiary error would not have affected the jury's rejection of Bynum's self-defense claim, only its finding of premeditation, and entry of a guilty verdict on the lesser included offense of second-degree murder, which does not require a finding of premeditation, was appropriate as relief in this case. The prejudice regarding premeditation could not be easily separated from the prejudice regarding self-defense in light of the evidence presented, however, and Bynum was entitled to a new trial.

Result of the Court of Appeals' judgment affirmed and case remanded.

Chief Justice YOUNG, dissenting, agreed that Sutherland's testimony was generally admissible, that his specific statement opining on the issue of Bynum's premeditation was inadmissible, and that the prejudice resulting from the impermissible statement regarding Bynum's state of mind warranted relief with respect to his first-degree-murder conviction. He disagreed, however, that the prejudice resulting from the improper testimony was inseparable from Bynum's unpersuasive claim of self-defense. Notwithstanding Sutherland's inadmissible premeditation testimony, Bynum's self-defense claim would have failed anyway because any belief on his part that deadly force was necessary was objectively unreasonable in light of the other evidence presented. Accordingly, Chief Justice YOUNG disagreed that defendant was entitled to a new trial and would instead have remanded the case for entry of a conviction on the lesser included offense of second-degree murder.

EVIDENCE — EXPERT WITNESSES — CRIMINAL LAW — GANGS.

If the prosecution presents evidence to show that the crime at issue was gang-related, expert testimony about gangs, gang membership, and gang culture may be admitted as relevant under MRE 402 and of assistance to the trier of fact to understand the evidence or determine a fact in issue under MRE 702; the prosecution may use an expert to identify the significance of evidence (such as symbols, clothing, or tattoos) that by itself would not be understood by the average juror to be connected with gangs or gang-related violence; MRE 404(a), however, precludes testimony that is specifically used to show that on a particular occasion, a gang member acted in conformity with character traits commonly associated with gang members.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *David E. Gilbert*, Prosecuting Attorney, and *Marc Crotteau*, Assistant Prosecuting Attorney, for the people.

Michael A. Faraone, PC (by *Michael A. Faraone*), for defendant.

Amici Curiae:

Bradley R. Hall for the Criminal Defense Attorneys of Michigan.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Linus Banghart-Linn*, Assistant Attorney General, for the Attorney General.

KELLY, J. Gang-related violence pervades our country, including Michigan, and is not likely to abate anytime soon.[1] In trials of crimes involving gang-related vio-

[1] See National Gang Intelligence Center, *2011 National Gang Threat Assessment: Emerging Trends*, p 15 (observing that "gang members are responsible for an average of 48 percent of violent crime in most jurisdictions"), available at <http://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment/2011-national-gang-threat-assessment-emerging-trends> (accessed July 3, 2014)

lence, prosecutors across the state now seek to introduce expert testimony to help a jury understand the importance of particular fact evidence and the context in which the gang-related violence occurs. This case involves the application of the Michigan Rules of Evidence to that expert testimony.

We hold that if the prosecution presents fact evidence to show that the crime at issue is gang-related, expert testimony about gangs, gang membership, and gang culture may be admitted as relevant under MRE 402 and of "assist[ance] [to] the trier of fact to understand the evidence or to determine a fact in issue" under MRE 702. In establishing the requirements of these rules, the prosecution may use an expert to identify the significance of certain fact evidence—such as symbols, clothing, or tattoos—that, by itself, would not be understood by the average juror to be connected with gangs or gang-related violence. In applying MRE 402 and MRE 702 to the facts of this case, we conclude that the trial court appropriately exercised its role as gatekeeper in determining that expert testimony about gangs and gang culture would assist the jury in understanding the evidence.

Nevertheless, there are limits to what an expert may opine, even when there is an appropriate foundation that the crime at issue is gang-related. Accordingly, we also hold that MRE 404(a) precludes testimony that is specifically used to show that, on a particular occasion,

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[http://perma.cc/P8WZ-Y88E]; National Gang Intelligence Center, *2013 National Gang Report*, p 52 (observing that gangs will "continue to vie for control of the territories they inhabit and will thereby continue to perpetrate violence and criminal activities in prisons and communities throughout the nation"), available at <http://www.fbi.gov/stats-services/publications/national-gang-report-2013/view> (accessed July 7, 2014) [http://perma.cc/XC2R-2M36].

a gang member acted in conformity with character traits commonly associated with gang members.

The expert witness in this case exceeded these limitations when he provided his opinion that defendant committed the crimes at issue because he acted in conformity with his gang membership. Specifically, the expert witness testified that because the defendant was a gang member, he was "posted up at" the scene of the crime "with a purpose," namely, to give him and his fellow gang members "the chance to shoot" at someone and defend the gang's turf. This improper character testimony affected both the element of premeditation in the first-degree-murder charge against defendant and the self-defense claim that defendant raised with respect to both first-degree murder and the lesser included offense of second-degree-murder. We therefore affirm the result of the Court of Appeals and remand this case to the Calhoun Circuit Court for a new trial.

I. FACTS AND PROCEDURAL HISTORY

On the evening of August 28, 2010, defendant, Levon Lee Bynum, was among a crowd of about 10 to 15 people gathered outside a party store in Battle Creek. Bynum and some of the other crowd members are alleged to be members of the Boardman Boys gang, the "territory" or "turf" of which borders the party store. Shortly before midnight, a Cadillac DeVille containing four people—Larry Carter, Josh Mitchell, Brandon Davis, and Darese Smith—arrived at the party store's parking lot. According to Mitchell, they were there to purchase Swisher Sweets and vodka so they could continue their all-day consumption of alcohol and marijuana, which they had begun at "bird-chirpin['] time" that morning. The crowd directed its attention toward the parking lot's newcomers, and Carter and Bynum exchanged words,

although exactly what was said is in dispute. Nevertheless, these words resulted in Carter punching Bynum. In response, Bynum and two others began shooting with the firearms that they had been carrying, causing Carter, Mitchell, Davis, and Smith to take shelter inside the party store. Carter collapsed on the floor of the party store and lay in a pool of his blood when first responders arrived and unsuccessfully attempted to resuscitate him. Mitchell and Davis discovered that they had also been shot. Unlike Carter, they survived their injuries after being transported to the hospital.

Battle Creek police identified Bynum and the other shooters from the surveillance video of the party store's parking lot. During police questioning, Bynum denied knowing Carter and the other victims and initially claimed that he had fired multiple times in the air to scare them off because he believed they posed a threat to his safety.[2] However, Bynum later admitted that it was possible that he had hit Carter, stating that "[b]ullets don't have names."[3] At all times, however, Bynum stated that he acted in self-defense, observing that he carried a gun only because "it's not safe to walk nowhere . . . ."

Bynum was arrested and bound over for trial in the Calhoun Circuit Court on charges of first-degree murder for the death of Carter,[4] two counts of assault with intent to murder for the shootings of Mitchell and

[2] Similarly, Mitchell and Davis denied knowing Bynum, the other shooters, and the other members of the crowd.

[3] Because the police did not recover Bynum's firearm, forensic evidence could not conclusively connect Bynum's firearm to Carter's death. However, a forensics expert testified that the bullets retrieved from Carter's body came from the same firearm and were consistent with the type of firearm that Bynum carried.

[4] MCL 750.316.

Davis,[5] carrying a concealed weapon,[6] and felony-firearm.[7] In addition to calling Mitchell and Davis as eyewitnesses, the prosecution called Battle Creek Police Officers James Bailey and Tyler Sutherland to testify about the circumstances of the crime. Both officers are part of the Battle Creek Police Department's Gang Suppression Unit. Bailey helped to investigate the shooting at the party store and testified that Bynum was a known member of the Boardman Boys gang. He also identified other members of the gang from the surveillance video.

Sutherland was proffered as an expert witness on gangs, gang membership, and gang culture, including his particular expertise about Battle Creek gangs. Before Sutherland's testimony, the prosecution filed a motion in limine to allow Sutherland to present a PowerPoint presentation about gangs and gang culture that connected Bynum to the Boardman Boys gang and showed how Battle Creek gangs, including the Boardman Boys, appropriated symbolism from nationally organized gangs like the Bloods and the Crips.[8] Defense counsel opposed the motion in limine and asserted in his written response that the presentation's "potential prejudicial impact far and away outweighs whatever trivial probative value it may possess." Moreover, counsel claimed that the prosecution did not need the presentation to "introduce evidence via testimony of gang association and/or rivalries . . . ." The court took the matter under advisement.

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[5] MCL 750.83.

[6] MCL 750.227.

[7] MCL 750.227b.

[8] The motion in limine did not propose to introduce the presentation as substantive evidence in the case, only as a guide or roadmap to Sutherland's testimony.

During trial, the court revisited the issue. Defense counsel reiterated that he was "still objecting to the use of essentially most of this testimony on the basis that it is more prejudicial than probative." Specifically, he claimed that it was "not particularly relevant . . . whether [Bynum] is in [a] gang or not," although defense counsel also admitted that Sutherland could "offer his . . . testimony as to associations and behavior and conduct of these groups . . . ." Even so, photographs and references "to gangs on a national stage that [Bynum] is not a member of [are] more prejudicial [than] probative."

The court allowed Sutherland's testimony and PowerPoint presentations to proceed on the basis that the evidence was relevant to prove Bynum's motive for shooting Carter, Mitchell, and Davis.[9] However, it cautioned that it did not want the proposed testimony to "contain evidence simply relating to . . . the fact that [Bynum] is quote/unquote a bad person by virtue of the commission of . . . wanton offenses as part of what a gang does." As a result, the court "restrict[ed] the presentation to a question and response format so that [defense counsel] can object to particular issues if he finds the basis to do so . . . ."

In his testimony, Sutherland defined a gang as "a group of three or more individuals" who "collectively

[9] There is a factual dispute regarding which slides were shown to the jury as part of Sutherland's expert testimony. For the reasons explained later, our ruling relies only on the matters on which Sutherland verbally opined during his testimony, not on what slides he showed the jury. As a result, we need not resolve this factual dispute between the parties. Instead, we caution the prosecution that the court unsuccessfully sought to insulate this appeal from this very factual dispute when it directed that the "images on the power point presentation be separately preserved as a special record for subsequent appellate review" and assigned that task to the assistant prosecutor.

engage in criminal activity" and "identify themselves by a gang name," usually a street name or a geographical area corresponding to their turf. They also "adopt certain signs and symbols that they like from nationally recognized gangs," using them as "key identifiers" in their tattoos, graffiti, and clothes. According to Sutherland, the Boardman Boys satisfied the definition of a gang and often used a unique style of the letter "B" and a five-pointed star as their symbols, and Bynum had his street nickname, "Cannon," tattooed on his person.

One of the key principles of gang culture, Sutherland explained, is that a gang enforces respect on its turf through power and fear. Gang members take "every opportunity they can to show how powerful they are." Moreover, the Boardman Boys were engaged in an ongoing turf war with a rival gang, and the party store where these crimes occurred sits on the border between the two gangs' turfs.

Sutherland also discussed the different levels of gang membership: hardcore members (who are the leaders of the gang), associates (who are in the gang and "trying to increase their status"), and fringe members (who "want to be seen with the gang" but do not want to commit the gang's crimes). Bynum was a "hardcore member," according to Sutherland, "because of what he's done [and] what people have told us he's done." In particular, Bynum and other hardcore members "are the ones in the police reports" and are identified by people in the neighborhood as "committing the most violent crime[s] out of all the members in this gang."

Finally, Sutherland turned to the events at the party store, explaining that if Bynum and other members of the gang had not reacted to what they had perceived was a sign of Carter's disrespect, both the individual members who were slighted and the gang itself would

have lost respect in the ongoing turf war. He also expressed his opinion of Bynum's state of mind at the time of the shooting:

> [W]hen I see that incident, when I watch the video, they [the gang members, including Bynum] are all posted up at the store with a purpose. When they went to that store that day, they didn't know who they were going to beat up or shoot, but they went up there waiting for someone to give them the chance. "Make us--give me [i.e., Bynum] a reason to--to shoot [you], to fight you, to show how tough we are, the Boardman Boys, on our turf."

Defense counsel did not specifically object to any of this testimony after the initial, general objection to Sutherland's testimony.[10]

The jury convicted Bynum as charged. Newly appointed appellate counsel moved for a new trial in the circuit court, citing the ineffective assistance of trial counsel for failing to object to Sutherland's testimony as improper propensity evidence.[11] The court rejected the ineffective-assistance claim because it was satisfied that trial counsel's objections had preserved the claimed error in Sutherland's testimony. The court also held that the expert witness testimony was appropriate.

The Court of Appeals reversed Bynum's convictions in a split, unpublished opinion per curiam.[12] Contrary to the circuit court's judgment, the majority explained, in relevant part, that trial counsel had not objected to much of Sutherland's testimony. Nevertheless, even under the plain-error standard for unpreserved claims

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[10] Counsel also objected to Sutherland's qualification as an expert witness, but that objection is not at issue in this appeal.

[11] Indeed, appellate counsel called trial counsel's failure to object "kind of shocking."

[12] *People v Bynum*, unpublished opinion per curiam of the Court of Appeals, issued April 18, 2013 (Docket No. 307028).

of error, Bynum was entitled to relief on the basis of the prejudicial admission of improper testimony. In particular, Sutherland "presented extensive testimony that can only be characterized as improper propensity evidence,"[13] such as describing Bynum as a "hardcore" member of the Boardman Boys and opining that Bynum shot Carter with premeditation. Moreover, this evidence was prejudicial because "[t]he evidence of premeditation was threadbare, at best," even though "there was overwhelming evidence that Bynum participated in the shooting that led to Carter's death and that his self-defense theory was not particularly persuasive."[14]

The dissenting judge determined that the evidence about gang culture and the Boardman Boys "does not . . . become objectionable 'propensity' evidence simply because the expert opined further that defendant was not only a 'member' of the Boardman Boys, but a 'hardcore member.' "[15] Moreover, the dissenting judge concluded that evidence of gang membership is relevant if it relates to motive and that Sutherland "did not opine on defendant's claim of self-defense, indicate whether defendant's self-defense claim was believable, or state that defendant actually shot the victim with premeditation."[16]

We granted the prosecution's application for leave to appeal,[17] limited to the following issues:

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[13] *Id*. at 7.

[14] *Id*. at 9.

[15] *Id*. at 3 (BOONSTRA, J., dissenting).

[16] *Id*. at 5.

[17] Bynum also filed an application for leave to cross-appeal, claiming violations of the right to the effective assistance of counsel and the Confrontation Clause, evidentiary error, prosecutorial misconduct, and instructional error. Because we affirm the result of the Court of Appeals' judgment, we need not reach the merits of Bynum's cross-appeal and deny leave to cross-appeal, although many of the issues presented on cross-appeal are related to Sutherland's testimony.

> (1) whether the police officer's expert testimony regarding gangs and gang membership—especially the testimony as to the defendant's gang, the defendant's role in his gang, and premeditation—was more prejudicial than probative under MRE 403; (2) the extent to which the profiling factors listed in *People v Murray*, 234 Mich App 46, 56-58 [593 NW2d 690] (1999), apply to the admissibility of this expert testimony; (3) whether any error by the trial court with respect to this testimony was preserved; and (4) whether, if there was any such error by the trial court, the Court of Appeals correctly held that the defendant was entitled to a new trial or whether any error was harmless.[18]

II. STANDARD OF REVIEW

The decision to admit evidence is within a trial court's discretion, which is reviewed for an abuse of that discretion.[19] Preliminary questions of law, such as whether a rule of evidence or statute precludes the admission of particular evidence, are reviewed de novo, and it is an abuse of discretion to admit evidence that is inadmissible as a matter of law.[20]

If a defendant has failed to preserve a claim of evidentiary error, relief may be granted only upon a showing that a plain error affected the defendant's substantial rights and that the defendant is actually innocent or the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings."[21]

III. ANALYSIS

The Michigan Rules of Evidence provide the appropriate framework for reviewing the Court of Appeals'

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[18] *People v Bynum*, 495 Mich 891, 891-892 (2013).

[19] *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

[20] *Id*.

[21] *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

conclusion that Bynum is entitled to a new trial on the basis of evidentiary error. When considering whether to admit expert testimony, MRE 702 requires the trial court to determine that the expert testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ."[22] If the average juror does not need the aid of expert testimony to understand the evidence or determine a fact in issue, then the proffered testimony is inadmissible because " 'it merely deals with a proposition that is not beyond the ken of common knowledge.' "[23] Similarly, MRE 402 provides that "[e]vidence which is not relevant is not admissible."[24] As a result, an expert witness may not testify about matters that are irrelevant. The trial court thus acts as a gatekeeper for expert testimony and has a fundamental duty to ensure that the proffered expert testimony is both relevant and reliable.[25]

MRE 404(a) prohibits the admission of character evidence except under limited circumstances:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to

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[22] Additionally, MRE 703 requires that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference . . . be in evidence."

[23] *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 790; 685 NW2d 391 (2004), quoting *Zuzula v ABB Power T & D Co, Inc*, 267 F Supp 2d 703, 711 (ED Mich, 2003) (emphasis omitted).

[24] MRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

[25] *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 589; 113 S Ct 2786; 125 L Ed 2d 469 (1993); *Gilbert*, 470 Mich at 780 n 46.

> rebut the same; or if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted[,] . . . evidence of a trait of character for aggression of the accused offered by the prosecution[.]

Application of these and other rules of evidence to expert testimony about gangs, gang membership, and gang culture has not been developed in our caselaw, although gang activity and gang culture have increasingly been the focus of federal, state, and local law enforcement agencies.[26] Indeed, the sharing of information about gang activity and gang culture across jurisdictions has created new expertise and new understanding to combat gang-related violence. Prosecutors are using that new expertise to help juries understand the context of the crimes that they are prosecuting and, as a result, it is increasingly important for us to explain how this newly developed expertise fits within our existing rules of evidence.

As a threshold matter, applying MRE 402 and MRE 702 requires a trial court to act as a gatekeeper of gang-related expert testimony and determine whether that testimony is relevant and will assist the trier of fact to understand the evidence. The introduction of evidence regarding a defendant's gang membership is relevant and can "assist the trier of fact to understand the evidence" when there is fact evidence that the crime

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[26] In 1992, the FBI began the Safe Streets Violent Crime Initiative, which joins federal, state, and local law enforcement agencies to address gang-related crime. Federal Bureau of Investigation, Gangs, *Violent Gang Task Forces* <http://www.fbi.gov/about-us/investigate/vc_majorthefts/gangs/violent-gangs-task-forces> (accessed July 7, 2014) [http://perma.cc/M25P-MTBG]. The National Gang Intelligence Center provides centralized access to information about gangs and their growth, migration, and evolution. Federal Bureau of Investigation, Gangs, *National Gang Intelligence Center* <http://www.fbi.gov/about-us/investigate/vc_majorthefts/gangs/ngic> (accessed July 7, 2014) [http://perma.cc/S4A9-T2Q2].

at issue is gang-related.[27] Ordinarily, expert testimony about gang membership is of little value to a fact-finder *unless* there is a connection between gang membership and the crime at issue.[28]

Sometimes, however, identifying whether a crime is gang-related requires an expert to establish the significance of seemingly innocuous matters—such as clothing, symbolism, and tattoos—as features of gang membership and gang involvement. At other times, "an expert's testimony that the crime was committed in rival gang territory may be necessary to show why the defendant's presence in that area, a fact established by other evidence, was motivated by his gang affiliation."[29] In other words, understanding the connection between the crime and gang activity is sometimes beyond the ken of common knowledge. Accordingly, the relevance of gang-related expert testimony "may be satisfied by fact evidence that, at first glance, may not indicate gang motivations, but when coupled with expert testimony, provides the gang-crime connection."[30]

In the context of gang-related violence, we conclude that expert testimony may be admitted regarding general characteristics of gang culture for an appropriate

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[27] MRE 702.

[28] It is foreseeable that certain criminal activity is unrelated to membership in a gang. If, for instance, a member of a gang is charged with domestic violence, the crime might not be gang-related and, as a result, evidence of gang membership might not be relevant to the defendant's guilt or innocence of the crime. Otherwise, "a juror might associate a defendant with such an affiliation as a person of bad character or someone prone to aggressive or violent behavior." *Utz v Commonwealth*, 28 Va App 411, 420; 505 SE2d 380 (1998). Of course, this example is not to say that an individual gang member cannot commit a gang-related crime as part of the gang's collective criminal activity without other gang members being present.

[29] *Gutierrez v State*, 423 Md 476, 496; 32 A3d 2 (2011).

[30] *Id*.

purpose, such as helping to elucidate a gang member's motive for committing a gang-related crime. For example, the Kansas Supreme Court upheld testimony "that if someone got a member of the gang in trouble, the gang would retaliate" as part of "the State's attempt to establish a motive" for such retaliation.[31] The testimony, of course, must otherwise meet the rules of evidence before it can be admitted, and we particularly caution that MRE 404(a) limits the extent to which a witness may opine about a defendant's gang membership. As stated, MRE 404(a) provides that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ." As a result, an expert may not testify that, on a particular occasion, a gang member acted in conformity with character traits commonly associated with gang members. Such testimony would attempt to prove a defendant's conduct simply because he or she is a gang member.

IV. APPLICATION

A. PRESERVATION

Before examining the merits of the claimed evidentiary errors at issue in this appeal, one threshold question we must answer is whether Bynum preserved these claims of evidentiary error. As previously noted, when the court revisited the prosecutor's motion to introduce Sutherland's PowerPoint presentation during trial, defense counsel stated that he was "still objecting to the use of essentially most of this testimony on the basis that it is more prejudicial than probative" and that "[i]t's not particularly relevant as it relates to

[31] *State v Tran*, 252 Kan 494, 505; 847 P2d 680 (1993).

this particular Defendant, whether he is in a gang or not." Nevertheless, defense counsel admitted that Sutherland "can offer his . . . testimony as to associations and behavior and conduct of these groups and what not." Counsel was particularly worried that "the use of photographs of gangs . . . and references to gangs on a national stage that this particular Defendant is not a member of is more prejudicial than probative." Additionally, counsel objected to proposed photographs of Bynum and other alleged gang members that he characterized as "nothing less than 'mug shots' taken when [Bynum] was in custody."

The court allowed the presentation to proceed but restricted it "to a question and response format so that [defense counsel] can object to particular issues if he finds the basis to do so . . . ."[32] While the scope of Bynum's objection to Sutherland's testimony seemed to change from one statement to the next, it is clear that counsel focused on the prejudicial effect of the PowerPoint presentation's being shown to the jury. At most, counsel's statement that he was objecting "to the use of essentially most of this testimony" because "[i]t's not particularly relevant" is akin to a general objection to the admissibility of any mention of gangs or gang-related violence. As a result, we conclude, as did the Court of Appeals, that a general objection to the relevance of Sutherland's expert testimony is preserved. However, because the court envisioned that the question-and-answer format of Sutherland's testimony would provide defense counsel with an opportunity to

[32] Counsel's only objection during Sutherland's question-and-answer testimony was to a question about whether the victims were armed, which the court overruled after a foundation for Sutherland's knowledge of the question had been established. Counsel also objected to whether Sutherland qualified as an expert witness, although the court overruled counsel's objection. Neither of these objections is at issue in this appeal.

tender objections to specific questions or responses, we also conclude that because defense counsel failed to object to specific portions of Sutherland's testimony, any specific claims of error arising out of the content of Sutherland's testimony must be examined under the standard for unpreserved error.

To summarize: We will apply our standard of review for preserved error to the threshold inquiry regarding whether any expert testimony about gangs is admissible in the first instance under MRE 402, and if it is admissible in the first instance, we will apply our standard of review for unpreserved error to the claims that the extent of the testimony admitted at trial violated MRE 404(a) and other pertinent rules of evidence. We now proceed to these inquiries.

B. FACT EVIDENCE REGARDING GANG-RELATED VIOLENCE

As stated, in applying MRE 402 and 702 to the facts of this case, fact evidence to show that the crime at issue is gang-related provides a sufficient basis for a trial court to conclude that expert testimony regarding gangs is relevant and will be helpful to the jury, although the significance of fact evidence and its relationship to gang violence can be gleaned from expert testimony.

Sutherland testified that the shootings occurred on disputed gang territory, and "an expert's testimony that the crime was committed in rival gang territory may be necessary to show why the defendant's presence in that area, a fact established by other evidence, was motivated by his gang affiliation."[33] Moreover, fact evidence connected Bynum and the other shooters to the Boardman Boys: Sutherland testified that Bynum has a tattoo

[33] *Gutierrez*, 423 Md at 496.

of his street nickname (Cannon), which was an identifier of his gang membership, and Bailey testified that Bynum was a known member of the gang, as were the other shooters. As a result, the location of the crimes, when combined with evidence that multiple gang members were involved in the crimes, provided sufficient fact evidence to conclude that expert testimony regarding gangs, gang membership, and gang culture would be relevant and helpful to the jury in this case.

C. INADMISSIBLE EXPERT TESTIMONY UNDER MRE 404(a)

The prosecution argues that Sutherland's testimony was proper evidence of motive because "[i]n a prosecution for murder proof of motive, while not essential, is always relevant."[34] Even if expert testimony about gang culture may be introduced, however, MRE 404(a) precludes the expert from providing evidence of a gang member's character to prove action in conformity with gang membership. Of course, a gang expert may testify that a gang, in general, protects its turf through violence as an explanation for why a gang member might be willing to commit apparent random acts of violence against people the gang member believes pose a threat to that turf.[35] Sutherland did so in discussing aspects of gang culture generally, and this testimony was proper under MRE 404(a).

Nevertheless, Sutherland veered into objectionable territory when he opined that Bynum had acted in conformity with his gang membership with regard to

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[34] *People v Mihalko*, 306 Mich 356, 361; 10 NW2d 914 (1943).

[35] See, e.g., *People v Bryant*, 241 Ill App 3d 1007, 1022-1023; 182 Ill Dec 376; 609 NE2d 910 (1993) (explaining that gang-related evidence is proper "to offer a motive for an otherwise inexplicable act" when "the trial court allowed in only as much gang testimony as was necessary to establish this motive").

the specific crimes in question.[36] In particular, Sutherland used Bynum's gang membership and the character traits associated therewith to describe what he saw on the surveillance video. In so doing, his testimony suggested Bynum's guilt in the underlying crime:

> [W]hen I see that incident, when I watch the video, they [the gang members, including Bynum] are all posted up at the store with a purpose. When they went to that store that day, they didn't know who they were going to beat up or shoot, but they went up there waiting for someone to give them the chance. "Make us--give me [i.e., Bynum] a reason to--to shoot [you], to fight you, to show how tough we are, the Boardman Boys, on our turf."

In contrast to his otherwise admissible general testimony about aspects of gang culture, Sutherland's testimony interpreting the video evidence specifically connected those character traits to Bynum's conduct in a particular circumstance. Such testimony impermissibly attempted to "prov[e] action in conformity" with character traits common to all gang members on a particular occasion. As a result, this testimony violated MRE 404(a).

Therefore, we agree with the Court of Appeals that Sutherland exceeded the limitations of expert testimony when he opined that he believed that Bynum and others went to the party store "waiting for someone to give [the Boardman Boys] the chance" to protect their turf. That testimony was an opinion that Bynum acted in conformity with the character traits commonly associated with gang members on a particular occasion, in violation of MRE 404(a).

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[36] Cf. *United States v Mejia*, 545 F3d 179, 190-191 (CA 2, 2008) (explaining that when an expert officer's testimony narrows from general characteristics of gangs, to a particular gang, to a particular defendant, the expert "displac[es] the jury by connecting and combining all other testimony and physical evidence into a coherent, discernable, internally consistent picture of the defendant's guilt").

D. PREJUDICE

As stated, defense counsel did not specifically object to Sutherland's testimony that Bynum acted in conformity with his gang membership in committing the charged crimes. As a result, Bynum must show that a plain error affected his substantial rights and that he is actually innocent or that the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings."[37]

Sutherland actually and clearly opined on Bynum's character traits as a gang member to link him to the particular conduct at issue when he explained what he saw on the surveillance video: Bynum's conformity with traits commonly associated with gang members on a particular occasion to show " 'how violent we [i.e., Bynum and the other Boardman Boys] can be . . . .' " Under the standard articulated above, Sutherland exceeded the limitations of MRE 404(a) when he went beyond discussing the general characteristics of gang membership and gang culture and instead testified that he believed that Bynum exemplified, on a particular occasion, the character trait of a gang member who needed to protect territory through violence. The error in allowing this testimony to be admitted was plain.

Furthermore, we agree with the Court of Appeals that, although "there was overwhelming evidence that Bynum participated in the shooting that led to Carter's death and that his self-defense theory was not particularly persuasive," the evidence of Bynum's premeditation "was threadbare, at best."[38] As a result, "it is likely that, had the jury not heard the propensity evidence or been told by an expert that Bynum and his friends went

[37] *Carines*, 460 Mich at 774.

[38] *Bynum*, unpub op at 9.

to the store with the intent to shoot someone, . . . it would have found that the prosecutor did not prove that Bynum premeditated beyond a reasonable doubt."[39] Moreover, Sutherland's testimony further weakened Bynum's self-defense claim by suggesting that Bynum's propensity for violence meant that he intended to shoot someone at the party store on the night of the shooting.

Carines also requires that the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings."[40] An error of this magnitude satisfies this requirement because it inevitably led the jury to find that Bynum premeditated in the murder on the basis of his membership in a gang and the asserted character trait that he was thus prone to violence. Particularly when the opinion is proffered by an officer of the law, the error seriously affects the fairness, integrity, or public reputation of the proceedings.[41] As a result, Bynum is entitled to relief.

As for the nature of Bynum's relief, the prosecution argues that a new trial is not warranted because any evidentiary error would not have affected the jury's rejection of Bynum's self-defense claim, only its finding of premeditation—an element of first-degree murder, but not the lesser included offense of second-degree murder. As a result, the prosecution requests that, if we conclude that Bynum is entitled to relief, we enter a guilty verdict on the lesser included offense of second-degree murder, which does not require a finding of premeditation. We decline to do so because we cannot so

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[39] *Id*. at 10.

[40] *Carines*, 460 Mich at 774.

[41] Cf. *People v Murray*, 234 Mich App 46, 55; 593 NW2d 690 (1999) (noting "the danger that [police officer expert] testimony may have an aura of special reliability and trustworthiness") (citations and quotation marks omitted).

easily separate the prejudice regarding premeditation from the prejudice regarding self-defense. While the evidence against Bynum's self-defense claim was stronger than the evidence supporting premeditation, a conclusion that Bynum premeditated necessarily entails a rejection of his self-defense claim. Moreover, Sutherland's testimony implicated Bynum's propensity for violence relating to both the murder charge and his self-defense claim, and Sutherland's opinion rejecting Bynum's self-defense claim cannot be considered merely cumulative to the prosecution's other evidence of Bynum's guilt.

By proffering an opinion that Bynum exhibited the character trait of violence commonly associated with gang members to explain how Bynum allegedly premeditated in the murder, Sutherland gave the jury a separate reason for rejecting Bynum's self-defense claim. In particular, Sutherland's testimony provided jurors with a specific basis to reject Bynum's statement to police that he was on his guard because "it's not safe to walk nowhere" and was "scared for [his] life." Unlike the partial dissent, we cannot look behind the jury's decision to reject Bynum's self-defense claim and determine, as a matter of law, that this claim was objectively unreasonable.[42] When considering the other evidence adduced at trial without Sutherland's testimony, a reasonable jury could have concluded that Bynum's purported subjective belief of his danger was objectively reasonable, given that the victims drove up and, within a matter of seconds, Carter began assaulting Bynum. That the victims were unarmed does not weaken the

[42] The partial dissent claims to profess that "this very issue is one submitted to the jury," *post* at 640 (emphasis omitted), yet we, not the partial dissent, would again submit the self-defense issue to a jury to accept or reject.

objective threat when there was no outward indication, one way or the other, of that fact. Moreover, the speed with which the verbal altercation escalated into a physical altercation belies the partial dissent's claim that Bynum could have retreated easily. Accordingly, we agree with the Court of Appeals that Bynum is entitled to a new trial.[43]

V. CONCLUSION

As stated, we hold that MRE 402 and MRE 702 require a trial court to act as a gatekeeper for the admission of relevant expert testimony that will help the fact-finder "to understand the evidence or to determine a fact in issue . . . ." Such expert testimony may meet these requirements when there is fact evidence that the crime at issue is gang-related. However, when the connection between the crime and gang activity is

[43] Because it is not necessary to this award of relief, we do not reach the issue of whether it was also reversible error for the trial court to admit Sutherland's testimony regarding Bynum's status as a "hardcore member" of the Boardman Boys. We leave it to the trial court to assess the admissibility of such testimony if and when it is offered at retrial, as well as to resolve any other challenges regarding gang-related testimony not otherwise addressed in this opinion. In that regard, we also note that, of course, gang-related testimony remains subject to MRE 403. See, e.g., *People v Musser*, 494 Mich 337, 356-357; 835 NW2d 319 (2013) (stating that "a trial court has a historic responsibility to always determine whether the danger of unfair prejudice to the defendant substantially outweighs the probative value of the evidence sought to be introduced before admitting such evidence") (citation and quotation marks omitted). We further note, in light of Bynum's argument that there was never a line drawn between fact evidence and expert testimony at his first trial, that

> [t]he potential for prejudice [when a police officer testifies as both an expert and a fact witness] can be addressed by means of appropriate cautionary instructions and by examination of the witness that is structured in such a way as to make clear when the witness is testifying to the facts and when he is offering his opinion as an expert. [*United States v Mansoori*, 304 F3d 635, 654 (CA 7, 2002).]

beyond the ken of common knowledge, the requirements of MRE 402 and MRE 702 "may be satisfied by fact evidence that, at first glance, may not indicate gang motivations, but when coupled with expert testimony, provides the gang-crime connection."[44] In applying MRE 402 and MRE 702 to the facts of this case, we conclude that the trial court appropriately exercised its role as gatekeeper in determining that expert testimony about gangs and gang culture would assist the jury in understanding the evidence.

Additionally, an expert witness may not use a defendant's gang membership to prove specific instances of conduct in conformity with that gang membership, such as opining that a defendant committed a specific crime because it conformed with his or her membership in a gang. Such testimony violates MRE 404(a). Because Bynum was prejudiced by the expert opinion that, on a particular occasion, he acted in conformity with character traits commonly associated with gang members, we conclude that he is entitled to a new trial. We therefore affirm the result of the Court of Appeals' judgment and remand this case to the Calhoun Circuit Court for further proceedings consistent with this opinion.

CAVANAGH, MARKMAN, ZAHRA, MCCORMACK, and VIVIANO, JJ., concurred with KELLY, J.

YOUNG, C.J. (*concurring in part and dissenting in part*). I respectfully dissent from the majority's conclusion that the errors committed in the trial court warrant a new trial. I concur with the majority's conclusions that the testimony of Officer Tyler Sutherland, an expert on gangs and gang culture, was generally admissible, but that his specific statement opining on the

[44] *Gutierrez*, 423 Md at 496.

issue of defendant's premeditation was inadmissible. Additionally, I agree that the prejudice resulting from the impermissible statement regarding defendant's state of mind warrants relief with respect to defendant's first-degree premeditated murder conviction.

However, I dissent from the majority's holding that the prejudice resulting from that improper testimony was inseparable from defendant's unpersuasive claim of self-defense.[1] The facts in the record belie defendant's contention that he had a *reasonable* belief that deadly force was necessary to repel the aggressor's attack. When accounting for the relevant facts, it becomes apparent that, notwithstanding Sutherland's inadmissible premeditation testimony, defendant's self-defense claim would have failed because any belief that deadly force was necessary was manifestly unreasonable.

As a result, I dissent from the majority's conclusion that defendant is entitled to a new trial, and I would instead enter a conviction on the lesser-included offense of second-degree murder.

I. PLAIN ERROR STANDARD

The majority correctly concludes that the evidentiary error of the improperly admitted testimony is unpreserved. Because defendant's counsel failed to raise the proper objections, it is defendant's burden on appeal to show plain error affecting substantial rights.[2] Defendant must show that (1) an error occurred, (2) the error

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[1] I note that both the Court of Appeals majority and this Court's majority have recognized the weakness of defendant's claim of self-defense. See *People v Bynum*, unpublished opinion per curiam of the Court of Appeals, issued April 18, 2013 (Docket No. 307028), p 9 (stating that defendant's "self-defense theory was not particularly persuasive"); *ante* at 632-633.

[2] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

was clear or obvious, and (3) the error prejudiced him—meaning that it affected the outcome of the lower court's proceedings.[3] If defendant meets this burden, it is within the appellate court's discretion to reverse, which is warranted only when the error resulted in the conviction of an actually innocent defendant or when an error seriously affected the "fairness, integrity or public reputation of judicial proceedings . . . ."[4] In other words, in order get a new trial, defendant must show that the error was decisive with regard to his self-defense claim. Otherwise, the proofs at trial sustain a charge of second-degree murder.

II. DEFENDANT'S SELF-DEFENSE CLAIM

Because defendant timely raised the issue of self-defense, the prosecution bore the burden at trial of disproving that the killing was done in self-defense.[5] By enacting MCL 780.972, the Legislature codified the common-law requirement that for a killing to be justified by self-defense, a defendant must have both a subjectively honest belief and an *objectively reasonable* belief that the use of deadly force is *necessary* to prevent imminent death or great bodily harm.[6] In other words, a defendant must avoid the use of deadly force if he can safely and reasonably do so, for example by applying nonlethal force.[7] Furthermore, when outside of one's

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[3] *Id*.

[4] *Id*. (quotation marks and citation omitted).

[5] *People v Dupree*, 486 Mich 693, 709-710; 788 NW2d 399 (2010). The prosecution must disprove defendant's self-defense claim beyond a reasonable doubt. *People v Bell*, 155 Mich App 408, 414; 399 NW2d 542 (1986).

[6] See *People v Riddle*, 467 Mich 116, 126-127; 649 NW2d 30 (2002).

[7] *Id*. at 129 ("If it is possible to safely avoid an attack then it is not *necessary*, and therefore not permissible, to exercise deadly force against the attacker.").

dwelling, a defendant's failure to withdraw from the altercation may be considered in deciding whether the defendant honestly and *reasonably* believed there was a need to employ deadly force.[8]

Sutherland's impermissible testimony, which exclusively concerned defendant's *subjective motive* for the use of deadly force, could not affect the inquiry whether defendant's belief in the necessity of using deadly force was *objectively reasonable*.[9] That the victim swung first does not support defendant's alleged reasonable belief that the situation required the use of deadly force.[10] Defendant and his companions outnumbered the victims nearly three-to-one and possessed numerous weapons, while the victim and his companions had none. Moreover, there was no evidence adduced at trial that the victim or his companions gave any indication that they had weapons.[11] Given these facts, defendant undeniably had the ability to withdraw from the altercation or to use nondeadly force to parry the victim's threat.[12] He did neither.[13]

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[8] See *People v Richardson*, 490 Mich 115; 803 NW2d 302 (2011); *Riddle*, 467 Mich at 127.

[9] By purporting to be unable to easily "separate the prejudice regarding premeditation from the prejudice regarding self-defense," the majority fails to fully account for the distinction between defendant's subjective belief in the need to employ deadly force and the objective reasonableness of that belief. The majority does not even directly assess this use of deadly force question.

[10] See *Riddle*, 467 Mich at 129.

[11] One could reasonably infer that the victim's choice to *throw a punch* at defendant (who was surrounded by a substantial group of men), rather than, say, pull a gun or draw a knife, was evidence that he wasn't armed. Indeed, defendant's contention that his belief that lethal force was necessary is compromised by the lack of *any* record evidence that would have led defendant to reasonably believe the victims were armed.

[12] See *id*.

[13] By concluding that the speed "with which the verbal altercation escalated into a physical altercation belies the . . . claim that Bynum could have retreated easily," the majority not only fails to account for the

Instead, surrounded by fellow gang members, some of whom were armed, he stood pat, pointed the gun at the victim's chest, and fired. Whatever defendant's subjective belief was, these facts are fatal to defendant's assertion that it was objectively reasonable to believe that lethal force was necessary.[14] But more to the point, *this very issue is one submitted to the jury*. In my judgment, the majority improperly concludes that the prejudicial effect of Sutherland's improper testimony extended to defendant's self-defense claim.

For these reasons, I conclude that the error in admitting Sutherland's impermissible statement was not prejudicial to defendant's self-defense claim such that a different outcome would have been even remotely likely if not for the evidentiary error.

III. CONCLUSION

Because any prejudice to defendant's claim of self-defense was not outcome-determinative, I respectfully dissent from the majority's holding that defendant is entitled to a new trial. Although one part of Sutherland's testimony improperly touched on premeditation, the jury's findings on all the elements of the necessarily lesser-included offense of second-degree murder remain unaffected.[15] Because there exists no outcome-

potential use of nondeadly force but ignores that defendant's group vastly outnumbered the victim and his companions.

[14] The prosecutor clearly made this point in his closing argument stating: "[I]f you can in a safe fashion back out of a situation, you are required to do so before you use deadly force," and that "there is no question that Levon Bynum had the opportunity and had the means of exiting that situation without ever having drawn the gun that he was carrying, pointing the gun he was carrying, or firing the gun that he was carrying."

[15] See MCL 750.316; MCL 750.317; *People v Carter*, 395 Mich 434, 437; 236 NW2d 500 (1975).

determinative error regarding defendant's claim of self-defense, the jury's remaining factual determinations are sufficient to sustain a conviction of second-degree murder. Therefore, I would remand this matter for the entry of such a conviction.

INTERNATIONAL BUSINESS MACHINES CORPORATION v DEPARTMENT OF TREASURY

Docket No. 146440. Argued January 15, 2014 (Calendar No. 1). Decided July 14, 2014.

International Business Machines Corporation (IBM) brought an action in the Court of Claims against the Department of Treasury, challenging the department's ruling that IBM was not entitled to apportion its business income tax base and modified gross receipts tax base using the three-factor apportionment formula provided in the Multistate Tax Compact, MCL 205.581 *et seq*., and was instead required to apportion its income using the sales-factor formula in the Business Tax Act (BTA), MCL 208.1101 *et seq*., when calculating its state taxes for 2008. Under this ruling, IBM was entitled to a refund of only $1,253,609 for the 2008 tax year rather than the $5,955,218 it had sought. IBM moved for summary disposition under MCR 2.116(C)(10), and the department moved for summary disposition under MCR 2.116(I)(2). After a hearing, the Court of Claims, Joyce A. Draganchuk, J., denied IBM's motion and granted summary disposition in favor of the department, ruling that the BTA mandated the use of the sales-factor apportionment formula. The Court of Appeals, RONAYNE KRAUSE, P.J., and BORRELLO, J. (RIORDAN, J., concurring), affirmed the Court of Claims order in an unpublished opinion per curiam issued November 20, 2012 (Docket No. 306618). It held that because there was a facial conflict between the BTA's mandatory sales-factor apportionment formula and the Compact's elective three-factor apportionment formula, the Legislature had repealed the Compact's election provision by implication when it enacted the BTA. The Supreme Court granted IBM's application for leave to appeal. 494 Mich 874 (2013).

In a lead opinion by Justice VIVIANO, joined by Justices CAVANAGH and MARKMAN, and a concurring opinion by Justice ZAHRA, the Supreme Court *held*:

The modified gross receipts tax is an income tax for purposes of the Multistate Tax Compact. IBM was entitled to use the Compact's elective three-factor apportionment formula to calculate its 2008 Michigan taxes.

Court of Appeals' judgment reversed; Court of Claims' order granting summary disposition in favor of the department reversed; case remanded to the Court of Claims for entry of an order granting summary disposition in favor of IBM.

Justice VIVIANO, joined by Justices CAVANAGH and MARKMAN, stated that the modified gross receipts tax fit within the Compact's broad definition of "income tax" by taxing a variation of net income, specifically, the entire amount received by the taxpayer as determined from any gainful activity minus inventory and certain other deductions that are expenses not specifically and directly related to a particular transaction. He further concluded that the Court of Appeals erred by holding that the BTA had repealed the Compact's election provision by implication because the statutes could be reconciled when read *in pari materia*.

Justice ZAHRA, concurring, agreed that IBM was entitled to use the Compact's elective apportionment formula for its 2008 Michigan taxes, and also that the tax bases at issue were "income taxes" within the meaning of the Compact. He would not have reached the question whether the Legislature repealed the Compact's election provision by implication when it enacted the BTA because the Legislature made clear that taxpayers were entitled to use the Compact's election provision for the 2008, 2009, and 2010 tax years.

Justice MCCORMACK, joined by Chief Justice YOUNG and Justice KELLY, dissenting, would have affirmed the Court of Appeals judgment, concluding that allowing taxpayers to apportion their multistate income in accordance with the Compact's formula violated the Legislature's unambiguous directive that taxes established under the BTA must be in accordance with the BTA's sales-only apportionment formula. She further concluded that there was no constitutional barrier that prevented the Legislature from making the Compact's alternative election provision unavailable to taxpayers.

1. TAXATION — BUSINESS TAX ACT — MODIFIED GROSS RECEIPTS TAX — MULTISTATE TAX COMPACT.

The modified gross receipts tax imposed by the Business Tax Act, MCL 208.1101 *et seq*., is an income tax for purposes of the Multistate Tax Compact, MCL 205.581 *et seq*.

2. TAXATION — BUSINESS TAX ACT — INCOME APPORTIONMENT — MULTISTATE TAX COMPACT.

The Legislature did not repeal by implication the election provision set forth in the Multistate Tax Compact, MCL 205.581 *et seq*., when it enacted the Business Tax Act; the Multistate Tax

Compact's three-factor apportionment formula was therefore available to taxpayers for the 2008 tax year.

Miller, Canfield, Paddock and Stone, PLC (by *Clifford W. Taylor* and *Gregory A. Nowak*), and *Silverstein & Pomerantz LLP* (by *Amy L. Silverstein*, *Edwin P. Antolin*, and *Johanna W. Roberts*, pro hac vice) for IBM Corporation.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Michael R. Bell*, Assistant Attorney General, for the Department of Treasury.

Amici Curiae:

Honigman Miller Schwartz and Cohn LLP (by *Lynn A. Gandhi*) for the Council on State Taxation.

Honigman Miller Schwartz and Cohn LLP (by *Lynn A. Gandhi*) and *Morrison & Foerster LLP* (by *Craig B. Fields* and *Mitchell A. Newark*, pro hac vice) for Lorillard Tobacco Company.

Joe Huddleston, *Shirley K. Sicilian*, and *Sheldon H. Laskin*, pro hac vice, for the Multistate Tax Commission.

Jeffrey B. Litwak, pro hac vice.

Richard L. Masters, pro hac vice, for the Interstate Commission for Juveniles and the Association of Compact Administrators of the Interstate Compact on the Placement of Children.

VIVIANO, J. In this case, we must determine whether plaintiff International Business Machines Corporation (IBM) could elect to use the three-factor apportionment

formula under the Multistate Tax Compact[1] (the Compact) for its 2008 Michigan taxes, or whether it was required to use the sales-factor apportionment formula under the Michigan Business Tax Act (BTA).[2] The Department of Treasury (the Department) rejected IBM's attempt to use the Compact's apportionment formula and, instead, required IBM to apportion its income using the BTA's sales-factor formula.

We conclude that IBM was entitled to use the Compact's three-factor apportionment formula for its 2008 Michigan taxes and that the Court of Appeals erred by holding otherwise on the basis of its erroneous conclusion that the Legislature had repealed the Compact's election provision by implication when it enacted the BTA. We further hold that IBM could use the Compact's apportionment formula for that portion of its tax base subject to the modified gross receipts tax of the BTA.

Accordingly, we reverse the Court of Appeals' judgment in favor of the Department, reverse the Court of Claims' order granting summary disposition in favor of the Department, and remand to the Court of Claims for entry of an order granting summary disposition in favor of IBM.

I. FACTS AND PROCEEDINGS

IBM is a corporation based in New York that provides information technology products and services worldwide. In December 2009, IBM filed its Michigan Business Tax annual return for the 2008 tax year. Line 10 of IBM's return, the "Apportionment Calculation" line, read "SEE ATTACHED ELECTION." IBM filed a sepa-

[1] MCL 205.581 *et seq*.

[2] MCL 208.1101 *et seq*.

rate statement along with its return, entitled "Election to use MTC Three Factor Apportionment," indicating that it elected to apportion its business income tax base and modified gross receipts tax base using the three-factor apportionment formula provided in the Compact. Under these calculations, IBM sought a refund of $5,955,218. The Department disagreed. It determined that IBM could not elect to use the Compact's formula and that IBM was entitled to a refund of only $1,253,609 when calculated under the BTA's sales-factor apportionment formula.

IBM filed a complaint in the Court of Claims, challenging the Department's decision. Thereafter, IBM moved for summary disposition under MCR 2.116(C)(10), and the Department moved for summary disposition under MCR 2.116(I)(2). After a hearing on the motions, the Court of Claims denied summary disposition to IBM and granted summary disposition in favor of the Department. The Court of Claims determined that the BTA mandated the use of the sales-factor apportionment formula.

In an unpublished opinion, the Court of Appeals affirmed the Court of Claims order granting summary disposition in favor of the Department.[3] The Court of Appeals first determined that there was a facial conflict between the BTA and the Compact insofar as the BTA mandates use of the sales-factor formula while the Compact permits taxpayers to elect to use a three-factor apportionment formula.[4] On the basis of this conflict, the Court of Appeals concluded that the Legislature had repealed the Compact's election provision by implica-

[3] *IBM v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2012 (Docket No. 306618).

[4] *Id*. at 3.

tion when it enacted the BTA.[5] The Court of Appeals then stated that it did not need to decide whether the modified gross receipts tax was an "income tax" under the Compact subject to the Compact's apportionment formula in light of its conclusion that the Compact's election provision had been repealed by implication.[6]

IBM sought leave to appeal in this Court. We granted IBM's application and asked the parties to address

> (1) whether the plaintiff could elect to use the apportionment formula provided in the Multistate Tax Compact, MCL 205.581, in calculating its 2008 tax liability to the State of Michigan, or whether it was required to use the apportionment formula provided in the Michigan Business Tax Act, MCL 208.1101 *et seq*.; (2) whether § 301 of the Michigan Business Tax Act, MCL 208.1301, repealed by implication Article III(1) of the Multistate Tax Compact; (3) whether the Multistate Tax Compact constitutes a contract that cannot be unilaterally altered or amended by a member state; and (4) whether the modified gross receipts tax component of the Michigan Business Tax Act constitutes an income tax under the Multistate Tax Compact.[7]

II. STANDARD OF REVIEW

We review de novo a Court of Claims decision on a motion for summary disposition.[8] We also review de novo issues of statutory interpretation.[9]

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[5] *Id*. at 3-4. It also determined that the Compact was not a binding contract.

[6] *Id*. at 5. Judge RIORDAN concurred in all respects except regarding the issue of repeal by implication. He determined that the panel did not need to conclude that the BTA had impliedly repealed the Compact because MCL 208.1309 allowed the taxpayer to petition for another apportionment formula. He concluded that the plain language of the BTA required IBM to apportion its income tax consistently with the BTA.

[7] *IBM v Dep't of Treasury*, 494 Mich 874 (2013).

[8] *Malpass v Dep't of Treasury*, 494 Mich 237, 245; 833 NW2d 272 (2013).

[9] *Id*.

III. HISTORY OF BUSINESS TAXATION IN MICHIGAN

Because we believe it important to our analysis in this case, we begin with a discussion of the history of business taxation in Michigan. Michigan's taxation of business income or activity began in 1953, when the Legislature enacted a business activities tax that taxed the adjusted receipts of a taxpayer.[10] This tax remained in effect until Michigan adopted its first corporate income tax as part of the Income Tax Act of 1967 (ITA).[11] Against the backdrop of the ITA, Michigan joined the Multistate Tax Compact in 1970 when the Legislature enacted MCL 205.581.[12] The Compact "symbolized the recognition that, as applied to multistate businesses, traditional state tax administration was inefficient and costly to both State and taxpayer."[13] Thus, the goals of the Compact include facilitating and promoting equitable and uniform taxation of multistate taxpayers.[14] To this end, the

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[10] See 1953 PA 150. See also *Armco Steel Corp v Dep't of Revenue*, 359 Mich 430, 444; 102 NW2d 552 (1960) ("This tax is part of a general scheme of State taxation of business activities in Michigan. It is a tax on Michigan activities measured, in amount, by adjusted receipts derived from or attributable to Michigan sources . . . .").

[11] See MCL 206.61, as enacted by 1967 PA 281. The stated purpose of the ITA was "to meet deficiencies in state funds by providing for the imposition, levy, computation, collection, assessment, and enforcement by lien and otherwise of taxes on or measured by net income activities . . . ." Title, 1967 PA 281.

[12] 1969 PA 343. Section 1 of 1969 PA 343, codified under MCL 205.581, includes the mandatory provisions of the Compact that must be enacted for a state to become a member. See *US Steel Corp v Multistate Tax Comm*, 434 US 452, 455-456; 98 S Ct 799; 54 L Ed 2d 682 (1978).

[13] *US Steel Corp*, 434 US at 456.

[14] See MCL 205.581, Art I ("The purposes of this compact are to: (1) Facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment on tax bases and settlement of apportionment disputes[,] (2) Promote uniformity or compatibility in significant components of tax systems[,] (3)

Compact operates in conjunction with Michigan's tax acts, containing several provisions designed to ensure uniform taxation of multistate taxpayers.

In 1976, the Legislature replaced the corporate income tax with a single business tax.[15] Unlike its predecessor, the Single Business Tax Act (SBTA) taxed business activity, not income, and operated as "a form of value added tax."[16] In enacting the SBTA, the Legislature expressly amended the ITA to the extent necessary to implement the SBTA and expressly repealed provisions of the ITA that would conflict with the SBTA.[17] The Legislature, however, did not expressly repeal the Compact.[18]

The SBTA remained in effect until 2008, when the Legislature enacted the BTA, which is at issue in this case.[19] Representing another shift in business taxation, the BTA imposed two main taxes: the business income tax and the modified gross receipts tax.[20] In enacting the BTA, the Legislature expressly repealed the SBTA, but again did not expressly repeal the Compact.[21] However, the BTA was short-lived. Effective January 1, 2012, Michigan returned to a corporate income tax.[22] At the same time, the

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Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration[,] and (4) Avoid duplicative taxation.").

[15] See MCL 208.1 *et seq*., as enacted by 1975 PA 228.

[16] *Trinova Corp v Dep't of Treasury*, 433 Mich 141, 149; 445 NW2d 428 (1989).

[17] See 1975 PA 233.

[18] See *id*.

[19] 2007 PA 36; MCL 208.1101 *et seq*.

[20] See MCL 208.1201; MCL 208.1203.

[21] Enacting section 1 of 2006 PA 325 provides: "The single business tax act, 1975 PA 228, MCL 208.1 to 208.145, is repealed effective for tax years that begin after December 31, 2007."

[22] See 2011 PA 38.

Legislature stayed true to its past practice of repealing conflicting tax acts and expressly repealed the BTA.[23]

Throughout the evolution of our state's method of business taxation, the Compact has remained in effect. Another constant throughout this history is that the Legislature has always required a multistate taxpayer with business income or activity both within and without the state to apportion its tax base.[24] This process, known as formulary apportionment, has allowed Michigan to tax the portion of a taxpayer's multistate business carried on in Michigan without violating the Due Process Clause of the United States Constitution.[25] We now address whether a multistate taxpayer retained the privilege of electing the apportionment method provided by the Compact for the 2008 tax year.

IV. WHETHER IBM COULD ELECT TO USE THE COMPACT'S APPORTIONMENT FORMULA FOR ITS 2008 TAXES

To determine whether IBM could elect to use the Compact's three-factor apportionment formula to calculate its 2008 Michigan taxes, we must decide if the Legislature repealed the Compact's election provision by implication when it enacted the BTA.[26]

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[23] See 2011 PA 39, which reads in part:

> Enacting section 1. The Michigan business tax act, 2007 PA 36, MCL 208.1101 to 208.1601, is repealed effective on the date that the secretary of state receives a written notice from the department of treasury that the last certificated credit or any carryforward from that certificated credit has been claimed.
>
> Enacting section 2. This amendatory act does not take effect unless House Bill No. 4361 of the 96th Legislature is enacted into law.

[24] See MCL 205.553, as amended by 1954 PA 17; 1970 CL 206.115; 1979 CL 208.41; MCL 208.1301.

[25] *Malpass*, 494 Mich at 245-246.

[26] This is the principal argument offered by the Department in disallowing use of the Compact's apportionment formula. In the alternative,

A. LEGAL PRINCIPLES

We begin our analysis "with the axiom that repeals by implication are disfavored."[27] We will presume, "in most circumstances, that if the Legislature had intended to repeal a statute or statutory provision, it would have done so explicitly."[28] Nevertheless, "[w]hen the intention of the legislature is clear, repeal by implication may be accomplished by the enactment of a subsequent act inconsistent with a former act" or "by the occupancy of the entire field by a subsequent enactment."[29] However, "where the intent of the Legislature is claimed to be unclear, it is our duty to proceed on the assumption that the Legislature desired both statutes to continue in effect unless it manifestly appears that such view is not reasonably plausible."[30] Repeals by implication will be allowed "only when the inconsistency and repugnancy are plain and unavoidable."[31] We will "construe statutes, claimed to be in conflict, harmoniously" to find "*any other* reasonable

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the Department argues the Compact can be harmonized with the BTA by reading the Compact's election provision and apportionment formula into MCL 208.1309. We address this argument in note 55 of this opinion.

[27] *Wayne Co Pros v Dep't of Corrections*, 451 Mich 569, 576; 548 NW2d 900 (1996). The implied repeal doctrine has "remained stable over approximately four centuries of common law in the United Kingdom and then here in the United States." Markham, *The Supreme Court's New Implied Repeal Doctrine: Expanding Judicial Power to Rewrite Legislation under the Ballooning Conception of "Plain Repugnancy,"* 45 Gonz L Rev 437, 464 (2010). Lord Edward Coke recognized the implied repeal doctrine as far back as 1614. See *id*., p 456-458 (discussing Lord Coke's seminal case on the implied repeal doctrine—*Doctor Foster's Case*, 77 Eng Rep 1222 (KB, 1614)).

[28] *Wayne Co Pros*, 451 Mich at 576.

[29] *Washtenaw Co Rd Comm'rs v Pub Serv Comm*, 349 Mich 663, 680; 85 NW2d 134 (1957).

[30] *Wayne Co Pros*, 451 Mich at 577.

[31] *Tillotson v Saginaw*, 94 Mich 240, 244-245; 54 NW 162 (1892).

construction" than a repeal by implication.[32] Only when we determine that two statutes "are so incompatible that both cannot stand" will we find a repeal by implication.[33]

In attempting to find a harmonious construction of the statutes, we "will regard all statutes upon the same general subject-matter as part of one system . . . ."[34] Further, "[s]tatutes *in pari materia*, although in apparent conflict, should, so far as reasonably possible, be construed in harmony with each other, so as to give force and effect to each . . . ."[35] This Court has stated:

> It is a well-established rule that in the construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although they were enacted at different times, and contain no reference to one another. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature, or to discover how the policy of the legislature with reference to the subject-matter has been changed or modified from time to time. In other words, in determining the meaning of a particular statute, resort may be had to the established policy of the legislature as disclosed by a general course of legislation. With this purpose in view therefore it is proper to consider, not only acts passed at

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[32] *Wayne Co Pros*, 451 Mich at 576-577 (emphasis added; citations and quotation marks omitted).

[33] *Valentine v Redford Twp Supervisor*, 371 Mich 138, 144; 123 NW2d 227 (1963). As with any issue of statutory interpretation, our goal "is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Malpass*, 494 Mich at 247-248 (citation and quotation marks omitted).

[34] *Rathbun v Michigan*, 284 Mich 521, 544; 280 NW 35 (1938) (citation and quotation marks omitted).

[35] *Id.* (citation and quotation marks omitted).

> the same session of the legislature, but also acts passed at prior and subsequent sessions.[36]

In this case, the Compact's election provision and § 301 of the BTA share the common purpose of setting forth the methods of apportionment of a taxpayer's multistate business income; therefore, we must construe them together as statutes *in pari materia*.[37]

B. APPLICATION

With the history of Michigan business taxation and applicable legal principles in mind, we turn to the specific statutes at issue. IBM sought to apportion its BTA tax base using the Compact's three-factor apportionment formula.[38] In so doing, IBM relied on the Compact's election provision, which reads in pertinent part:

> (1) Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party state or pursuant to the laws of subdivisions in 2 or more party states may elect to apportion and allocate his income in the manner provided by the laws of such state or by the laws of such states and subdivisions without reference to this compact, or may elect to apportion and allocate in accordance with article IV . . . .[39]

This provision allows a taxpayer subject to an income tax to elect to use a party state's apportionment formula or the Compact's three-factor apportionment formula.

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[36] *Id*. at 543-544 (citation and quotation marks omitted).

[37] *Id*. at 543 ("Statutes *in pari materia* are those . . . which have a common purpose . . . .").

[38] MCL 205.581, Art IV(9) ("All business income shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is 3.").

[39] MCL 205.581, Art III(1).

However, the Department rejected IBM's attempts to apportion its income through the Compact's apportionment formula. Instead, it required IBM to apportion its BTA tax base consistently with the BTA and its sales-factor formula. Section 301 of the BTA reads as follows:

> (1) Except as otherwise provided in this act, each tax base established under this act shall be apportioned in accordance with this chapter.
>
> (2) Each tax base of a taxpayer whose business activities are confined solely to this state shall be allocated to this state. Each tax base of a taxpayer whose business activities are subject to tax both within and outside of this state shall be apportioned to this state by multiplying each tax base by the sales factor calculated under section 303.[40]

We recognize that the language of the BTA is mandatory in nature.[41] Under the statute, a taxpayer's BTA tax base must be apportioned through the BTA's sales-factor apportionment formula.[42] The Department argues that this mandatory language precludes the use of any other apportionment formula and, reading it in isolation, we would agree. However, as stated previously, § 301 of the BTA is not the only provision of Michigan's tax laws pertaining to the apportionment of business income—the Compact's election provision shares the same purpose. Therefore, we cannot interpret § 301 of the BTA in a vacuum.[43] Rather, we must

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[40] MCL 208.1301.

[41] See *Fradco v Dep't of Treasury*, 495 Mich 104, 114; 845 NW2d 81 (2014) ("The Legislature's use of the word 'shall' . . . indicates a mandatory and imperative directive.").

[42] MCL 208.1301(1).

[43] See also *People v Stephan*, 241 Mich App 482, 497; 616 NW2d 188 (2000) (recognizing that interpreting the unambiguous language of two conflicting statutes does not end the analysis because "courts do not construe individual statutes in a vacuum" but rather construe statutes together under the doctrine of *in pari materia*).

consider it along with the Compact "by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature."[44]

The BTA is not the first Michigan business tax act to contain a mandatory apportionment formula. All our past business tax acts mandated that a taxpayer with income or activity that was taxable within and without the state allocate and apportion its tax base consistently with each respective act.[45] These acts further mandated that the tax base be apportioned through a specific apportionment formula.[46] The mandatory apportionment language of the BTA is nearly identical to the language of its predecessors.

The Department argues that the Legislature repealed the Compact's election provision when it enacted

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[44] *Rathbun*, 284 Mich at 543-544 (stating further that courts " 'will regard all statutes upon the same general subject matter as part of one system' ") (citation omitted).

[45] See MCL 205.552, as amended by 1954 PA 17 (providing that "[t]he adjusted receipts of a taxpayer derived from or attributable to Michigan sources shall be determined in accordance with the provisions of section 3 of this act"); 1970 CL 206.103 (providing that "[a]ny taxpayer having income from business activity which is taxable both within and without this state . . . shall allocate and apportion his net income as provided in this act"); 1979 CL 208.41 (providing that "[a] taxpayer whose business activities are taxable both within and without this state, shall apportion his tax base as provided in this chapter").

[46] See MCL 205.553(b), as amended by 1954 PA 17 (requiring that a taxpayer with adjusted receipts attributable to activity within and without Michigan apportion the receipts consistent with a three-factor formula); 1970 CL 206.115 (requiring that "[a]ll business income . . . shall be apportioned to this state" through the standard three-factor apportionment formula); 1979 CL 208.45 (requiring that "[a]ll of the tax base . . . shall be apportioned to this state" through the three-factor apportionment formula). In 1991, the Legislature began to phase out the SBTA's equally weighted, three-factor apportionment formula, requiring a progressively more sales-factor-focused apportionment formula. See MCL 208.45, as amended by 1991 PA 77. However, the new apportionment formula was still mandatory.

the BTA because § 301 of the BTA is the first tax provision with apportionment language directly in conflict with the Compact's election provision. The import of this argument is that the Compact's election provision was a dead letter when it was enacted because both the ITA and the election provision required use of the same three-factor apportionment formula. However, the Department's argument overlooks that the Compact's election provision, by using the terms "may elect," contemplates a divergence between a party state's mandated apportionment formula and the Compact's own formula—either at the time of the Compact's adoption by a party state or at some point in the future.[47] Otherwise, there would be no point in giving taxpayers an election between the two. In fact, reading the Compact's election provision as forward-looking—i.e., contemplating the future enactment of a state income tax with a mandatory apportionment formula different from the Compact's apportionment formula—is the only way to give meaning to the provision when it was enacted in Michigan.[48] Viewed in this light, the BTA's mandatory apportionment language may plausibly be read as compatible with the Compact's election provision.

Moreover, our review of the statutes *in pari materia* indicates a uniform and consistent purpose of the Legislature for the Compact's election provision to operate alongside Michigan's tax acts.[49] Just as it did

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[47] MCL 205.581, Art III(1). See also *Black's Law Dictionary* (9th ed) (defining an "election" as "[t]he exercise of a choice; esp., the act of choosing from several possible rights or remedies in a way that precludes the use of other rights or remedies").

[48] See *Moore v Fennvile Pub Schs Bd of Ed*, 223 Mich App 196, 201; 566 NW2d 31 (1997) ("It is the duty of the courts to interpret statutes so as to render no provision meaningless.").

[49] *Rathbun*, 284 Mich at 543-544.

when it enacted the ITA,[50] the Legislature, in enacting the BTA, had full knowledge of the Compact and its provisions.[51] Even with such knowledge on both occasions, the Legislature left the Compact's election provision intact. By contrast, the Legislature expressly repealed or amended other inconsistent acts regarding the taxation of businesses.[52] Had the Legislature believed that the Compact's election provision no longer had a place in Michigan's tax system or conflicted with the purpose of the BTA, it could have taken the necessary action to eliminate the election provision.

Because the Legislature gave no clear indication that it intended to repeal the Compact's election provision, we proceed under the assumption that the Legislature intended for both to remain in effect.[53] After reading the statutes *in pari materia*, we conclude that a reasonable construction exists other than a repeal by implication.[54] Under Article III(1) of the Compact, the Legislature provided a multistate taxpayer with a choice between the apportionment method contained in the Compact or the apportionment method required by Michigan's tax laws. If a taxpayer elects to apportion its income through the Compact, Article IV(9) mandates that the

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[50] Although the ITA's apportionment method is largely consistent with the Compact's apportionment method, caselaw during the period in which both were in effect reflects some potential for inconsistency. See *Consumers Power Co v Dep't of Treasury*, 235 Mich App 380, 386 n 6; 597 NW2d 274 (1999) (discussing definitional differences between the ITA and the Compact); *Chocola v Dep't of Treasury*, 132 Mich App 820, 831; 348 NW2d 290 (1984); *Donovan Const Co v Dep't of Treasury*, 126 Mich App 11; 337 NW2d 297 (1983).

[51] *In re Reynolds Estate*, 274 Mich 354, 362; 264 NW 399 (1936) ("The Legislature, in passing [a new act], is presumed to have done so with a full knowledge of existing statutes.").

[52] See notes 21 and 23 of this opinion.

[53] See *Wayne Co Pros*, 451 Mich at 577.

[54] *Id*. at 576-577.

taxpayer do so using a three-factor apportionment formula. Alternatively, if the taxpayer does not make the Compact election, then the taxpayer must use the apportionment formula set forth in Michigan's governing tax laws. In this case, IBM's tax base arose under the BTA. Had it not elected to use the Compact's apportionment formula, IBM would have been required to apportion its tax base consistently with the mandatory language of the BTA—i.e., through the BTA's sales-factor apportionment formula.[55] Thus, we believe the BTA and the Compact are compatible and can be read as a harmonious whole.

Subsequent action by the Legislature indicates that it did not impliedly repeal the Compact's election provision when it enacted the BTA.[56] On May 25, 2011, the Legislature expressly amended the Compact's election provision by adding the following language:

> [E]xcept that *beginning January 1, 2011* any taxpayer subject to the Michigan business tax act, 2007 PA 36, MCL 208.1101 to 208.1601, or the income tax act of 1967, 1967 PA 281, MCL 206.1 to 206.697, shall, for purposes of that act, apportion and allocate in accordance with the provi-

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[55] Despite the above framework, the Department argues that if the BTA and the Compact can be harmonized, it is only through MCL 208.1309(1), which allows a taxpayer to petition to use another apportionment method. We disagree. The Department's "harmonization" would actually be an abrogation of the election provision. Section 309 requires that a taxpayer *petition* the Department for another apportionment method and prove that the BTA's apportionment provision does not fairly represent the taxpayer's business activity in the state. Thus, the Department's interpretation takes the choice out of the taxpayer's hands and is inconsistent with the plain language of the Compact. Therefore, we decline to accept the Department's proposed harmonization.

[56] See *Baxter v Robertson*, 57 Mich 127, 132; 23 NW 711 (1885) ("Legislative construction of past legislation . . . is always entitled to be considered with some care, so far as it throws light on doubtful language . . . .").

> sions of that act and shall not apportion or allocate in accordance with article IV.[57]

There is no dispute that the Legislature specifically intended to retroactively repeal the Compact's election provision for taxpayers subject to the BTA beginning January 1, 2011. The Legislature could have—but did not—extend this retroactive repeal to the start date of the BTA. In addressing this legislation, the dissent suggests that "the 2011 Legislature may have simply been acting expressly to confirm what the 2007 Legislature believed it had already done implicitly."[58] We would agree with that conclusion if the Legislature had retroactively repealed the Compact's election provision beginning January 1, 2008, the effective date of the BTA. However, by only repealing the Compact's election provision starting January 1, 2011, the Legislature created a window in which it did not expressly preclude use of the Compact's election provision for BTA taxpayers. Further, we believe that the express repeal of the Compact's election provision effective January 1, 2011, is evidence that the Legislature had not impliedly repealed the provision when it enacted the BTA.[59] Therefore, a review of the 2011 amendments supports our conclusion that the Compact's election provision remained in effect for the 2008 tax year.

C. RESPONSE TO THE DISSENT

The dissent's analysis has a tantalizing simplicity to it. It homes in on the plain language and mandatory

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[57] 2011 PA 40 (emphasis added).

[58] *Post* at 675.

[59] See 1A Singer, Sutherland Statutory Construction (7th ed), § 23:11, p 485 ("[T]he later express repeal of a particular statute may be some indication that the legislature did not previously intend to repeal the statute by implication.").

nature of the BTA's apportionment provision. However, the dissent spends very little time considering the language of the Compact, its history, or the history of business taxation in Michigan. While this approach may be proper in construing the BTA in a typical case, it is incomplete when we are faced with the question of implied repeal. Under such circumstances, that the dissent has arrived at the better or even the best interpretation *of the BTA* does not end the inquiry. Rather, because there is a presumption *against* implied repeals,[60] it is our task to determine if there is *any other reasonable construction* that would harmonize the two statutes and avoid a repeal by implication.[61]

Repeals by implication are rare, and properly so, given that we will presume under most circumstances that "if the Legislature had intended to repeal a statute or statutory provision, it would have done so explicitly."[62] They are even more unlikely in the realm of our state's taxation laws.[63] This certainly creates a very

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[60] See *Jackson v Mich Corrections Comm*, 313 Mich 352, 356; 21 NW2d 159 (1946).

[61] *Wayne Co Pros*, 451 Mich at 576-577 (emphasis added). See also *Rathbun*, 284 Mich at 544-545 (If we "can by *any fair, strict, or liberal construction* find for the two provisions a reasonable field of operation, without destroying their evident intent and meaning, preserving the force of both, and construing them together in harmony with the whole course of legislation upon the subject, it is [our] duty to do so.") (emphasis added).

[62] *Wayne Co Pros*, 451 Mich at 576. See also *Matsushita Elec Indus Co v Epstein*, 516 US 367, 381; 116 S Ct 873; 134 L Ed 2d 6 (1996) ("The rarity with which we have discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an 'irreconcilable conflict' between the two federal statutes at issue.").

[63] 1A Singer, Sutherland Statutory Construction (7th ed), § 23:10, p 484, citing *Sylk v United States*, 331 F Supp 661, 665 (ED Pa, 1971) ("On subjects to which the legislature pays continuous, close attention, such as internal revenue laws, the presumption against implied repeal may have greater force.").

high bar, but we disagree with the dissent that we have made it absolute. Rather, by using the applicable canons of construction and faithfully applying our precedents in this area, we have arrived at a reasonable construction that harmonizes the BTA and the Compact.[64]

The dissent agrees that "every attempt" must be made to construe the BTA and the Compact harmoniously. But, in the end, the dissent fails to heed this call. Instead, because of its rigid focus on the mandatory language of the BTA—to the exclusion of the language and history of the Compact, and its place in Michigan's taxation scheme—the dissent's analysis is at odds with our longstanding implied-repeal jurisprudence.

D. CONCLUSION AS TO THE ISSUE OF IMPLIED REPEAL

In sum, because we are able to harmonize the BTA and the Compact's election provision, we conclude that the statutes are not " 'so incompatible that both cannot stand.' "[65] We believe that our interpretation allows the Compact's election provision to serve its purpose of providing uniformity to multistate taxpayers in light of Michigan's enactment of an apportionment formula different from the Compact's formula. Any conflict apparent from a first reading of these statutes is reconcilable when the statutes are read *in pari materia*.[66] Therefore, the Department has failed to overcome

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[64] Contrary to the dissent's suggestion, the question is not whether the 2008 Legislature could disregard a policy choice by the 1970 Legislature—obviously it could—but instead what action it must take to make its intentions clear in the absence of express repealing language in the statute.

[65] *Valentine*, 371 Mich at 144 (citation omitted).

[66] The Department also cannot show that the Legislature intended to occupy the entire field covered by the Compact when it enacted the BTA to establish a repeal by implication. *Washtenaw Co Rd Comm'rs*, 349 Mich at 680. The BTA and the Compact, while having some overlapping

the presumption against repeals by implication. Accordingly, the Court of Appeals erred by holding that the Legislature repealed the Compact's election provision by implication when it enacted the BTA. Instead, we hold that the Compact's election provision was available to IBM for the 2008 tax year.[67]

V. WHETHER THE MODIFIED GROSS RECEIPTS TAX IS AN INCOME TAX UNDER THE COMPACT

Having determined that IBM could elect to use the Compact's apportionment formula for the 2008 tax year, we must next consider whether IBM could apportion its entire BTA tax base through the Compact's apportionment formula. IBM's 2008 BTA tax base contained two components: the business income tax base and the modified gross receipts tax (MGRT) base. The parties quarrel over whether both components may be apportioned under the Compact. The Compact election is available to "[a]ny taxpayer subject to an income tax."[68] While it is undisputed that the business income tax is an income tax, the Department argues that the

provisions, occupy two different fields. The BTA is a stand-alone tax act that governs the taxation of businesses. The Compact acts as an overlay to Michigan's taxation system. It is specifically designed to leave the member states with "complete control over all legislation and administrative action affecting the rate of tax, the composition of the tax base . . . , and the means and methods of determining tax liability and collecting any taxes determined to be due." *US Steel Corp*, 434 US at 457.

[67] Because we are able to harmonize the statutes and conclude that no repeal by implication occurred, we decline to discuss whether the Compact is binding and, thus, whether the Legislature even could repeal the Compact by implication. That inquiry involves constitutional issues, which we will not reach because they are unnecessary to resolve the case. See *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993) ("In addition, there exists a general presumption by this Court that we will not reach constitutional issues that are not necessary to resolve a case.").

[68] MCL 205.581, Art III(1).

MGRT is not an income tax, but rather a gross receipts tax not subject to the Compact's election provision. Therefore, we must determine whether the MGRT is an income tax under the Compact and, thus, apportionable under the Compact's three-factor apportionment formula.

The Compact defines "income tax" as follows:

> [A] tax imposed on or measured by net income including any tax imposed on or measured by an amount arrived at by deducting expenses from gross income, 1 or more forms of which expenses are not specifically and directly related to particular transactions.[69]

Under the Compact's broad definition, a tax is an income tax if the tax measures net income by subtracting expenses from gross income, with at least one of the expense deductions not being specifically and directly related to a particular transaction.[70]

"Modified gross receipts tax" is not defined by the BTA, but MCL 208.1203(2) states, "[The MGRT] levied and imposed under this section is upon the privilege of

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[69] MCL 205.581, Art II(4). The Compact also defines "gross receipts tax" in Art II(6) as follows:

> [A] tax, other than a sales tax, which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which no deduction is allowed which would constitute the tax an income tax.

[70] We need not put a definitive label on the MGRT, a task with which commentators have struggled. See, e.g., McIntyre & Pomp, *A Policy Analysis of Michigan's Mislabeled Gross Receipts Tax*, 53 Wayne L Rev 1283 (2007) (concluding that the MGRT is akin to a sales-subtraction value added tax but that it is not a transactional tax); Gandhi, *Computing the Tax Base: The Michigan Business Tax*, 53 Wayne L Rev 1369 (2007) (concluding that the MGRT is a reverse-build of Michigan's now-repealed Single Business Tax); Grob & Roberts, *The Michigan Business Tax Replaces the State's Much-Vilified SBT*, 17-Oct J Multistate Tax'n & Incentives 8 (2007) (concluding that the MGRT is something between a gross receipts tax and a gross margin tax). Instead, we are only tasked with determining whether the MGRT qualifies as an income tax under the Compact.

doing business and not upon income or property." Although this statement indicates that the MGRT is not a tax upon income under the BTA, we must still determine whether the MGRT fits under the broad definition of "income tax" under the Compact.

The MGRT base is "a taxpayer's gross receipts . . . less purchases from other firms . . . ."[71] The BTA defines "gross receipts" as

> the entire amount received by the taxpayer as determined by using the taxpayer's method of accounting used for federal income tax purposes, less any amount deducted as bad debt for federal income tax purposes that corresponds to items of gross receipts . . . , from any activity whether in intrastate, interstate, or foreign commerce carried on for direct or indirect gain, benefit, or advantage to the taxpayer or to others . . . .[72]

Not only is the gross receipts amount reduced by numerous exclusions, it is also subject to a deduction for the "amount deducted as bad debt for federal income tax purposes that corresponds to items of gross receipts included in the modified gross receipts tax base."[73] This total—the entire amount received by the taxpayer from any activity minus the bad-debt deduction and the numerous exclusions under MCL 208.1111—is the gross receipts base from which the MGRT liability originates.

After the taxpayer determines its gross receipts through the above calculation, the taxpayer then reduces the gross receipts base by "purchases from other firms."[74] The "purchases from other firms" deductions include, among other things, "inventory acquired dur-

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[71] MCL 208.1203(3).

[72] MCL 208.1111(1).

[73] *Id*.

[74] MCL 208.1203(3).

ing the tax year, including freight, shipping, delivery, or engineering charges included in the original contract price"; "assets . . . acquired during the tax year of a type that are, or under the internal revenue code will become, eligible for depreciation, amortization, or accelerated capital cost recovery for federal income tax purposes"; and materials and supplies to the extent not included in inventory or depreciable property.[75] There are also deductions for compensation paid in certain industries and for payments to independent contractors.[76] Once gross receipts is reduced by any applicable deductions, the taxpayer arrives at its MGRT base, which is then subject to the MGRT at a rate of .80 percent after allocation or apportionment to this state.[77]

Having examined how a taxpayer's MGRT base is calculated, we now turn to the question whether the MGRT fits within the Compact's definition of "income tax." For the MGRT to be an income tax under the Compact, a tax must measure net income by starting with gross income and subtracting expenses, with at least one of the expense deductions not specifically and directly related to a particular transaction.[78] The Compact and the BTA do not define "gross income." Therefore, we look elsewhere to determine what normally constitutes gross income. The Internal Revenue Code defines "gross income" as "all income from whatever source derived" and includes a nonexclusive list of items that includes things such as "gross income de-

[75] MCL 208.1113(6)(a) through (c). "Inventory" is defined as "[t]he stock of goods held for resale in the regular course of trade of a retail or wholesale business" and "[f]inished goods, goods in process, and raw materials of a manufacturing business purchased from another person." MCL 208.1111(4)(a) and (b).

[76] MCL 208.1113(6)(d) through (g).

[77] MCL 208.1203(1).

[78] MCL 205.581, Art II(4).

rived from business" and "gains derived from dealings in property."[79] 26 CFR § 1.61-1 provides that "[g]ross income includes income realized in any form, whether in money, property, or services." 26 CFR § 1.61-3 further provides that gross income for manufacturing, merchandising, or mining businesses is "the total sales, less the cost of goods sold, plus any income from investments and from incidental or outside operations or sources." Moreover, *Black's Law Dictionary* states that gross income means "[t]otal income from all sources before deductions, exemptions, or other tax reductions."[80]

These definitions of gross income are similar to the definition of gross receipts under the BTA—the entire amount received by the taxpayer as determined from any gainful activity. Like gross income under the Internal Revenue Code, gross receipts are subject to myriad exclusions and deductions. Notably, gross receipts are subject to a reduction for the purchase of inventory during the tax year, including freight, shipping, delivery, or engineering charges included in the original contract price. This is similar to the IRS's definition of "gross income" for manufacturing, merchandising, or mining businesses—total sales less the cost of goods sold.[81] In addition, several of these exclusions or deductions are not specifically and directly related to particular transactions.[82] Depreciable

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[79] 26 USC 61.

[80] *Black's Law Dictionary* (9th ed), p 831.

[81] "Cost of goods sold" is determined by a taxpayer's inventory. See 33A Am Jur 2d, Federal Taxation, § 6500 ("A taxpayer must use inventories to determine the cost of goods sold if the production, purchase, or sale of merchandise is an income-producing factor."). See also *Thor Power Tool Co v Comm'r of Internal Revenue*, 439 US 522, 530 n 9; 99 S Ct 773; 58 L Ed 2d 785 (1979); *Hygienic Prods Co v Comm'r of Internal Revenue*, 111 F2d 330, 331 (CA 6, 1940).

[82] While the Compact does not define the phrase "not specifically and directly related to particular transactions," the use of the words "specifi-

assets can be assets used over a certain number of years and, thus, not related to a single transaction.[83] Materials and supplies purchased during a tax year can be used at any time for the operation of a business and for any amount of transactions. Finally, the purchase of inventory, which includes such things as goods held for resale or raw materials, some of which can stay in a taxpayer's warehouse for an indeterminate amount of time, can be an expense not specifically or directly related to a particular transaction.[84]

We hold that the MGRT fits within the broad definition of "income tax" under the Compact by taxing a variation of net income—the entire amount received by the taxpayer as determined from any gainful activity minus inventory and certain other deductions that are expenses not specifically and directly related to a particular transaction. Therefore, IBM could elect to use the Compact's apportionment formula for that portion of its tax base subject to the MGRT for the 2008 tax year.[85]

VI. CONCLUSION

We conclude that Court of Appeals erred by holding that the BTA repealed the Compact's election provision by implication. Therefore, IBM could elect to use the Compact's apportionment formula during the 2008 tax

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cally," "directly," and "particular" connotes a close relation to an individual transaction. See *Random House Webster's College Dictionary* (2001). That is, the tax cannot be a tax focusing on specific transactions, i.e., a transactional tax.

[83] See 26 USC 167, 168.

[84] MCL 208.1111(4)(a), (b).

[85] Our holding is limited to the determination that the MGRT is included within the Compact definition of "income tax." As noted earlier in note 70, we do not need to reach the issue whether the MGRT, generally, is an income tax.

year. We further hold that IBM could use the Compact's apportionment formula to apportion its MGRT base under the BTA. Accordingly, we reverse the Court of Appeals' judgment in favor of the Department, reverse the Court of Claims' order granting summary disposition in favor of the Department, and remand to the Court of Claims for entry of an order granting summary disposition in favor of IBM.

CAVANAGH and MARKMAN, JJ., concurred with VIVIANO, J.

ZAHRA, J. (*concurring*). I agree with the lead opinion's holding that IBM was entitled to use the Compact's elective three-factor apportionment and allocation formula for its 2008 Michigan taxes. I also agree with both the lead opinion and the dissenting opinion that the tax bases at issue here are "income taxes" within the meaning of the Compact. Whether the Legislature repealed the Compact's election provision by implication when it enacted the BTA is a very close question. I would not reach that question because the Legislature made clear that taxpayers are entitled to use the Compact's election provision for the 2008, 2009, and 2010 tax years.

Assuming that the Legislature impliedly repealed the Compact's election provision in 2008 by enacting the BTA, IBM could nonetheless avail itself of the Compact's election provision for tax years 2008 through 2010 because the Legislature, in 2011, clearly intended to provide multistate taxpayers the benefit of the Compact's election provision for these tax years. Specifically, on May 25, 2011, the Legislature necessarily *re-enacted* all the provisions of the Compact, and ordered that act to take immediate effect.[1] MCL 8.3u provides that

[1] 2011 PA 40.

> [t]he provisions of any law or statute which is re-enacted, amended or revised, so far as they are the same as those of prior laws, shall be construed as a continuation of such laws and not as new enactments. If any provision of a law is repealed and in substance re-enacted, a reference in any other law to the repealed provision shall be deemed a reference to the re-enacted provision.

Pursuant to this provision, we must construe the Compact as though it had not been impliedly repealed.[2]

That said, the BTA's exclusive apportionment method remains in conflict with the election provision of the Compact. This conflict, in my view, is easily resolved because the Legislature in 2011 also expressly supplemented the Compact. This new provision is not "the same as those of prior laws" and is a "new enactment," which expressly provides that a taxpayer could elect to apportion its income under article IV of the Compact

> except that beginning January 1, 2011 any taxpayer subject to the Michigan business tax act, 2007 PA 36, MCL 208.1101 to 208.1601, or the income tax act of 1967, 1967 PA 281, MCL 206.1 to 206.697, shall, for purposes of that act, apportion and allocate in accordance with the provisions of that act and shall not apportion or allocate in accordance with article IV.[3]

There can be no dispute given this language that the Legislature specifically intended to retroactively repeal the Compact's election provision beginning January 1, 2011. Further, I conclude that this language contemplates that any taxpayer could avail itself of the Compact's election provision for tax years 2008 through 2010. This is because the Legislature, either under the

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[2] See also 1A Singer, Sutherland Statutory Construction (7th ed), Repeal and Reenactment, § 23:29.

[3] 2011 PA 40.

original enactment of the Compact[4] (assuming the Legislature did not repeal the Compact's election provision by implication when it enacted the BTA) or under the above re-enactment and supplementation of the Compact[5] (assuming the Legislature repealed the Compact's election provision by implication when it enacted the BTA), chose to commence its express repeal of the Compact's election provision on January 1, 2011, even though the conflict between the BTA and the Compact had existed from the 2008 tax year. Simply put, the contrapositive of the Compact's supplemental provision must mean that before January 1, 2011, a taxpayer could, "for purposes of that act [the ITA or the BTA], apportion and allocate in accordance with the provisions of [the ITA or the BTA] and [may] apportion or allocate in accordance with article IV" of the Compact. This is, in my opinion, the most reasonable understanding of this legislation.

In sum, the Legislature in 2011 *created* a window in which it intended the Compact's election provision to apply. In this case, IBM sought to "apportion and allocate" its taxes under the BTA well before January 1, 2011, and therefore may apportion or allocate its taxes in accordance with article IV of the Compact. For this reason, I concur in the result reached in the lead opinion.

MCCORMACK, J. (*dissenting*). I respectfully dissent because I conclude that the Michigan Business Tax Act (BTA), MCL 208.1101 *et seq*., requires taxpayers to apportion their multistate income in accordance with the BTA's sales-only apportionment formula and without resort to the Multistate Tax Compact's election provision. I reach this result because the Legislature's

[4] 1969 PA 343.

[5] 2011 PA 40.

command—"each tax base established under this act *shall be apportioned in accordance with this chapter*," MCL 208.1301(1) (emphasis added)—is plain, unambiguous, and permits only one interpretation. Further, there is no constitutional barrier that prevents the Legislature from making the Compact's alternative election provision unavailable to taxpayers. I would affirm the judgment of the Court of Appeals.

I. AN IRRECONCILABLE CONFLICT OF STATUTES

The threshold issue is, at its core, one of statutory interpretation. When the language of a statute is unambiguous, we give effect to its plain meaning. *Ter Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014). It is hard to imagine a more unambiguous command than the mandatory directive found in § 301 of the BTA: "Except as otherwise provided in this act, each tax base established under this act shall be apportioned in accordance with this chapter." MCL 208.1301(1). There is no "otherwise provided" exception in the BTA that would aid IBM in its attempt to avoid the statute's sales-only apportionment requirement. And, within Chapter 208 of the Michigan Compiled Laws, it is the BTA alone that provides the formula by which taxpayers are to apportion their multistate income. See MCL 208.1301(2); MCL 208.1303(1). Neither the Compact nor its apportionment provisions are referred to anywhere in the BTA.

I share the lead opinion's view that we must make every attempt "to construe statutes, claimed to be in conflict, harmoniously[.]" *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 577; 548 NW2d 900 (1996).[1] When later enacted legislation irreconcilably

[1] The lead opinion implies that if the Compact is found to irreconcilably conflict with the BTA, the Compact, as the earlier enacted statute, will necessarily have been repealed by implication. Our caselaw does not

conflicts with a prior act, however, "the last expression of the legislative will must control." *Jackson v Mich Corrections Comm*, 313 Mich 352, 356; 21 NW2d 159 (1946).

Section 301(1) of the BTA directs that taxes established under the BTA be apportioned "in accordance with this chapter." "[T]his chapter" requires taxpayers to use a sales-only apportionment formula.[2] The Compact, however, provides that "[a]ny taxpayer subject to an income tax[3] . . . may elect to apportion" its income in accordance with the Compact's three-factor apportionment formula. MCL 205.581, Art III(1). Reading these provisions side by side, I see two, and only two, possible results: either taxes established under the BTA need not be apportioned "in accordance with this chapter," as § 301 demands, or taxpayers may not elect to use the Compact formula to apportion tax bases established under the BTA. While I agree with the lead opinion that statutes that appear to be conflict should be read together and reconciled, if reasonably possible, *Rathbun v State of Michigan*, 284 Mich 521, 544; 280 NW 35 (1938), I disagree that this is a case where reconciliation is possible. The differing opinions offered

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demand such a result. See *Metro Life Ins Co v Stoll*, 276 Mich 637, 641; 268 NW 763 (1936) ("It is the rule that where two laws *in pari materia* are in irreconcilable conflict, the one last enacted will control or be regarded as an exception to or qualification of the prior statute.") In any event, regardless of whether the BTA impliedly repealed the Compact beginning January 1, 2008, the issue remains the same—whether the Compact election was available for tax years 2008 through 2010.

[2] Taxpayers may petition the Treasury to use an alternative apportionment method if the apportionment provisions of the BTA "do not fairly represent the extent of the taxpayer's business activity in this state[.]" MCL 208.1309(1).

[3] I agree with the lead opinion that the tax bases at issue here are "income taxes" within the meaning of the Compact. MCL 205.581, Art II(4).

by this Court here make the underlying conflict undeniably plain. The Compact and the BTA are irreconcilably in conflict; one statute—either the Compact or the BTA—must prevail over the other. And neither alternative is easily dismissed. Traditional rules of construction lead me to resolve the conflict in favor of the later enacted and more specific legislation. See *Kalamazoo v KTS Indus, Inc*, 263 Mich App 23, 38-39; 687 NW2d 319 (2004) (resolving a direct conflict between two statutes in favor of the subsequently enacted legislation).

The lead opinion agrees that the plain language of § 301 is mandatory. But it asserts that § 301 can nevertheless be interpreted as permitting taxpayers to make the Compact election. I do not see how this interpretation of the BTA is reasonable. If a taxpayer can elect an alternative apportionment formula, then § 301 is in no sense *mandatory*. Quite the opposite: § 301's mandatory apportionment "in accordance with this chapter" becomes *optional*. By interpreting § 301 as permitting taxpayers to make the Compact election, the lead opinion has not, as it claims, settled on a harmonious construction of the BTA and the Compact. Rather, it has resolved the conflict in favor of the Compact, the *earlier* enacted statute. But our precedent is clear: when an irreconcilable conflict exists, as in this case, the later enacted legislation controls. *Jackson*, 313 Mich at 356; see also *Washtenaw Co Rd Comm'rs v Pub Serv Comm*, 349 Mich 663, 680; 85 NW2d 134 (1957). Because I am not convinced that the two statutes can be read harmoniously, I believe that, for tax years 2008 through 2010, the enactment of the BTA impliedly repealed the Compact's election provision.

The lead opinion tries to give some effect to § 301 by stating that a taxpayer "must use the apportionment formula set forth in" the BTA if it does not make the

Compact election. *Ante* at 658. This construction does not make § 301's mandatory directive "mandatory" at all. When a taxpayer is given a choice as to whether they will apportion their income in accordance with the BTA's sales-only formula, the number of alternative options—a single one, or more—is irrelevant. As long as an alternative option exists, the taxpayer may, not must, use the apportionment formula set forth in the BTA. And once the lead opinion's "mandatory" construction is revealed to be anything but that, I do not believe that the lead opinion has persuasively explained *why* the BTA did not impliedly amend or repeal the Compact's election provision. Rather, the lead opinion, relying on the fact that the Legislature has expressly repealed and amended tax statutes in the past, simply states that "[h]ad the Legislature believed that the Compact's election provision no longer had a place in Michigan's tax system . . . , it could have taken the necessary action to eliminate the election provision." *Ante* at 657. Because it did not, the lead opinion "proceed[s] under the assumption that the Legislature intended for [the Compact's election provision] to remain in effect." *Ante* at 657. This, of course, simply assumes the lead opinion's conclusion that there was no repeal. Yes, repeals by implication are disfavored, and that the Legislature knows how to effect an express repeal is irrefutable. But by demanding that the Legislature take "the necessary action"—i.e., *expressly* amend or repeal the Compact—the lead opinion has elevated the presumption against implied repeals into an absolute bar.

Having failed to adequately explain why the statutory language itself permits the result it reaches, the lead opinion anchors its analysis in a historical overview of business taxation in Michigan. While informative, I find this approach ultimately unpersuasive. The lead opinion argues that because the Compact was enacted at a time when Michigan law applied the same three-factor appor-

tionment formula as that provided in the Compact, the Legislature, in enacting it, must have anticipated the future enactment of a tax act requiring a different apportionment formula and intended for the Compact to prevail should a conflict arise. But even assuming that the lead opinion is correct, that interpretation reads into the Compact a policy choice by the *1970* Legislature that the *2008* Legislature was free to disagree with, either by enacting an income tax with a different, mandatory apportionment formula, as it did in 2008, or by repealing the election provision outright, as it did in 2011. See *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 661; 698 NW2d 350 (2005) ("[A] fundamental principle of the jurisprudence of both the United States and this state is that one legislature cannot bind the power of a successive legislature.").

The lead opinion underscores its error by attaching particular significance to 2011 PA 40, which expressly amended the Compact to make the election unavailable to BTA taxpayers beginning January 1, 2011. The effect of this amendment on tax years 2011 and beyond is plain to see, but whether the amendment lends force to IBM's position in *this* dispute is not. In enacting this amendment, the 2011 Legislature may have simply been acting expressly to confirm what the 2007 Legislature believed it had already done implicitly. And even if the 2011 Legislature was expressing its view that the BTA did not, in fact, repeal the election provision, this Court is not bound by the prior Legislature's construction of the earlier enactment. See *Robertson v Baxter*, 57 Mich 127, 132; 23 NW 711 (1885) ("Legislative construction of past legislation has no judicial force except for the future. But it is always entitled to be considered with some care, so far as it throws light on doubtful language, and for future cases it has authority."); *Frey v Mitchie*, 68 Mich 323, 327; 36 NW 184 (1888) ("It is unnecessary to say more than that a

legislative interpretation of old laws has no judicial force. Whether right or wrong must be determined by the statutes themselves."). The question we must answer in this case concerns what the Legislature intended when it enacted the BTA—not what it intended when it enacted the Compact forty years earlier or amended it three years later. While in answering this question the 2011 amendment may be considered "with some care, so far as it throws light on doubtful language," *Baxter*, 57 Mich at 132, that light does not shine on the lead opinion's argument.

In my view the BTA made the Compact election unavailable. Because the statutes are irreconcilably in conflict, the latter, as the more specific and later enacted statute, must be given effect over the former. For this reason, I disagree with the lead opinion that the BTA's mandatory directive can be interpreted so as to allow BTA taxpayers to make the Compact election instead. As a result, I find it necessary to address IBM's argument that the Legislature was not constitutionally permitted to make the BTA's sales-only apportionment formula exclusive and mandatory without first repealing the Compact in its entirety.

II. THE LEGISLATURE WAS NOT BARRED FROM UNILATERALLY AMENDING THE COMPACT

IBM asks this Court to invoke the authority of "compact law" and hold that the Legislature, even had it intended to alter the Compact's election provision when it enacted the BTA, was prohibited from doing so.[4] I would decline that invitation.

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[4] To the extent that IBM is separately arguing that the Compact is a binding contract among its member states and that unilateral amendment of the Compact offends the Contract Clause, that argument is discussed later in this opinion.

The United States Constitution provides that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement of Compact with another State[.]" US Const, art I, § 10, cl 3. As the Supreme Court explained in *US Steel Corp v Multistate Tax Comm*, 434 US 452; 98 S Ct 799; 54 L Ed 2d 682 (1978), the clause is not to be read strictly, but only as requiring congressional consent for compacts that tend to increase the political power of the states in a way that "may encroach upon or interfere with the just supremacy of the United States." *Id*. at 471 (quotation marks and citation omitted). Those compacts that receive congressional authorization *and* fall within the scope of the Compact Clause are treated as federal law. *Cuyler v Adams*, 449 US 433, 440; 101 S Ct 703; 66 L Ed 2d 641 (1981). Compacts without congressional approval, however, are not transformed into federal law; thus their construction is a matter of state statutory law.

Notwithstanding the fact that the Multistate Tax Compact, as a compact without congressional approval, does not carry the supreme force of federal law, IBM believes that the Legislature could not impose an exclusive apportionment formula because the Compact supersedes conflicting state law in any event. This is contrary to our well-established rule that a statute can be amended, repealed, or superseded, in whole or in

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The California First District Court of Appeal recently decided this very issue in *Gillette Co v Franchise Tax Bd*, 209 Cal App 4th 938; 147 Cal Rptr 3d 603 (2012), review granted and opinion superseded sub nom *Gillette v Franchise Tax Bd*, 151 Cal Rptr 3d 106; 291 P3d 327 (2013). The *Gillette* Court held that "under established compact law, the [Multistate Tax] Compact superseded subsequent conflicting state law . . . [and] the federal and state Constitutions prohibit states from passing laws that impair the obligations of contracts." *Gillette*, 147 Cal Rptr 3d at 615. For the reasons stated herein, I believe that *Gillette* was wrongly decided.

part, expressly or impliedly, by a subsequently enacted statute. *LeRoux v Secretary of State*, 465 Mich 594, 615; 640 NW2d 849 (2002) ("Absent the creation of contract rights, the later Legislature is free to amend or repeal existing statutory provisions."). The essence of IBM's argument is that because a compact is an agreement between Michigan and the other member states, it is not like any other state law subject to traditional principles of statutory construction, but rather it has some greater force and authority. As a result, any variation from the Compact's terms is strictly prohibited. In support of this proposition, IBM cites as persuasive authority *McComb v Wambaugh*, 934 F2d 474, 479 (CA 3, 1991), and *CT Hellmuth & Assoc, Inc v Washington Metro Area Transit Auth*, 414 F Supp 408, 409 (D Md, 1976). Neither case, in my view, supports such a rule.

In *McComb*, the plaintiff, as guardian ad litem for a minor child, brought a suit against the city of Philadelphia and its employees under 42 USC 1983. The suit sought damages for injuries the child suffered as a result of parental abuse. Before he was injured the child was under the protective custody of a Virginia court. The Virginia court ordered that the child be returned to his parental home in Philadelphia, where the abuse occurred. Plaintiff argued that the Virginia court order, in conjunction with the Interstate Compact for Placement of Children (ICPC), a compact to which Pennsylvania and Virginia are parties that had not been congressionally approved, extended the jurisdiction of the Virginia court into Pennsylvania and thereby imposed a legal duty on the Philadelphia social workers. The United States Court of Appeals for the Third Circuit rejected this argument, ultimately concluding that the ICPC did not apply when a child is returned by the

sending state to a natural parent residing in another state. *McComb*, 934 F2d at 482.

IBM cites the Third Circuit's discussion of the scope of the ICPC for its argument here:

> Because Congressional consent was neither given nor required, the [ICPC] does not express federal law. Consequently, this Compact must be construed as state law. . . .
>
> Nevertheless, uniformity of interpretation is important in the construction of a Compact because in some contexts it is a contract between the participating states. *Having entered into a contract, a participant state may not unilaterally change its terms. A Compact also takes precedence over statutory law in member states*. [*McComb*, 934 F2d at 479 (citations omitted; emphasis added).]

The *McComb* court did not cite any authority for the above emphasized rule—that compacts without congressional approval cannot be unilaterally amended and must take precedent over conflicting state law—and I have found none. Moreover, the unsupported statement contradicts the one that precedes it. Either the compact must be construed as state law or it must be construed as something with greater authority than state law, but the *McComb* court said both. Finally, this statement was dictum, because the court did not identify any potential conflict between the ICPC and Pennsylvania law and the court ultimately determined that the ICPC did not apply. *Id*. at 482.

In *CT Hellmuth*, the plaintiff sought to compel disclosure of documents under Maryland law. The defendant, an interstate agency formed by an interstate compact between Maryland, Virginia, and the District of Columbia, argued that its status as an interstate agency exempted it from the Maryland law. In granting the defendant's motion for summary judgment, the court remarked that

> when enacted, a compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties. It, therefore, appears settled that one party may not enact legislation which would impose burdens upon the compact absent the concurrence of the other signatories. [*CT Hellmuth*, 414 F Supp at 409.]

CT Hellmuth and the cases it relied upon, however, involved congressionally approved compacts, which, as explained, supersede subsequent state law by virtue of the Supremacy Clause. *Cuyler*, 449 US at 440.

IBM's claim that the Compact trumps the BTA simply because of its status as a compact relies on the faulty premise that the distinction between compacts that have congressional approval and those that do not is unimportant, and that *all* compacts are immune to unilateral modification by their member states because "[a] Compact . . . takes precedence over statutory law in member states." *McComb*, 934 F2d at 479. This assumes too much. Any immunity, if it exists, is a result of a compact's dual nature as both state law and a contract among its member states. See *Green v Biddle*, 21 US (8 Wheat) 1; 5 L Ed 547 (1832) (recognizing that an interstate compact can be a contract). As a result the Legislature is free to amend or repeal an existing statutory provision *as long as it does not impair a contractual obligation*. *LeRoux*, 465 Mich at 615; see US Const, art I, § 10, cl 1; Const 1963, art 1, § 10. In other words, the Legislature is prohibited from unilaterally amending the Compact only if that amendment impairs contractual obligations created by the Compact itself. When viewed as a matter of *contract* law, I believe that it was within the Legislature's power to require BTA taxpayers to apportion their multistate income solely in accordance with § 301.

III. UNILATERAL AMENDMENT OF MCL 205.581, ART III(2) DOES NOT VIOLATE THE STATE OR FEDERAL CONTRACTS CLAUSE

In evaluating whether § 301 of the BTA unconstitutionally impairs a contract, the threshold question is whether the Compact did, in fact, create a contractual relationship in the first instance. I do not believe that it did. Two factors weigh heavily in this conclusion. First, the member states' courses of conduct indicate that there is no contractual obligation to strictly adhere to Articles III and IV of the Compact. Second, the Compact is silent regarding a member state's authority to enact exclusive apportionment formulas that differ from the Compact's formula.

Starting with the obvious: taxpayers like IBM were *not* parties to the Compact. To the extent that the Compact can be viewed as a contract, it is an agreement between its member states, not between taxpayers and the states.[5] The Compact member states' courses of performance are critical to understanding the nature of the agreement. As the Supreme Court recently explained, a party's course of performance is "highly significant" evidence of the party's understanding of the Compact's terms. *Tarrant Regional Water Dist v Hermann*, 569 US ___; 133 S Ct 2120, 2135; 186 L Ed 2d 153 (2013) (citation and quotation marks omitted).[6] Here, it is plain that the member states did *not* view

[5] While the Treasury has not made the argument in its brief on appeal, it is not entirely clear to me why IBM has standing to enforce the Compact *as a contract*, given that IBM is neither a party to the Compact nor is it clear that they were intended as a third-party beneficiary. See *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422; 670 NW2d 651 (2003); MCL 600.1405. In any event, because I conclude that no such contractual relationship was formed, I find it unnecessary to address this issue *sua sponte*.

[6] Michigan law recognizes a similar principle. See *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 478-479; 663 NW2d 447 (2003).

strict adherence to Articles III and IV as a binding contractual obligation, as Compact members have deviated from the Compact's election provision and apportionment formula without objection from other members. Arkansas, for example, has retained the Compact's election provision but changed the Compact formula to place additional emphasis on the sales factor. Ark Code 26-5-101, Art IV(9). Nondeviating members have not pursued actions against those states that have deviated, and no member state has intervened on IBM's behalf in this case. Further, the Multistate Tax Commission—the organization charged with administering the Compact—has urged us to reject IBM's rigid interpretation of the Compact. These facts weigh heavily in favor of rejecting IBM's argument that the Compact creates a binding contractual obligation on its member states to refrain from amending the election provision.[7]

Deference to principles of state sovereignty leads me to the same conclusion. As this Court explained in *Studier*, 472 Mich at 661, there is a "strong presumption that statutes do not create contractual rights." This presumption is grounded in the principle that "surrenders of legislative power are subject to strict limitations that have developed in order to protect the sovereign prerogatives of state governments." *Id*. IBM has not overcome this presumption here. The Compact's silence on the effect of a member state's ability to elect an exclusive apportionment formula indicates that Michigan did not contract away its right to do exactly

[7] It bears emphasizing that Compact members have not only refrained from bringing legal action against one another for deviating from Articles III and IV, they have endorsed the Commissioner's interpretation of the Compact: in the *Gillette* litigation, all of the member states jointly filed an amicus brief urging the Supreme Court of California to reject the lower court's construction of the Compact as a binding contract.

that. *Id*. at 662. While it is true that the Compact does not expressly allow Michigan to adopt a different apportionment formula, neither does the Compact surrender the state's right to do so. When the state's sovereign power of taxation is implicated, as it is here, any uncertainty should be resolved in favor of concluding that the state did *not* cede that power. See *Tarrant*, 133 S Ct at 2132 (recognizing that states "do not easily cede their sovereign powers"). Admittedly, any sovereignty concerns are abated by the fact that a member state may withdraw from the Compact, unilaterally and without repercussion, at any time. MCL 205.581, Art X(2). But this withdrawal provision is equally strong evidence that the member states did not intend to be contractually bound, as it demonstrates the member states' desire to retain control over their sovereignty with respect to taxation. Moreover, if continued participation in the Compact is, essentially, completely voluntary, I fail to see how its terms can be construed as creating binding contractual obligations, especially in light of the presumption against such an interpretation. *Studier*, 472 Mich at 661.[8]

IV. CONCLUSION

I would affirm the judgment of the Court of Appeals because the Legislature expressly provided that taxes

[8] In arguing that unilateral amendment of the Compact would offend the state and federal constitutions, IBM cites *Green*, 21 US 1, in which the Supreme Court analyzed an interstate compact under the Contract Clause, US Const, art I, § 10, cl 1. While I conclude that the Compact did not create a contractual obligation that precluded Michigan from unilaterally amending its election provision, it is important to note that the Supreme Court has since retreated from the "any deviation" standard it applied in *Green*. See *US Trust Co v New Jersey*, 431 US 1, 21; 97 S Ct 1505; 52 L Ed 2d 92 (1977). Because IBM does not engage these post-*Green* developments, it has failed to explain how a constitutional violation arises under a modern analysis.

established under the BTA "shall be in accordance with" the BTA's sales-only apportionment formula. Allowing taxpayers to apportion their multistate income in accordance with the Compact's formula violates this unambiguous directive. And because the state was not contractually obligated to allow taxpayers to make the Compact election, the BTA does not offend the state or federal constitutions.

YOUNG, C.J., and KELLY, J., concurred with MCCORMACK, J.

MADUGULA v TAUB

Docket No. 146289. Argued December 10, 2013 (Calendar No. 5). Decided July 15, 2014.

Rama Madugula brought an action in the Washtenaw Circuit Court against Benjamin A. Taub and Dataspace, Incorporated (the company Taub had founded), under the Business Corporation Act, MCL 450.1101 *et seq*. In 2002, Taub hired Madugula as a vice president and also hired Andrew Flower. Taub was Dataspace's sole shareholder until 2004, when Madugula and Flower became part owners. The three shareholders entered into a stockholders' agreement under which Taub became president, secretary, and treasurer and Madugula and Flower became vice presidents. The agreement included a supermajority provision requiring approval by the holders of 70 percent of the corporate stock for, among other things, material changes in the nature of the business, compensation for the shareholders, or methods of determining compensation for the shareholders. Madugula continued to work for Dataspace, but Flower exercised his right under a buy-sell agreement to withdraw from Dataspace. Taub and Madugula purchased Flower's shares, giving Madugula about 36% of the shares. Taub changed Dataspace's focus to marketing a new product, which Madugula claimed was a major departure and a material change. Taub subsequently terminated Madugula's employment, though Madugula maintained his board position and interest in the company and continued to receive dividends from the company as a shareholder. Madugula's complaint asserted counts of shareholder oppression under MCL 450.1489 (§ 489), breach of the duty of good faith under MCL 450.1541a, and common-law fraud and misrepresentation. Madugula sought damages, the removal of Taub as a director, the appointment of a receiver to protect the value of his stock, an accounting of Dataspace, and all other relief to which he was entitled in equity or law. The court, Archie C. Brown, J., granted Taub and Dataspace summary disposition in part, dismissing all counts against them except Madugula's claim of shareholder oppression under § 489 against Taub. Taub then filed a motion in limine arguing, among other things, that Madugula did not have a right to a jury trial for his § 489 claim. The court denied the motion and further determined that Madugula

could present evidence regarding breaches of the stockholders' agreement to establish his claim of oppression. The jury determined that Taub had engaged in willfully unfair and oppressive conduct that substantially interfered with Madugula's interests as a shareholder and awarded Madugula economic damages. It further concluded that Taub was required to buy Madugula's stock. The court entered a judgment in Madugula's favor. Taub moved for judgment notwithstanding the verdict or, in the alternative, for a new trial or for remittitur, arguing that the case should have never gone before a jury because a § 489 claim is equitable in nature. The court denied Taub's motions, and he appealed. The Court of Appeals, RIORDAN, J. (BORRELLO, J., concurring and RONAYNE KRAUSE, P.J., concurring in part and dissenting in part), affirmed in an unpublished opinion, issued October 25, 2012 (Docket No. 298425), concluding that Taub's behavior was willfully unfair and oppressive, that there was further evidence of oppression because Taub had violated the supermajority provision in the stockholders' agreement, and that the termination of Madugula's services was evidence of oppression. The Court of Appeals further determined that the trial court had not abused its discretion by denying Taub's motion for a new trial based on the argument that he was entitled to a bench trial. Taub sought leave to appeal in the Supreme Court, which granted his application. 494 Mich 862 (2013).

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

There is no statutory or constitutional right to a jury trial for shareholder-oppression claims brought under MCL 450.1489, which must instead be heard by a court of equity.

1. Section 489 provides that a shareholder may bring an action in circuit court to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. If the shareholder establishes grounds for relief, the circuit court may grant the relief it considers appropriate, without limitation. Section 489 further provides the court with a nonexhaustive list of remedies available to it in its discretion.

2. A right to a jury trial can exist either statutorily or constitutionally. Whether § 489 claims must be decided by a court of equity depends on whether a § 489 claimant has a right to a jury trial. While § 489 contains no express language granting the right to a jury trial, that fact was not by itself dispositive. Rather, it was necessary to examine the statutory language as a whole to determine the Legislature's intent. Damages are a legal rather than

equitable remedy, and legal issues are traditionally tried before a jury. Accordingly, the question was whether the reference to an award of damages in § 489 indicated that the Legislature intended to provide a claimant seeking damages the right to a jury trial. Considering the remedy of damages authorized in § 489(1)(f) as part of the statute as a whole, however, did not lead to the conclusion that there was a statutory right to a jury trial for claims seeking damages. The statute's use of the word "may," use of the phrase "as it considers appropriate," and lack of limitations on the court with respect to determining the appropriate relief available indicated wide discretion for the court when deciding what relief, if any, should be awarded after shareholder oppression is established. Wide latitude to fashion relief is consistent with an action in equity. Moreover, while damages are generally considered legal relief awarded by a jury, a court of equity is likewise capable of awarding that relief. Accordingly, § 489 does not provide the right to a jury trial.

3. Const 1963, art 1, § 14 preserved the right to trial by jury in all cases in which the right existed before adoption of the 1963 Constitution, but also guaranteed that right for cases arising under statutes enacted after the adoption of the Constitution that are similar in character to cases in which the right existed before it was adopted. To determine whether there is a constitutional right to a jury trial for a claim under § 489, which was enacted after the Constitution, it was necessary to consider whether a § 489 claim is similar in character to a claim affording a right to a jury trial when the Constitution was adopted, focusing on the nature of the claim and the relief sought by the claimant. If the claim would have been considered legal in nature when the Constitution was adopted, the right to a jury trial would be preserved, but if it would have been considered equitable, then a court of equity must hear the claim.

4. A § 489 claim has similarities to two types of claims that existed before the adoption of the Constitution: shareholder derivative claims against the directors or those in control of the corporation and claims for corporate dissolution. Both types of claims would have been considered equitable in nature at the time the 1963 Constitution was adopted. Madugula sought a forced buyout of his stock and money damages under § 489(1)(e) and (f). Despite his request for specific relief, however, the trial court was free under the statute to grant relief as it considered appropriate, or none at all, even if Madugula were to establish shareholder oppression. The fact that the relief sought did not bind the trial court was consistent with an equity claim.

Furthermore, a claim under which the trial court has broad power to fashion relief as the circumstances require is consistent with an action in equity. Accordingly, a claim like one under § 489 would have been considered equitable in nature at the time the 1963 Constitution was adopted. Moreover, a court sitting in equity may award damages when necessary, so the availability of money damages did not change the overall equitable nature of a § 489 claim. No constitutional right to a jury trial exists for a claim under § 489, which must be tried before a court of equity in its entirety.

5. The trial court abused its discretion by not granting Taub's motion for new trial and by allowing a jury trial on Madugula's § 489 claim. It was necessary to remand the case to the trial court, however, to determine whether it could, on the present record, make the necessary findings of fact and conclusions of law as a court of equity or whether a new trial was necessary.

6. Evidence of a breach of a shareholder agreement may be used to establish shareholder oppression under § 489. The relationship between a corporation and its stockholders is contractual in its nature. To determine a shareholder's interests, a court may examine the articles of incorporation, the bylaws, and the governing statutes. Although the Business Corporation Act provides specific rights and interests to a shareholder as a shareholder, shareholders are entitled to modify those rights and interests through voting agreements under MCL 450.1461 and shareholder agreements under MCL 450.1488. The shareholders in this case entered into an effective stockholders' agreement that modified their statutory rights and interests as shareholders. The Court of Appeals correctly determined that a breach of the rights and interests in the stockholders' agreement could be evidence of shareholder oppression, but the trial court must determine on remand whether and to what extent any breach of the agreement demonstrated oppression in this case.

Court of Appeals' judgment reversed, trial court's judgment in favor of Madugula reversed, and case remanded to the trial court.

1. CORPORATIONS — SHAREHOLDER OPPRESSION — RIGHT TO JURY TRIAL — EQUITY.

There is no statutory or constitutional right to a jury trial for shareholder-oppression claims brought under MCL 450.1489, which is part of the Business Corporation Act, MCL 450.1101 *et seq*., and those claims must instead be heard by a court of equity.

2. CORPORATIONS — SHAREHOLDER OPPRESSION — EVIDENCE — VIOLATIONS OF SHAREHOLDER AGREEMENTS.

Evidence of a breach of a shareholder agreement may be used to establish a shareholder-oppression claim under MCL 450.1489, which is part of the Business Corporation Act, MCL 450.1101 *et seq*.

Mantese Honigman Rossman and Williamson, PC (by *Gerard V. Mantese*, *Brian M. Saxe*, and *Mark C. Rossman*), *Tangalos & Associates, PC* (by *Peter S. Tangalos*), and *Blum & Associates* (by *Corene C. Ford*) for Rama Madugula.

Reach Law Firm (by *Ian James Reach*) and *Jenner & Block LLP* (by *John F. Ward, Jr.*, and *Jessica Ring Amunson*) for Benjamin A. Taub.

Amicus Curiae:

James L. Carey, *Justin G. Klimko*, *Douglas L. Toering*, and *Cyril Moscow*, for the Business Law Section of the State Bar of Michigan.

VIVIANO, J. In this case, we address whether Michigan's shareholder-oppression statute, MCL 450.1489 (§ 489) of the Business Corporation Act (BCA), MCL 450.1101 *et seq.*, provides a right to a jury trial or whether claims under § 489 are instead required to be heard by a court of equity. We hold that the plain language of § 489 does not afford a claimant a right to a jury trial and, instead, expresses a legislative intent to have shareholder-oppression claims heard by a court of equity. We further hold that there is no constitutional right to a jury trial for claims brought under § 489. Finally, we hold that violations of a shareholder agreement may constitute evidence of

shareholder oppression pursuant to § 489(3). Because the trial court erred by submitting plaintiff's § 489 claim to the jury and allowing it to award an equitable remedy, the Court of Appeals erred by affirming the trial court's judgment in favor of plaintiff. Therefore, we reverse the judgment of the Court of Appeals, reverse the judgment of the trial court in favor of plaintiff, and remand the case to the trial court to determine whether, on the present record, sitting as a court of equity, it can make the requisite findings of fact and conclusions of law under MCR 2.517(A) or whether a new trial is necessary.

I. FACTS AND PROCEDURAL HISTORY

Defendant Benjamin A. Taub founded Dataspace, Incorporated, in 1994. Dataspace is a technology consulting firm that focuses on constructing business intelligence and data warehouse systems. In 2002, Taub hired plaintiff, Rama Madugula, as vice president of sales and business development for Dataspace. Around this time, Dataspace also hired an individual named Andrew Flower.[1] Taub was Dataspace's sole shareholder until 2004, when Madugula and Flower became part owners, with Madugula purchasing 29% of the outstanding shares and Flower purchasing 20%. The three shareholders entered into a stockholders' agreement on January 1, 2004.[2] Pursuant to the agreement, Taub became president, secretary, and treasurer of Dataspace, while Madugula and Flower became vice presidents. The stockholders' agreement established a five-member board of directors and allowed Taub to elect three directors and Madugula and Flower to each

[1] Dataspace and Flower are not parties to this appeal.

[2] The shareholders also entered into a buy-sell agreement, which sets forth the procedures to be followed upon the death or permanent disability of a shareholder or the voluntary withdrawal by a shareholder.

elect one director.[3] The agreement also contained a supermajority provision, requiring approval by the holders of 70% of the outstanding corporate stock for material changes in the nature of the business, compensation for the shareholders, or methods of determining compensation for the shareholders.[4]

After becoming a shareholder, Madugula continued to work for Dataspace, drawing a salary of about $150,000 a year. In 2007, Flower exercised his right under the buy-sell agreement and voluntarily withdrew from Dataspace. Taub and Madugula purchased Flower's shares, increasing Madugula's interest to about 36% of the shares. Around this time, with Dataspace allegedly struggling, Taub switched the focus of Dataspace to marketing a new product that it developed called JPAS, a software platform for jails. Madugula claims that the JPAS software was a major departure and a material change from Dataspace's prior software focus. Taub claims that it was simply an attempt to market the firm's existing jail consulting products to other counties. At the time, Madugula did not object to the new focus.

Thereafter, in August 2007, Taub terminated Madugula's employment with Dataspace. Because of his termination, Madugula no longer received a salary from Dataspace, but he maintained his board position and his interest in the company. As a shareholder, he continued to receive dividends from the company.

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[3] Madugula elected himself as a member of the board of directors.

[4] A supermajority was also necessary for the adoption of certain benefit or stock plans, a sale of assets other than in the ordinary course of business, the establishment of annual capital expense budgets or actual capital expenses exceeding $100,000 a year, and any other corporate action that would have a material adverse impact on the shareholders.

Madugula sued Taub and Dataspace, asserting the following six counts in the complaint: (1) shareholder oppression under § 489, (2) breach of the duty of good faith under MCL 450.1541a, (3) common-law fraud and misrepresentation, (4) exemplary damages, (5) an appointment of a receiver, and (6) an accounting of Dataspace. Madugula sought damages, the removal of Taub as a director of Dataspace, the appointment of a receiver to protect the value of his stock in Dataspace, an accounting of Dataspace, and all other relief that he was entitled to in equity or law. The circuit court granted summary disposition in favor of Taub and Dataspace, dismissing all counts against them except Madugula's claim of shareholder oppression under § 489 against Taub.[5]

In February 2010, Taub filed a motion in limine arguing, among other things, that Madugula did not have a right to a jury trial for his § 489 claim. In support of the motion, Taub relied on the language of § 489 and an unpublished Court of Appeals opinion, *Forsberg v Forsberg Flowers, Inc*.[6] After a hearing, the circuit court rejected Taub's reliance on *Forsberg* and denied his motion to have the § 489 claim heard in equity. The court also determined that Madugula could present evidence regarding breaches of the stockholders' agreement to establish his claim of oppression.

At trial, Madugula argued that Taub had terminated his employment with Dataspace and changed the material nature of the company without obtaining the re-

[5] The court also granted Taub's motion for summary disposition as cross-plaintiff against Madugula on a claim that Madugula owed Taub money from a loan for the initial stock purchase. The court determined that Madugula owed Taub $107,892.34, but it denied Taub's request for the immediate release of those funds.

[6] *Forsberg v Forsberg Flowers, Inc*, unpublished opinion per curiam of the Court of Appeals, issued December 5, 2006 (Docket No. 263762).

quired 70 percent supermajority vote. Taub argued that his actions were in the best interests of the company and that Madugula could not establish any oppressive conduct by Taub. The jury determined that Taub had engaged in willfully unfair and oppressive conduct that substantially interfered with Madugula's interests as a shareholder. The jury awarded economic damages of $191,675 in favor of Madugula, and it further concluded that Taub had to buy Madugula's stock in Dataspace for $1.2 million.[7] The court entered a judgment in Madugula's favor for these amounts, plus interest. Thereafter, Taub moved for judgment notwithstanding the verdict or, in the alternative, for a new trial or remittitur. In this motion, he argued that the case should have never gone before a jury because a § 489 claim is equitable in nature. The court denied Taub's motions, again determining that it was not bound by *Forsberg*.

[7] Although neither party raised the issue, there is a discrepancy in the jury's verdict with regard to the stock buyout. The verdict form required the jury to first answer whether there was willfully unfair and oppressive conduct by Taub against Madugula (Question No. 1) and then whether that conduct substantially interfered with Madugula's interest as a shareholder (Question No. 2). The jury answered yes to both questions. Because it answered yes to both, it was then required to answer Question No. 3: "Is Plaintiff Rama Madugula entitled to economic damages?" The jury answered yes and then awarded him damages totaling $191,675 (Question No. 4). At this point, the jury should have stopped because Question No. 5 read, "If your answer to Question No. 3 was 'NO', is Mr. Madugula entitled to have his stock purchased by Defendant Benjamin Taub?" Notwithstanding the fact that the jury answered yes to Question No. 3, the jury continued on to award Madugula $1.2 million for the fair-value buyout of his stock (Question No. 6). Thus, by the terms of the verdict form, having already awarded economic damages under Question No. 3 and No. 4, the jury should not have considered Question No. 5 or No. 6. There was no discussion on the record of this discrepancy. The court and counsel simply accepted the verdict, and the court entered a judgment reflecting both amounts set forth on the verdict form.

Taub appealed to the Court of Appeals. In an unpublished opinion, the Court of Appeals affirmed.[8] First, the Court of Appeals considered whether Madugula had established shareholder oppression. After reviewing § 489, the lead opinion concluded that Taub's behavior was willfully unfair and oppressive because Madugula did not have an opportunity to vote on material changes to Dataspace or examine the corporate books.[9] It also determined that there was further evidence of oppression because Taub had violated the supermajority provision in the stockholders' agreement.[10] Noting that termination of employment might give rise to oppression under § 489(3), the lead opinion concluded that the termination of Madugula's services was evidence of oppression. It reasoned that Madugula's "termination disproportionately affected Madugula's interest as a shareholder because Madugula's compensation was reduced to zero and he was no longer involved in decisions on material issues such as the development of JPAS."[11] Finally, the lead opinion determined that the trial court had not abused its discretion by denying Taub's motion for a new trial based on his argument that he was entitled to a bench trial. It reasoned that Taub had failed "to cite any binding precedent suggesting that the trial court's decision on this issue or its failure to follow an unpublished opinion constitutes an abuse of discretion."[12] Judge BORRELLO concurred. He agreed that the trial court did not abuse its discretion by trying the matter before a jury, but he would have adopted the reasoning of the partial concurrence/dissent in *Fors-*

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[8] *Madugula v Taub*, unpublished opinion of the Court of Appeals, issued October 25, 2012 (Docket No. 298425).

[9] *Id*. at 3-4 (opinion by RIORDAN, J.).

[10] *Id*. at 4.

[11] *Id*. at 4-5.

[12] *Id*. at 5.

berg.[13] Judge RONAYNE KRAUSE concurred in part and dissented in part. She concurred with the lead opinion's analysis of minority shareholder oppression and affirmance of the damages award. However, she would have remanded for a new trial on the equitable remedies, including the forced share buyout, because she believed that the equitable remedies should be determined by a bench trial.[14]

Taub then sought leave to appeal in this Court. We granted Taub's application and asked the parties to address:

> (1) whether claims brought under MCL 450.1489 are equitable claims to be decided by a court of equity; (2) whether the provisions of a stockholders' agreement can create shareholder interests protected by MCL 450.1489; and (3) whether the plaintiff's interests as a shareholder were interfered with disproportionately by the actions of the defendant-appellant, where the plaintiff retained his corporate shares and his corporate directorship.[15]

II. STANDARD OF REVIEW

This case involves questions of constitutional law, statutory interpretation, and contract interpretation, all of which are legal questions that we review de novo.[16]

III. ANALYSIS

A. RIGHT TO A JURY TRIAL FOR CLAIMS UNDER MCL 450.1489

Whether § 489 claims are to be decided by a court of equity depends on whether a § 489 claimant has a right

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[13] *Id*. at 1-2 (opinion by BORRELLO, J.).

[14] *Id*. at 1 (opinion by RONAYNE KRAUSE, P.J.).

[15] *Madugula v Taub*, 494 Mich 862 (2013).

[16] *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006); *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013).

to a jury trial. A right to a jury trial can exist either statutorily or constitutionally.[17] We must first review the plain language of the statute to determine whether the Legislature intended to provide a statutory right to a jury trial.[18] If not, we must next consider whether a § 489 claimant nonetheless has a constitutional right to a jury trial.[19]

1. STATUTORY ANALYSIS

We first turn to the question of whether the Legislature intended to provide a statutory right to a jury trial in § 489. As with any statutory interpretation, our goal " 'is to give effect to the Legislature's intent, focusing first on the statute's plain language.' "[20] In so doing, we examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme.[21] When a statute's language is unambiguous, "the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted."[22]

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[17] See *Conservation Dep't v Brown*, 335 Mich 343, 346; 55 NW2d 859 (1952).

[18] We examine the statute first because, depending on our resolution of the statutory issue, we may not need to reach the constitutional question. See *Lisee v Secretary*, 388 Mich 32, 40; 199 NW2d 188 (1972) ("[I]t is well settled in Michigan that '[c]onstitutional questions will not be passed upon when other decisive questions are raised by the record which dispose of the case.' ") (citation omitted) (second alteration in original).

[19] See *Brown*, 335 Mich at 346.

[20] *Malpass v Dep't of Treasury*, 494 Mich 237, 247-248; 833 NW2d 272 (2013) (citation omitted).

[21] *Id*. In addition, according to MCL 450.1103(c), the BCA must be liberally construed and applied "[t]o give special recognition to the legitimate needs of close corporations."

[22] *Malpass*, 494 Mich at 249 (citation and quotation marks omitted).

Section 489, commonly known as the shareholder-oppression statute, allows for actions by minority shareholders in closely held corporations against directors or those in control of the corporation for acts that are illegal, fraudulent, or willfully unfair and oppressive to the corporation or the shareholder. Section 489 reads as follows:

> (1) A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following:
>
> (a) The dissolution and liquidation of the assets and business of the corporation.
>
> (b) The cancellation or alteration of a provision contained in the articles of incorporation, an amendment of the articles of incorporation, or the bylaws of the corporation.
>
> (c) The cancellation, alteration, or injunction against a resolution or other act of the corporation.
>
> (d) The direction or prohibition of an act of the corporation or of shareholders, directors, officers, or other persons party to the action.
>
> (e) The purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts.
>
> (f) An award of damages to the corporation or a shareholder. An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued, or within 2 years after the

> shareholder discovers or reasonably should have discovered the cause of action under this section, whichever occurs first.
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> * * *
>
> (3) As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.[23]

Section 489 contains no express language granting the right to a jury trial and makes no mention of juries, which is a relevant consideration regarding the issue at hand. However, the Legislature's failure to explicitly refer to a "jury" is not, in itself, dispositive. Rather, the statutory language must be examined as a whole to determine the Legislature's intent.[24]

Madugula argues that the Legislature intended to provide a statutory right to a jury trial for a claim under § 489, citing *Anzaldua v Band*.[25] At issue in *Anzaldua* was whether there was a right to a jury trial in an action under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. Like § 489, the WPA is silent about juries or any right thereto. The WPA provides in part, "A person who alleges a violation of this act may bring a

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[23] MCL 450.1489.

[24] *Malpass*, 494 Mich at 248.

[25] *Anzaldua v Band*, 457 Mich 530; 578 NW2d 306 (1998).

civil action for appropriate injunctive relief, or actual damages, or both . . . ."[26] The WPA further provides:

> A court, in rendering a judgment in an action brought pursuant to this act, shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies. A court may also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, if the court determines that the award is appropriate.[27]

Focusing on whether a WPA claimant had a statutory right to a jury trial for a claim of actual damages, the *Anzaldua* Court first noted that the WPA's mere reference to a "court" rather than a "jury" was not controlling because it was necessary to examine what the WPA "provided that the 'court' should do" with respect to that relief.[28] In undertaking this inquiry, the *Anzaldua* Court noted that the WPA expressly couched the court's authority to order relief in the "procedural step" of "rendering a judgment," which is done on the basis of "previously decided issues of fact."[29] It explained that, while the language "rendering a judgment" did not foreclose the court from determining an award of damages, it plainly contemplated that a jury, upon proper demand, could do the same.[30] The *Anzaldua* Court then recognized that damages are "a legal, rather than an equitable, remedy, and legal issues are traditionally tried to a jury."[31] Therefore, when the Legislature

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[26] MCL 15.363(1).

[27] MCL 15.364.

[28] *Anzaldua*, 457 Mich at 536.

[29] *Id*.

[30] *Id*. at 537-539.

[31] *Id*. at 541.

expressly provides for that relief, it may intend that relief to carry with it a right to a jury trial as well.[32] Viewing the statutory language as a whole, the Court held that the Legislature's inclusion of an actual damages remedy in the statute was an indication that the Legislature intended not only to provide a damages remedy under that statute, but to attach a jury right to it as well.[33] The *Anzaldua* Court found further support for this conclusion in the history of the WPA and its language—namely, the fact that the Legislature imported the WPA's language directly from the Civil Rights Act, which had been recognized as providing a right to a jury trial.[34] However, the statutory right to a

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[32] *Id*. at 542-543.

[33] *Id*. at 543.

[34] *Id*. at 543-548. The *Anzaldua* Court specifically held "that, by including [the term 'actual damages'], the Legislature intended that the act contain a right to a jury trial." *Id*. at 543. Similarly, at the conclusion of its analysis, the Court stated:

> Where (1) an action by its nature is not jury barred, (2) the claim is for money damages, (3) the Legislature provided for it to be brought in circuit court, and (4) the Legislature did not deny the right to a jury, the plaintiff properly may demand a trial by jury. [*Id*. at 549-550.]

Despite this language, we do not read *Anzaldua* as standing for the proposition that the inclusion of a damages remedy in a statute automatically attaches a right to a jury trial. Rather, we read *Anzaldua* as meaning that the inclusion of a damages remedy is an indicator that the Legislature may have intended to provide a statutory right to a jury trial, but it is not *a dispositive factor*. As always, and as done both here and in *Anzaldua*, the statute must be read as a whole to determine the intent of the Legislature. *Malpass*, 494 Mich at 248. The four-pronged test set forth in *Anzaldua*, while perhaps a useful distillation of the Court's rationale in that case, should not be read as supplanting or excusing a court's fundamental interpretive obligations, nor does its satisfaction foreclose a court from concluding, on the basis of proper review of the statute as a whole, that the Legislature did not intend to attach a jury right to a claim of damages.

jury trial discussed in *Anzaldua* did not extend to claims for equitable relief under the WPA because, unlike the legal remedy of damages, a claimant seeking equitable relief has no traditional right to a jury trial on those issues.[35]

At issue in this case is whether the Legislature's inclusion of the phrase "[a]n award of damages" indicates that it intended to provide a § 489 claimant seeking damages the right to a jury trial when the language of § 489 is read as a whole. We agree with *Anzaldua* that "actual damages" is a term of art and is generally considered a legal remedy that is traditionally tried by a jury.[36] Thus, we recognize that the inclusion of a damages remedy in a statute, given the peculiar meaning it has acquired in our law, may be an indication that the Legislature intended to provide a right to a jury trial.[37] However, when we consider the damages

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[35] *Anzaldua*, 457 Mich at 538, 541.

[36] See *id*. at 541. While the availability of damages does not automatically afford a right to a jury trial in Michigan, as discussed below, an action for damages has long been considered to be an action at law to which a right to a jury trial attaches. See, e.g., *McFadden v Detroit Bar Ass'n*, 4 Mich App 554, 558; 145 NW2d 285 (1966) (concluding that the plaintiff had an adequate remedy at law—an action for damages—and a right to a jury trial for that action); *Mich Bean Co v Burrell Engineering & Constr Co*, 306 Mich 420, 424; 11 NW2d 12 (1943) (recognizing that the plaintiff's action for damages was a law action that "must be brought on the law side of the court where the parties may have the benefit of a trial by jury"); *Teft v Stewart*, 31 Mich 367, 371-372 (1875) (recognizing that the plaintiff's action for a single judgment of damages was legal in nature and to be heard by a jury).

[37] See *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 493; 835 NW2d 363 (2013) ("[W]here the Legislature uses a technical word that has acquired a particular meaning in the law, and absent any contrary legislative indication, we construe it 'according to such peculiar and appropriate meaning.' "), quoting MCL 8.3a.

We focus on the statutory reference to an award of damages within § 489(1)(f) because the remedies listed within § 489(1)(a) through (e) are

remedy under § 489(1)(f) as part of the statute as a whole,[38] we cannot conclude that the Legislature intended to attach a statutory right to a jury trial to a claim for damages.

Under § 489, once a shareholder establishes "grounds for relief"—i.e., that oppression occurred—"the circuit court may make an order or grant relief as it considers appropriate," including an award of money damages.[39] In contrast to the WPA's focus on "rendering a judgment," this language emphasizes the court's affirmative authority to award relief and does not inherently contemplate another fact-finder whose determinations the court may be effectuating. Indeed, through the use of the word "may," the phrase "as it considers appropriate," and, significantly, the statement that the court is "without limitation" with respect to determining the appropriate relief available,[40] the Legislature provided the circuit court wide discretion in deciding what relief, if any, should be awarded after shareholder oppression is established. As discussed at length below, such wide latitude to fashion relief is consistent with an action in equity.[41] So too is the presence of damages within the nonexhaustive list of remedies enumerated in § 489, for while damages are

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equitable, rather than legal, in nature and thus are not traditionally tried to a jury. See Part III(A)(2)(c) of this opinion; see also *Anzaldua*, 457 Mich at 541.

[38] See *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) (recognizing that statutes must be read as a whole and that we must "consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme") (citation and quotation marks omitted).

[39] MCL 450.1489(1).

[40] MCL 450.1489(1) (providing that the court's discretion in determining the appropriate relief is "without limitation").

[41] See Part III(A)(2)(c) of this opinion.

generally considered legal relief awarded by a jury, a court of equity is likewise capable of awarding that relief.[42]

In addition, while the *Anzaldua* Court concluded that the history of the WPA and its language supported the conclusion that the Legislature intended to provide a statutory right to a jury trial under the WPA,[43] a review of the history of § 489 compels a different result. Section 489 is nearly identical in form to its predecessor, former MCL 450.1825 (§ 825),[44] which was considered equitable in nature and was correspondingly tried to a court.[45] Like § 489, § 825 enumerated a nonexhaustive list of various forms of equitable relief that a court could award. Section 825, however, made no mention of damages. When, in 1989, the Legislature replaced § 825 with § 489, damages were added to the nonexhaustive list of relief specified in the statute. The Legislature, however, left intact the statutory language describing the court's authority to grant relief and provided no textual indication that, by choosing to clarify damages as being included among that relief, it intended to introduce a right to a jury into the statute as well. These circumstances fall well outside those present in *Anzaldua* and suggest the opposite result. Thus, unlike *Anzaldua*, a historical analysis of § 489 does not lead us to conclude that the Legislature intended to provide a right to a jury trial under the statute.

Accordingly, we cannot conclude that the Legislature intended to provide a jury right for claims of share-

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[42] See *id*.

[43] See *Anzaldua*, 457 Mich at 543-548.

[44] Repealed by 1989 PA 121.

[45] See, e.g., *Barnett v Int'l Tennis Corp*, 80 Mich App 396, 403; 263 NW2d 908 (1978); *Moore v Carney*, 84 Mich App 399, 405; 269 NW2d 614 (1978); *Salvador v Connor*, 87 Mich App 664, 673-674; 276 NW2d 458 (1978).

holder oppression under § 489. The only indication comes from the mention in § 489(1)(f) of a damages remedy; proper scrutiny, however, does not bear out that suggestion and instead signals an intent to leave all claims of relief under § 489 with a court and not a jury.

2. CONSTITUTIONAL ANALYSIS

a. BACKGROUND

Having determined that the Legislature did not intend to create a right to a jury trial, we must next determine whether a constitutional right to a jury trial exists for claims under § 489.

Michigan's Constitution provides, in pertinent part: "The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law."[46] The intention of this provision is

> to preserve to parties the right to have their controversies tried by jury, in all cases where the right then existed . . . and suitors can not constitutionally be deprived of this right except where, in civil cases, they voluntarily waive it by failing to demand it in some mode which the legislature shall prescribe.[47]

Not only is the right to a jury trial "preserved in all cases where it existed prior to adoption of the Constitution," the constitutional guarantee also applies "to cases arising under statutes enacted subsequent to

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[46] Const 1963, art 1, § 14. See also MCR 2.508(A) ("The right of trial by jury as declared by the constitution must be preserved to the parties inviolate."). Prior versions of the Michigan Constitution contained similar provisions. See Const 1908, art 2, § 13; Const 1850, art 6, § 27; Const 1835, art 1, § 9. These provisions were derived from the Northwest Ordinance of 1787, art II.

[47] *Tabor v Cook*, 15 Mich 322, 325 (1867).

adoption of the Constitution which are similar in character to cases in which the right to jury trial existed before the Constitution was adopted."[48] However, we have also recognized in certain cases the right to trial by court. This Court has stated, " '[T]he distinctions between law and equity must continue to be recognized for the purpose of preserving constitutional rights to trial by jury in legal matters and *trial by court in equity matters*.' "[49] Long ago, we recognized that "[t]he right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury."[50] That is, "[t]he cognizance of equitable questions belongs to the judiciary as a part of the judicial power, and under our Constitution must remain vested where it always has been vested heretofore."[51]

To determine whether a constitutional right to a jury trial attaches to a claim brought under § 489, which was enacted after the 1963 Constitution, we must consider whether a § 489 claim is similar in character to a claim that afforded the right to a jury trial at the time the 1963 Constitution was adopted.[52] We focus on "the nature of the controversy between the parties . . . ."[53] If the nature of the controversy would have been consid-

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[48] *Brown*, 335 Mich at 346.

[49] *Abner A Wolf, Inc v Walch*, 385 Mich 253, 261; 188 NW2d 544 (1971) (emphasis added) (citation omitted).

[50] *Brown v Buck*, 75 Mich 274, 284; 42 NW 827 (1889).

[51] *Id*. at 285. We recognize that our Constitution requires us to abolish, as far as practicable, the distinctions between law and equity proceedings. Const 1963, art 6, § 5. However, the provision does not abolish the historical differences between law and equity, nor can the distinction between law and equity be abolished so far as to remove the constitutional right to a jury trial. See *Holland Sch Dist v Holland Ed Ass'n*, 380 Mich 314, 319; 157 NW2d 206 (1968); *Abner A Wolf*, 385 Mich at 261.

[52] *Brown*, 335 Mich at 346.

[53] *Risser v Hoyt*, 53 Mich 185, 201; 18 NW 611 (1884).

ered legal at the time the 1963 Constitution was adopted, the right to a jury trial is preserved.[54] However, if the nature of the controversy would have been considered equitable, then it must be heard before a court of equity.[55]

In making this determination, we consider not only the nature of the underlying claim, but also the relief that the claimant seeks. Indeed, equity will not take "jurisdiction of cases where a suitor has a full, complete, and adequate remedy at law, unless it is shown that there is some feature of the case peculiarly within the province of a court of equity."[56] Accordingly, we must consider the relief sought as part of the nature of the claim to determine whether the claim would have been denominated equitable or legal at the time the 1963 Constitution was adopted.

In sum, our inquiry in this case is whether a claim similar to one under § 489 would have been considered legal or equitable in nature at the time that the 1963 Constitution was adopted.

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[54] *Abner A Wolf*, 385 Mich at 261.

[55] *Id*. For further discussion, see then Judge MARKMAN's analysis of this issue in the Court of Appeals' opinion in *Anzaldua v Band*, 216 Mich App 561; 550 NW2d 544 (1996), aff'd on other grounds 457 Mich 530 (1998). In particular, see his explanation of why the nature-of-the-action approach provides the proper framework for determining whether the constitutional right to a jury trial attaches to a statute enacted after the adoption of the 1963 Constitution.

[56] *Detroit Trust Co v Old Nat'l Bank of Grand Rapids*, 155 Mich 61, 65; 118 NW 729 (1908). For instance, at the time the 1963 Constitution was adopted, the relief sought could meaningfully bear on whether the nature of the claim was considered legal or equitable. See, e.g., *Teft*, 31 Mich at 371-372 ("The facts as given, and the case as shaped, point to just the action and relief peculiar to a court of law. They look to a single judgment for damages, and nothing else. The case, then, was really of legal, and not in strict propriety of equitable cognizance.").

b. THE UNDERLYING CLAIM

A § 489 claim has similarities to two types of claims that existed before the adoption of the 1963 Constitution: shareholder derivative claims against the directors or those in control of the corporation and claims for corporate dissolution. We will discuss each in turn.

A § 489 claim allows a shareholder to bring suit against the directors or those in control of the corporation for fraud, illegality, or oppressive conduct. Shareholders have long been able to bring a similar claim for fraud, illegality, abuses of trust, and other oppressive conduct on the part of those in control of the corporation through a shareholder derivative action. Whereas a shareholder in a derivative action sues on behalf of the corporation, a shareholder bringing a § 489 claim may sue the directors directly or derivatively—i.e., on his or her own behalf or on behalf of the corporation. However, even when a shareholder brings a claim on his or her own behalf under § 489, the claim is often derivative in nature because the remedies sought affect the corporation.[57] Accordingly, a § 489 claim is similar in nature to a shareholder derivative claim, and we must determine whether such a claim would be denominated equitable or legal in nature at the time the 1963 Constitution was adopted.

In *Miner v Belle Isle Ice Co*, this Court, considering a minority stockholder's action against the majority stockholder and the corporation, addressed the power of a court of equity to remedy the oppression of a minority

[57] See *Moore*, 84 Mich App at 402 ("This suit was brought in equity by the plaintiff on behalf of herself as a minority shareholder. It also had some aspects of a shareholder derivative suit, relief sought was dissolution of the corporation and to have plaintiff's interest bought out.").

shareholder.[58] After concluding that the majority stockholder's actions harmed the minority stockholder, the Court stated:

> It cannot be denied that minority stockholders are bound hand and foot to the majority in all matters of legitimate administration of the corporate affairs; and the courts are powerless to redress many forms of oppression, practiced upon the minority under a guise of legal sanction, which fall short of actual fraud.[59]

However, because the majority shareholder's actions were a breach of trust, the Court recognized that the " 'jurisdiction of a court of equity reaches such a case, to give such a remedy as its circumstances may require.' "[60] The *Miner* Court concluded, "[A] court of equity will not so far tolerate such a manifest violation of the rules of natural justice as to deny him the relief to which his situation entitles him."[61] It continued, "[A] court of equity, under the circumstances of this case, in the exercise of its general equity jurisdiction, has the power to grant to this complainant ample relief, even to the dissolution of the trust relations."[62]

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[58] *Miner v Belle Isle Ice Co*, 93 Mich 97, 98-108; 53 NW 218 (1892). The case was on appeal from a court sitting in chancery. Courts in chancery were those courts with equitable jurisdiction. See *Cady v Centreville Knit Goods Mfg Co*, 48 Mich 133, 135; 11 NW 839 (1882).

[59] *Miner*, 93 Mich at 114 (citation omitted and quotation marks).

[60] *Id*. at 115 (citation omitted).

[61] *Id*. at 117.

[62] *Id*. Ultimately, the Court appointed a receiver to wind up the affairs of the corporation, required the majority stockholder to account for all money illegally paid by him or paid to him, ordered the majority stockholder to pay all those funds back to the corporation and all costs and fees incurred by the corporation in the proceedings, and ordered the majority stockholder to pay the complainant's costs for the proceedings. *Id*. at 117-118.

Indeed, courts of equity have long heard shareholders' direct or derivative claims against the majority shareholders or directors for fraud, illegality, or other oppressive conduct.[63] Since *Miner*, this Court has continued to recognize a court of equity's power "in case of fraud, abuse of trust, or misappropriation of corporate funds, at the instance of a single stockholder, to grant relief and compel a restitution . . . ."[64] Accordingly, a § 489 claim, insofar as it is similar to a shareholder derivative claim, would have been considered equitable in nature at the time the 1963 Constitution was adopted.

In addition, a § 489 claim is similar to a common-law claim for dissolution. At the time the 1963 Constitution was adopted, shareholders could bring a claim for dissolution of a corporation based on instances of fraud, illegality, or abuse of trust by other shareholders, or even deadlock between shareholders.[65] Historically, " '[t]he general rule . . . [was] that courts of equity have no power to wind up a corporation, in the absence of statutory authority.' "[66] However, by 1963, Michigan

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[63] See, e.g., *Nahikian v Mattingly*, 265 Mich 128; 251 NW 421 (1933); *Witter v LeVeque*, 244 Mich 83; 221 NW 131 (1928); *Crowe v Consolidated Lumber Co*, 239 Mich 300; 214 NW 126 (1927); *Thwing v Weibatch Liquid Scale Co*, 233 Mich 87; 206 NW 320 (1925); *Marcoux v Reardon*, 203 Mich 506; 169 NW 893 (1918); *Essex v Essex*, 141 Mich 200; 104 NW 622 (1905); *Edwards v Mich Tontine Investment Co*, 132 Mich 1; 92 NW 491 (1902); *Walsh v Goulden*, 130 Mich 531; 90 NW 406 (1902); *Flynn v Third Nat'l Bank of Detroit*, 122 Mich 642; 81 NW 572 (1900); *Keeney v Converse*, 99 Mich 316; 58 NW 325 (1894).

[64] *Miner*, 93 Mich at 112. See also *Futernick v Statler Builders, Inc*, 365 Mich 378, 386; 112 NW2d 458 (1961); *Kimball v Bangs*, 321 Mich 394, 416; 32 NW2d 831 (1948); *Dean v Kellogg*, 294 Mich 200, 207; 292 NW 704 (1940); *Van Wie v Storm*, 278 Mich 632, 636; 270 NW 814 (1937).

[65] See *Levant v Kowal*, 350 Mich 232, 242-243; 86 NW2d 336 (1957).

[66] *Town v Duplex-Power Car Co*, 172 Mich 519, 528; 138 NW 338 (1912), quoting *Miner*, 93 Mich at 112.

"ha[d] squarely aligned itself with those jurisdictions holding that a court of equity has inherent power to decree the dissolution of a corporation when a case for equitable relief is made out upon traditional equitable principles."[67] Thus, the nature of a § 489 claim—allowing a shareholder to seek dissolution if he or she can establish fraud, illegality, or oppressive conduct—is consistent with a common-law claim for dissolution, which was considered equitable in nature at the time the 1963 Constitution was adopted.[68]

Finally, claims similar to those under § 489, which may ultimately affect the shareholders and the corporation itself, typically involve difficult determinations of adequate relief. At the time the 1963 Constitution was adopted, it was recognized that "[a] suit in equity . . . is proper . . . if there are circumstances of great complication or difficulty in the way of adequate relief at law."[69] This is because "[j]uries cannot devise specific remedies, or safely deal with complicated interests, or with relief given in successive stages, or adjusted to varying

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[67] *Levant*, 350 Mich at 241.

[68] A review of § 489 and its predecessor indicates that § 489 evolved from a common-law claim for dissolution. When the Legislature enacted the BCA through 1972 PA 284, former MCL 450.1825(1) allowed a circuit court to "adjudge the dissolution of, and liquidate the assets and business of, a corporation" for fraudulent, illegal, or willfully unfair and oppressive conduct on the part of a director or person in control of the corporation, thus making it similar to a common-law action for dissolution. However, the Legislature allowed a court under § 825(2) to fashion equitable remedies similar to those in § 489(1)(b) to (e) if the court did not believe that dissolution was proper. As discussed above, actions under § 825 were considered equitable in nature—a character that was preserved when the Legislature replaced § 825 with § 489, moving dissolution into and adding damages to the nonexhaustive list of remedies available to the circuit court in its discretion.

[69] *Second Mich Coop Housing Ass'n v First Mich Coop Housing Ass'n*, 358 Mich 252, 256; 99 NW2d 665 (1959).

conditions."[70] In this regard, this Court has recognized that "[c]ourts of law are inadequate to protect the rights and interests of creditors and stockholders."[71]

In sum, we conclude that a § 489 claim, given its similarities to equitable shareholder derivative claims and claims for dissolution, would have been denominated equitable in nature at the time the 1963 Constitution was adopted.

c. THE RELIEF SOUGHT

Having determined that the underlying claim of shareholder oppression would have been denominated equitable in nature at the time the 1963 Constitution was adopted, we must next consider the remedy sought by Madugula. From Madugula's complaint, it is unclear what remedies he sought specifically for his § 489 claim. However, by the time the trial began, Madugula was seeking a forced buyout of his stock and money damages under § 489(1)(e) and (f).

Despite Madugula's request for specific relief, the court was free under the language of the statute to grant relief as it considered appropriate, or none at all, even if he were to establish his claim of oppression.[72] The fact that the relief sought did not bind the court is consistent in nature with a claim before a court of equity because the remedies sought by a claimant do not bind a court of equity. That is,

> [t]he premises of a bill in equity—not its prayer—are determinative of the substance thereof, and this is but

[70] *Brown*, 75 Mich at 285.

[71] *Torrey v Toledo Portland Cement Co*, 150 Mich 86, 91; 113 NW 580 (1907) ("Equity can and should extend its strong and beneficent arm to protect the rights of all.").

[72] See MCL 450.1489(1).

> another way of saying that relief within scope of the bill is the final responsibility of the chancellor and that the prayer aids rather than dictates equity's decretal beneficence.[73]

Furthermore, a claim for which the court has broad power to fashion relief as the circumstances require is consistent with an action in equity.[74] Accordingly, we conclude that a claim, like one under § 489, that allows the court to shape the remedy regardless of what a claimant seeks would have been considered equitable in nature at the time the 1963 Constitution was adopted.

Moreover, the enumerated remedies available to the court in its discretion under § 489(1)(a) to (f) and, more specifically, those sought by Madugula in this case do not change our determination. As discussed previously, dissolution of the sort contemplated under § 489(1)(a) was awarded by courts of equity at the time the 1963 Constitution was adopted.[75] Moreover, § 489(1)(b) and (c) allow a court to cancel or alter corporate documents or resolutions; that relief is equitable in nature because "[e]quity has jurisdiction where complete protection and relief requires the cancellation of written instruments, the rescission of a transaction, or other specific relief of equitable character."[76] Section 489(1)(d) allows a court to direct or prohibit an act of the corporation or

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[73] *Herpolsheimer v A B Herpolsheimer Realty Co*, 344 Mich 657, 665-666; 75 NW2d 333 (1956) (citations omitted). The *Herpolsheimer* Court recognized that if a "plaintiff [in equity] . . . establishes the right he has pleaded, equity's grace will come to him" and "[t]he shape of that relief will be formed by the chancellor according to germane conditions and equities existing at the time decree is made—not of necessity by the prayer of the bill." *Id*. at 665 (citation omitted).

[74] *Miner*, 93 Mich at 115.

[75] *Levant*, 350 Mich at 241.

[76] *Haylor v Grigg-Hanna Lumber & Box Co*, 287 Mich 127, 133; 283 NW 1 (1938).

relevant persons. Section 489(1)(e) allows a court to compel the purchase at fair value of the shares of the shareholder. Although the final result of a forced buy-out under § 489(1)(e) is a payment of money, the relief sought requires the court to compel a party to purchase shares.[77] Relief requiring a court to compel another to act, like that of § 489(1)(d) and (e), has long been considered equitable in nature.[78] Accordingly, the relief enumerated in § 489(1)(a) to (e) was within the province of a court of equity, not a court of law, at the time the 1963 Constitution was adopted.

Finally, the fact that § 489(1)(f) allows a court to award money damages, or the fact that Madugula sought damages in this action, does not change our conclusion regarding the equitable nature of a § 489 claim. We recognize that claims for money damages were generally considered legal in nature at the time the 1963 Constitution was adopted.[79] However, as noted above, these money damages are only one remedy available to a court in granting the relief it deems appropriate after a shareholder establishes a claim of oppression. This is consistent with actions that are equitable in nature because "[a] court of equity may adapt its relief to the exigencies of the case, and, when

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[77] See Bahls, *Resolving Shareholder Dissension: Selection of the Appropriate Equitable Remedy*, 15 J Corp L 285, 298 (1990) ("Although the statutes of many states expressly authorize courts to require the majority shareholder or the corporation to purchase the interest of minority shareholders, courts at common law have always had the inherent equitable power to order share purchases.") (citations omitted).

[78] See, e.g., *Maxwell v Eddy Paper Co*, 232 Mich 356; 205 NW 111 (1925); *Stevenson v Sicklesteel Lumber Co*, 219 Mich 18; 188 NW 449 (1922); *Detroit Trust Co v Goodrich*, 175 Mich 168; 141 NW 882 (1913); *Graves v Brooks*, 117 Mich 424; 75 NW 932 (1898); *Hunter v Roberts, Throp & Co*, 83 Mich 63; 47 NW 131 (1890); *Bengley v Wheeler*, 45 Mich 493; 8 NW 75 (1881).

[79] *Teft*, 31 Mich at 371-372.

nothing more is required, may order a sum of money to be paid to the plaintiff, or give him a personal judgment therefor, to be enforced by execution."[80] Indeed, we have long recognized that a court sitting in equity could award damages when necessary.[81]

Therefore, although we recognize that damages are generally a legal remedy, we conclude that the availability of money damages does not change the overall equitable nature of a § 489 claim. As previously discussed, our jurisprudence requires that the entire nature of the claim be considered, not just the relief sought, when determining whether there is a constitutional right to a jury trial.[82] Giving the court the discretion to award money damages after a shareholder establishes a claim of oppression is wholly consistent with a court of equity's ability to adapt its relief to the circumstances of the case.

In sum, we hold that a § 489 claim would have been denominated equitable at the time the 1963 Constitution was adopted. Therefore, no constitutional right to

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[80] *Grigg v Hanna*, 283 Mich 443, 460; 278 NW 125 (1938) (citations and quotation marks omitted).

[81] See, e.g., *Carson v Milcrow Motor Sales*, 303 Mich 86; 5 NW2d 665 (1942) (affirming in part a chancery court's award of damages); *Backus v Kirsch*, 264 Mich 339; 249 NW 872 (1933) (affirming the chancery court's jurisdiction to award damages as incident to equitable relief); *Mich Sugar Co v Falkenhagen*, 243 Mich 698, 701-702; 220 NW 760 (1928) (remanding to the chancery court to for an award of damages after determining that specific performance was improper); *Rhoades v McNamara*, 135 Mich 644, 646; 98 NW 392 (1904) (determining that the chancery court's award of damages had not deprived the defendant of his constitutional right to a jury trial because the court of equity had jurisdiction over the controversy and "[h]aving jurisdiction, the court should dispose of every question involved"); *McLean v McLean*, 109 Mich 258, 261; 67 NW 118 (1896) (decreeing an award of $500 after concluding that an accounting would not be helpful).

[82] See *Abner A Wolf*, 385 Mich at 261.

a jury trial exists under § 489. Instead, a § 489 claim, in its entirety, must be tried before a court of equity.[83]

3. APPLICATION

In his complaint, Madugula demanded a jury trial. Through a motion in limine before trial, Taub argued that there was no right to a jury trial for Madugula's sole remaining claim under § 489 and requested that the claim be decided at a bench trial. The trial court denied Taub's motion. Thereafter, a jury heard Madugula's shareholder-oppression claim, and the trial court allowed the jury to consider whether damages or the equitable remedy of a forced stock buyout under § 489(1)(e) was proper. After the jury awarded both in favor of Madugula, the trial court entered a judgment reflecting the jury's verdict. After trial, Taub renewed his objection to the jury trial through a motion for a new trial.

The trial court abused its discretion by not granting Taub's motion for a new trial because Madugula did not have a right to a jury trial for his § 489 claim; instead, Taub had a right to have the controversy heard by a court of equity.[84] Because of the equitable nature of Madugula's claim, the case should have been tried at a bench trial. In addition, the trial court erred by allowing the jury to consider the purely equitable remedy of a forced buyout of stock. As we noted previously, "[j]uries cannot devise specific remedies . . . ."[85] That is, after Madugula established his claim for shareholder oppression, it was the job of the court sitting in equity to fashion an appropriate remedy under § 489, not the

[83] See *Brown*, 75 Mich at 284.

[84] *Id*.

[85] *Id*. at 285.

jury. Therefore, the trial court erred by allowing a jury trial on Madugula's § 489 claim.[86]

We recognize that MCR 2.509(D) allows a court to use an advisory jury to determine issues of fact.[87] In fact, this Court has long recognized the use of advisory juries in equity settings.[88] However, even when a court of equity uses an advisory jury to decide issues of fact, the

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[86] In his brief on appeal, Taub states that he conceded in the Court of Appeals that there was a right to a jury trial under § 489 for a claim of damages. Normally, Taub's concession would compel us to treat the issue as abandoned. See *Coddington v Robertson*, 160 Mich App 406, 412; 407 NW2d 666 (1987). However, we decline to be bound by Taub's concession in this case. Leaving in place the award of damages in favor of Madugula would improperly constrain the plenary authority of the court sitting in equity to determine on remand not only whether shareholder oppression occurred, but also what remedy is appropriate and to whom it should be given. Further, guidance in this area is necessary because courts have struggled to determine whether a right to a jury trial exists under § 489. See *Madugula v Taub*, unpublished opinion of the Court of Appeals, issued October 25, 2012 (Docket No. 298425); *Forsberg v Forsberg Flowers, Inc*, unpublished opinion per curiam of the Court of Appeals, issued December 5, 2006 (Docket No. 263762). Therefore, "we cannot consent to be bound by any concession of counsel on so important a question." *Busch v Nester*, 62 Mich 381, 384; 28 NW 911 (1886).

[87] MCR 2.509(D) reads:

> Advisory Jury and Trial by Consent. In appeals to circuit court from a municipal court and in actions involving issues not triable of right by a jury because of the nature of the issue, the court on motion or on its own initiative may
>
> (1) try the issues with an advisory jury; or
>
> (2) with the consent of all parties, order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

[88] See, e.g., *McPeak v McPeak*, 457 Mich 311; 577 NW2d 670 (1998); *Business Men's Assurance Co v Marriner*, 223 Mich 1; 193 NW 907 (1923); *Marcoux*, 203 Mich 506; *Cole v Cole Realty Co*, 169 Mich 347; 135 NW 329 (1912); *Detroit United Railway v Smith*, 144 Mich 235; 107 NW 922 (1906); *Maier v Wayne Circuit Judge*, 112 Mich 491; 70 NW 1032 (1897).

court must still state its own findings of the facts and conclusions of law.[89] That did not occur in this case. Accordingly, we remand the case to the trial court to determine whether, on the present record, it can make the requisite findings of fact and conclusions of law under MCR 2.517(A) or whether a new trial is necessary.

B. USE OF A SHAREHOLDER AGREEMENT TO ESTABLISH SHAREHOLDER OPPRESSION

We are also asked to determine whether evidence of a breach of a shareholder agreement can be used to establish shareholder oppression under § 489. That is, we must determine whether a private contractual agreement (the stockholders' agreement in this case) can give rise to shareholder interests that are actionable under § 489 if violated.

Section 489(3) reads:

> "[W]illfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.[90]

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[89] See *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 301-302; 224 NW2d 883 (1975). See also MCR 2.517(A)(1) ("In actions tried on the facts without a jury or with an advisory jury, the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment.").

[90] MCL 450.1489(3).

Notably, "willfully unfair and oppressive conduct" occurs when the conduct "substantially interferes with the interests of the shareholder as a shareholder." The parties quarrel over what a shareholder's interests as a shareholder actually entail.

This Court has never exhaustively listed the interests or rights that shareholders have as shareholders of a corporation. However, we have recognized that "[t]he relation between a corporation and its stockholders is contractual in its nature"[91] and that "[t]he charter of a corporation is its constitution. It prescribes the duties of stockholders and directors within the limits of the charter in the exercise of the power conferred upon them."[92] Beyond a corporation's articles of incorporation, we may also consider a corporation's bylaws and the governing statutes to determine a shareholder's interests.[93]

Under the BCA, a shareholder is "a person that holds units of proprietary interest in a corporation . . . ."[94] Through this interest in the corporation, a shareholder retains certain statutory rights that allow the shareholder to protect and gain from his or her interest as a shareholder, including, but not limited to, the right to vote, inspect the books, and receive distributions.[95] The BCA also allows shareholders to enter into voting agreements and shareholder agreements. Through a voting agreement, shareholders may agree to modify how the shares held by them are voted.[96] Through a

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[91] *Voigt v Remick*, 260 Mich 198, 204; 244 NW 446 (1932).

[92] *Id*. at 205.

[93] 12B Fletcher, Cyclopedia of Corporations, § 5715, p 23.

[94] MCL 450.1109(2).

[95] See MCL 450.1441, 450.1487(2), and 450.1345; see also MCL 450.1231, 450.1343, 450.1405, 450.1505(2), and 450.1511.

[96] MCL 450.1461.

shareholder agreement, shareholders are able to modify several of the statutory rights and interests.[97] A shareholder agreement, if it complies with the requirements of MCL 450.1488, "is effective among the shareholders and the corporation . . . ."[98] Thus, although the BCA provides specific rights and interests to a shareholder as a shareholder, shareholders are entitled to modify these rights and interests through shareholder agreements.

In this case, Taub argues that the Court of Appeals erred by concluding that a breach of the contractual rights set forth in the stockholders' agreement could give rise to a statutory shareholder-oppression claim under § 489. However, Taub fails to recognize that several of the rights modified in the stockholders' agreement were Madugula's rights as a shareholder. Under the stockholders' agreement, the shareholders agreed to elect each other as the directors of the corporation, which is normally a right reserved to shareholders. The stockholders' agreement provided the shareholders with preemptive rights. It also modified the voting rights by instituting a 70 percent supermajority for certain corporate actions. Accordingly, as permitted under MCL 450.1461 and 450.1488, the shareholders entered into a stockholders' agreement that modified the shareholders' statutory rights and interests as shareholders. Because these modified rights and interests are statutorily effective among shareholders and the corporation, evidence of a breach of those rights or interests may be evidence of shareholder

[97] For example, shareholder agreements can modify the method of distributions, establish directors or officers, "govern[] the exercise or division of voting power by or between the shareholders and directors or by or among any of the shareholders or directors, including use of weighted voting rights or director proxies," change dissolution requirements, and more. MCL 450.1488(1).

[98] *Id*.

oppression.[99] Thus, we agree with the Court of Appeals to the extent that it determined that a breach of the rights and interests contained in the stockholders' agreement could be evidence of shareholder oppression. However, it remains to the trial court to determine on remand whether and to what extent any breach of the stockholders' agreement evidences such oppression in this case.[100]

IV. CONCLUSION

We hold that the language of MCL 450.1489 does not afford a claimant a right to a jury trial. Instead, the language indicates a legislative intent to have a § 489 claim heard by a court sitting in equity. We further hold that the Michigan Constitution does not afford a right to a jury trial for claims brought under § 489 because those claims would have been considered equitable in nature at the time the 1963 Constitution was adopted. Finally, we hold that violations of a shareholder agreement may constitute evidence of shareholder oppression pursuant to § 489(3). Because the trial court erred

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[99] That is not to say that a violation of one of these rights automatically *establishes* a claim of shareholder oppression. Under § 489(3), the oppressive conduct must be "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder." MCL 450.1489(3). In addition, "[w]illfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder." *Id*.

[100] We also asked the parties to address whether Madugula's interests as a shareholder were interfered with disproportionately by the actions of Taub given that Madugula retained his corporate shares and his corporate directorship. We need not answer this question in light of our decision to reverse the Court of Appeals' judgment and remand for further proceedings. The trial court will make this determination on remand.

by submitting Madugula's § 489 claim to the jury and allowing it to award an equitable remedy, the Court of Appeals erred by affirming the trial court's judgment. Therefore, we reverse the judgment of the Court of Appeals, reverse the judgment of the trial court in favor of Madugula, and remand the case to the trial court to determine whether, on the present record, sitting as a court of equity, it can make the requisite findings of fact and conclusions of law under MCR 2.517(A) or whether a new trial is necessary.

YOUNG, C.J., and CAVANAGH, MARKMAN, KELLY, ZAHRA, and MCCORMACK, JJ., concurred with VIVIANO, J.

ORDERS IN CASES

ORDERS ENTERED IN CASES BEFORE THE SUPREME COURT

Summary Disposition June 11, 2014:

AFFILIATED MEDICAL OF DEARBORN v LIBERTY MUTUAL INSURANCE COMPANY, No. 148443; Court of Appeals No. 314179. 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.

HOBSON v INDIAN HARBOR INSURANCE COMPANY, No. 148592; Court of Appeals No. 316714. 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 Granted June 11, 2014:

PEOPLE v HARTWICK, No. 148444; reported below: 303 Mich App 247. The parties shall include among the issues to be briefed: (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.

We direct the Clerk to schedule the oral argument in this case for the same future session of this Court when it will hear oral argument in *People v Tuttle* (Docket No. 148971).

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 TUTTLE, No. 148971; Court of Appeals No. 312364. The parties shall include among the issues to be briefed: (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.

We direct the Clerk to schedule the oral argument in this case for the same future session of this Court when it will hear oral argument in *People v Hartwick* (Docket No. 148444).

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 LOCKRIDGE, No. 149073; reported below: 304 Mich App 278. The parties shall 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).

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered June 11, 2014:

SPEICHER v COLUMBIA TOWNSHIP BOARD OF TRUSTEES, No. 148617; reported below: 303 Mich App 475. The parties shall submit supplemental briefs within 42 days of the date of this order addressing whether MCL 15.271(4) authorizes an award of attorney fees and costs to a plaintiff who obtains declaratory relief regarding claimed violations of the Open Meetings Act (MCL 15.261 *et seq*.), or whether the plaintiff must obtain injunctive relief as a necessary condition of recovering attorney fees and costs under MCL 15.271(4). The parties should not submit mere restatements of their application papers.

Persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied June 11, 2014:

PEOPLE v CARRUTHERS, No. 147670; reported below: 301 Mich App 590.

PEOPLE v BAKER, No. 147908; Court of Appeals No. 317395.

PEOPLE v BELL, No. 148223; Court of Appeals No. 316300.

PEOPLE v BARBARA JOHNSON, No. 148317; PEOPLE v ANTHONY AGRO, No. 148318; PEOPLE v FLEISSNER, No. 148319; PEOPLE v BARBARA AGRO, No. 148320; PEOPLE v RICHMOND, No. 148321; PEOPLE v CURTIS, No. 148322; PEOPLE v NICHOLAS AGRO, No. 148323; reported below: 302 Mich App 450.

PEOPLE v RELERFORD, No. 148493; Court of Appeals No. 310488.

COMMAND OFFICERS ASSOCIATION OF STERLING HEIGHTS v CITY OF STERLING HEIGHTS, No. 148579; Court of Appeals No. 310977.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered June 13, 2014:

EPPS v 4 QUARTERS RESTORATION, LLC, No. 147727; Court of Appeals No. 305731. The parties shall submit supplemental briefs within 42 days of the date of this order addressing whether the contracts and limited power of attorney at issue are void or merely voidable, and whether the plaintiffs are required to establish actual damages to recover on their breach of contract and fraud/misrepresentation claims. The parties should not submit mere restatements of their application papers.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

The application for leave to appeal as cross-appellants remains pending.

PEOPLE v OVERTON, No. 148347; Court of Appeals No. 308999. The parties shall submit supplemental briefs within 42 days of the date of this order addressing whether the evidence was sufficient to show that the defendant engaged in the "intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body," MCL 750.520a(r), such that his conviction of first-degree criminal sexual conduct under MCL 750.520b can be sustained. 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.

Summary Disposition June 17, 2014:

In re FENTON, No. 149348; Court of Appeals No. 319696. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the February 14, 2014 and April 15, 2014 orders of the Court of Appeals, and we remand this case to the Court of Appeals for consideration as on

reconsideration granted. On remand, the Court of Appeals shall either reinstate the children's claim of appeal or explain why the children do not have an appeal of right, pursuant to MCR 3.993(A)(1), from the trial court's November 12, 2013 order of disposition. We do not retain jurisdiction.

Summary Disposition June 18, 2014:

ANDERSON v SEARS ROEBUCK AND COMPANY, No. 148301; Court of Appeals No. 318532. 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. 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.

THOMAI v MIBA HYDRAMECHANICA CORPORATION, No. 148373; reported below: 303 Mich App 196. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the Macomb Circuit Court's May 24, 2012 judgment for the defendants. The trial court did not abuse its discretion in limiting discovery where the plaintiffs had seven months of unfettered discovery and, in lieu of granting summary disposition to the defendants, the trial court permitted additional discovery limited to evidence that would support a prima facie case under the intentional tort exception to the exclusive remedy provision of the worker's disability compensation act, MCL 418.131(1). Nor did the trial court err in its understanding of the legal elements of the intentional tort exception. There is simply no evidence in the record to establish that the defendants wilfully disregarded knowledge that an injury was certain to occur to the plaintiff from his operation of the grooving machine.

WENNERS v CHISOLM, No. 148446; Court of Appeals No. 314938. 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. The Court of Appeals shall consider the defendant's motion for summary disposition in light of MCR 2.605.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered June 18, 2014:

PEOPLE v NELSON, No. 147743; Court of Appeals No. 308244. The parties shall submit supplemental briefs within 42 days of the date of the order appointing counsel, or of the ruling that the defendant is not entitled to appointed counsel, addressing the defendant's claim of ineffective assistance of trial counsel. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied June 18, 2014:

THURSFIELD v THURSFIELD, No. 148041; Court of Appeals No. 302186.

PEOPLE v MCNORIELL, No. 148129; Court of Appeals No. 316162.

PEOPLE v EDWARD FOSTER, No. 148131; Court of Appeals No. 301361.

CLUM v JACKSON NATIONAL LIFE INSURANCE COMPANY, No. 148298; Court of Appeals No. 307357.

PEOPLE v OLIVER, No. 148362; Court of Appeals No. 318161.

PEOPLE v CHAMBERS, No. 148577; Court of Appeals No. 311292.

PEOPLE v CREPS, No. 148691 and 148692; Court of Appeals No. 318888 and 318889.

PEOPLE v COON, No. 148733; Court of Appeals No. 318907.

Reconsideration Denied June 18, 2014:

PEOPLE v VINSON, No. 146128; Court of Appeals No. 303593. Leave to appeal denied at 495 Mich 946.

CAVANAGH, J., would grant the motion for reconsideration.

MCCORMACK, J., not participating because of her prior involvement as counsel for a party.

Summary Disposition June 20, 2014:

PEOPLE v HARPER, No. 148790; Court of Appeals No. 319153. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the Clinton Circuit Court's August 7, 2013 award of restitution, and we remand this case to the circuit court for the restitution hearing required by the May 20, 2013 judgment of sentence. MCL 780.767.

Leave to Appeal Granted June 20, 2014:

PEOPLE v FERONDA SMITH, No. 148305; Court of Appeals No. 304935. The application for leave to appeal the October 29, 2013 judgment of the Court of Appeals is considered, and it is granted, limited to the 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.

KRUSAC v COVENANT MEDICAL CENTER, INC, No. 149270; Court of Appeals No. 321719. The parties shall include among the issues to be briefed: (1) whether *Harrison v Munson Healthcare, Inc.,* 304 Mich App 1 (2014), erred in its analysis of the scope of the peer review privilege, MCL 333.21515; and (2) whether the Saginaw Circuit Court erred when it ordered the defendant to produce the first page of the improvement

report based on its conclusion that "objective facts gathered contemporaneously with an event do not fall within the definition of peer review privilege." We further order that the stay entered by this Court on May 14, 2014 shall remain in effect until completion of this appeal.

Leave to Appeal Denied June 20, 2014:

PEOPLE v GOOD, No. 148636; Court of Appeals No. 315914.

MARKMAN, J. (*dissenting*). I would grant leave to appeal to consider whether the trial court's decision to exclude evidence of the complainant's alleged threat to a prosecution witness, as well as evidence of the complainant's alleged statement of an intention to get involved in a fight on the evening of the criminal incident for which defendant was convicted, violated defendant's statutory or constitutional right to present a defense. See *Chambers v Mississippi*, 410 US 284 (1973); *People v Barrera*, 451 Mich 261 (1996); MCL 763.1.

Summary Disposition June 24, 2014:

PEOPLE v HENDY, No. 148313; Court of Appeals No. 315587. 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 of the defendant's delayed application for leave to appeal under the standard for direct appeals.

PEOPLE v GILLIARD, No. 148486; Court of Appeals No. 318666. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Calhoun Circuit Court for the appointment of substitute appellate counsel, in light of *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005). Based on our review of the record, the circuit court granted original appointed appellate counsel's motion to withdraw, but failed to appoint substitute appellate counsel until after the then effective 12-month deadline to file a direct appeal had expired. See MCR 7.205(F). On remand, substitute appellate counsel, once appointed, may file an application for leave to appeal in the Court of Appeals, and/or any appropriate postconviction motions in the circuit court, within six months of the date of the circuit court's order appointing counsel. Counsel may include among the issues raised, but is not required to include, the issue raised by the defendant in his motion for relief from judgment that was filed in 2009. We do not retain jurisdiction.

PEOPLE v JAMES, No. 148862; Court of Appeals No. 319661. 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 June 24, 2014:

BONAR v DEPARTMENT OF TREASURY, No. 147393; Court of Appeals No. 310707.

PEOPLE v FORD, No. 148154; Court of Appeals No. 315271.

JAAKKOLA v CRIME VICTIM SERVICES COMMISSION, No. 148157; Court of Appeals No. 315122.

SEXTON-WALKER v DETROIT BOARD OF EDUCATION, No. 148162; Court of Appeals No. 315412.

PEOPLE v COWART, No. 148231; Court of Appeals No. 311890.

In re MERRIWEATHER, No. 148239; Court of Appeals No. 316661.

PEOPLE v SIFUENTES, No. 148240; Court of Appeals No. 315618.

In re PETITION OF WASHTENAW COUNTY TREASURER FOR FORECLOSURE, No. 148245; Court of Appeals No. 314969.

PEOPLE v ADAMS, No. 148253; Court of Appeals No. 318644.

PEOPLE v ZEIGLER, No. 148265; Court of Appeals No. 316551.

PEOPLE v DARYL SMITH, No. 148332; Court of Appeals No. 305437.

PEOPLE v JAMES BROWN, No. 148335; Court of Appeals No. 312553.

PEOPLE v YOKLEY, No. 148341; Court of Appeals No. 317656.

PEOPLE v TIBBS, No. 148352; Court of Appeals No. 318639.

PEOPLE v HANEY, No. 148354; Court of Appeals No. 317777.

LAWRENCE J STOCKLER & ASSOCIATES, PC v MAHADEV AGYA, LLC, No. 148374; Court of Appeals No. 316986.

PEOPLE v DOUGLAS JACKSON, No. 148376; Court of Appeals No. 315335.

PEOPLE v HURT, No. 148377; Court of Appeals No. 316726.

PEOPLE v JUAREZ, No. 148378; Court of Appeals No. 315159.

PEOPLE v RUPERT, No. 148381; Court of Appeals No. 314931.

US BANK NATIONAL ASSOCIATION v BAJWA, No. 148387; Court of Appeals No. 313516.

PEOPLE v MASON, No. 148390; Court of Appeals No. 318615.

PEOPLE v PRESCOTT, No. 148396; Court of Appeals No. 317652.

PEOPLE v ANTOINE BAILEY, No. 148404; Court of Appeals No. 317517.

PEOPLE v ALLEN, No. 148417; Court of Appeals No. 317452.

PEOPLE v LAFLIN, No. 148420; Court of Appeals No. 317049.

RIGGIO v RIGGIO, Nos. 148435, 148436, and 148437; Court of Appeals Nos. 308587, 308588, and 310508.

PEOPLE v CAMPBELL, No. 148449; Court of Appeals No. 314976.

PEOPLE v PARKER, No. 148461; Court of Appeals No. 318902.

PEOPLE v WATKINS, No. 148464; Court of Appeals No. 317525.

PEOPLE v MARION, No. 148468; Court of Appeals No. 317388.

PEOPLE v GILMAN, No. 148470; Court of Appeals No. 313167.

PEOPLE v HOWARD, No. 148475; Court of Appeals No. 316009.

PEOPLE v HARRIS, No. 148478; Court of Appeals No. 318108.

PEOPLE v EDWARD MCCASKILL, No. 148480; Court of Appeals No. 310839.

PEOPLE v POWE, No. 148485; Court of Appeals No. 317320.

PEOPLE v SOBAY, No. 148499; Court of Appeals No. 316684.

PEOPLE v WADE, No. 148500; Court of Appeals No. 314993.

PEOPLE v STANLEY TAYLOR, No. 148503; Court of Appeals No. 315540.

CLARK v SWARTZ CREEK COMMUNITY SCHOOLS BOARD OF EDUCATION, No. 148506; Court of Appeals No. 310115.

PEOPLE v SHIELDS, No. 148511; Court of Appeals No. 316956.

PEOPLE v LICEAGA, No. 148517; Court of Appeals No. 317070.

PEOPLE v EGGLESTON, No. 148518; Court of Appeals No. 317533.

PEOPLE v HAMILTON, No. 148529; Court of Appeals No. 317448.

In re DEWALD (PEOPLE v DEWALD), Nos. 148538 and 148539; Court of Appeals Nos. 31500 and 315654.

PEOPLE v RODRIGUEZ, No. 148558; Court of Appeals No. 318892.

PEOPLE v ANDRE JACKSON, No. 148560; Court of Appeals No. 318197.

PEOPLE v KELLY, No. 148561; Court of Appeals No. 319024.

PEOPLE v KEVIN JOHNSON, No. 148569; Court of Appeals No. 318428.

PEOPLE v RONNIE WILLIAMS, No. 148571; Court of Appeals No. 316169.

MOFFIT v COOPER STREET CORRECTIONAL FACILITY WARDEN, No. 148578; Court of Appeals No. 317381.

PEOPLE v WEST, No. 148594; Court of Appeals No. 309821.

PEOPLE v DILLARD, No. 148595; reported below: 303 Mich App 372.

PEOPLE v REED, No. 148600; Court of Appeals No. 317628.

PEOPLE v CHANDLER, No. 148601; Court of Appeals No. 312017.

TINGLEY v PIONEER GENERAL CONTRACTORS, INC, Nos. 148611 and 148612; Court of Appeals Nos. 309537 and 312177.

MORAN v RISSER, No. 148619; Court of Appeals No. 304281.

PEOPLE v WITHERS, No. 148620; Court of Appeals No. 312252.

PEOPLE v COMTOIS, No. 148622; Court of Appeals No. 317621.

PEOPLE v LANDERS, No. 148624; Court of Appeals No. 318266.

PEOPLE v JACKMAN, No. 148625; Court of Appeals No. 307182.

BILLINGS v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 148628; Court of Appeals No. 315482.

PEOPLE v MEADOR, No. 148632; Court of Appeals No. 316353.

PEOPLE v KALAK, No. 148635; Court of Appeals No. 319464.

PEOPLE v LC BROWN, No. 148640; Court of Appeals No. 319064.

PEOPLE v THAMES, No. 148648; Court of Appeals No. 306313.

PEOPLE v LORING WALKER, No. 148655; Court of Appeals No. 318444.

PEOPLE v MCCRACKEN, No. 148671; Court of Appeals No. 319556.

PEOPLE v WALTERS, No. 148680; Court of Appeals No. 318342.

PEOPLE v MCCLINTON, No. 148681; Court of Appeals No. 312249.

PEOPLE v KAHRI SMITH, No. 148686; Court of Appeals No. 309407.

PEOPLE v JOHN JONES, No. 148689; Court of Appeals No. 310704.

PEOPLE v MAURICE WILLIAMS, No. 148694; Court of Appeals No. 306499.

KIRBY v GENERAL MOTORS CORPORATION, No. 148695; Court of Appeals No. 316964.

PEOPLE v PHILLIPS, No. 148696; Court of Appeals No. 311110.

GOLDEN v DEPARTMENT OF HUMAN SERVICES, No. 148697; Court of Appeals No. 317056.

PEOPLE v RODELL BROWN, No. 148699; Court of Appeals No. 307163.

PEOPLE v PRINGLE, No. 148706; Court of Appeals No. 311962.

PEOPLE v WOOD, No. 148708; Court of Appeals No. 319741.

PEOPLE v COOPER, No. 148710; Court of Appeals No. 319315.

PEOPLE v MASZATICS, No. 148712; Court of Appeals No. 310146.

BRAVERMAN v GRANGER, No. 148716; reported below: 303 Mich App 587.
VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v SIVERTSEN, No. 148717; Court of Appeals No. 319453.

PEOPLE v KUMAL BURTON, No. 148718; Court of Appeals No. 316699.

PEOPLE v KNOX, No. 148719; Court of Appeals No. 318811.

PEOPLE v GERRON, No. 148727; Court of Appeals No. 312564.

PEOPLE v WOODS, No. 148729; Court of Appeals No. 311452.

PEOPLE v JACOBSON, No. 148730; Court of Appeals No. 303786.

PEOPLE v BARNER, No. 148732; Court of Appeals No. 311739.

PEOPLE v BIRD, No. 148737; Court of Appeals No. 312874.

HENRY v FRANCIS, No. 148756; Court of Appeals No. 316451.

ESTATE OF BENTLEY, SR v BENTLEY, No. 148757; Court of Appeals No. 310801.

WOODWARD v SCHWARTZ, No. 148766; Court of Appeals No. 317043.

WOODWARD v SCHWARTZ, No. 148768; Court of Appeals No. 318029.

PEOPLE v FOLDS, No. 148774; Court of Appeals No. 319525.

PEOPLE v LYONS, No. 148785; Court of Appeals No. 306462.

KUKUK v HSBC BANK USA, No. 148795; Court of Appeals No. 310616.

PEOPLE v HENDERSON, No. 148801; Court of Appeals No. 319191.

PEOPLE v SIBLANI, No. 148813; Court of Appeals No. 313760.

PEOPLE v LEBLANC, No. 148815; Court of Appeals No. 315272.

PEOPLE v EARL DAVIS, No. 148827; Court of Appeals No. 319401.

PEOPLE v MONTALDI, No. 148837; Court of Appeals No. 312276.

PEOPLE v SHIVERS, No. 148842; Court of Appeals No. 305426.

PEOPLE v MARTIN LEWIS, No. 148847; Court of Appeals No. 312568.

PEOPLE v MCCOY, No. 148848; Court of Appeals No. 319100.

FLEMMING v DEPARTMENT OF CORRECTIONS, No. 148865; Court of Appeals No. 318227.

PEOPLE v HARRISON, No. 148867; Court of Appeals No. 311288.

PEOPLE v BRIGGS, No. 148870; Court of Appeals No. 317329.

WINGET v DEPARTMENT OF TREASURY, No. 148879; reported below: 304 Mich App 542.

PEOPLE v ENGLISH, No. 148884; Court of Appeals No. 308852.

PEOPLE v HURSTON, No. 148905; Court of Appeals No. 319160.

PEOPLE v FRITZ, No. 148911; Court of Appeals No. 319637.

PEOPLE v REYNOLDS, No. 148915; Court of Appeals No. 317424.

PEOPLE v ALBERT SMITH, No. 148919; Court of Appeals No. 318963.

PEOPLE v WILLIS, No. 148941; Court of Appeals No. 319691.

PEOPLE v PORTER, No. 148942; Court of Appeals No. 308094.

PEOPLE v SOLOMON, No. 148957; Court of Appeals No. 319760.

PEOPLE v STANFILL, No. 148958; Court of Appeals No. 319847.

PEOPLE v CLEMONS, No. 148960; Court of Appeals No. 319526.

PEOPLE v STENNIS, No. 148967; Court of Appeals No. 319766.

PEOPLE v HOWARD-WEDLOW, No. 148968; Court of Appeals No. 319448.

PEOPLE v BURKS, No. 148973; Court of Appeals No. 312472.

PEOPLE v KELLEY, No. 148974; Court of Appeals No. 306577.

CARLISLE v WRIGHT, No. 148982; Court of Appeals No. 310762.

PEOPLE v SADER, No. 148989; Court of Appeals No. 312266.

PEOPLE v RIVERA, No. 149111; Court of Appeals No. 319677. CAVANAGH, J., would grant leave to appeal.

PEOPLE v STACKPOOLE, No. 149113; Court of Appeals No. 319682. CAVANAGH, J., would grant leave to appeal.

PEOPLE v PILLETTE, No. 149157; Court of Appeals No. 320491.

GERALD L POLLACK & ASSOCIATES, INC v POLLACK, No. 149183; Court of Appeals No. 319180.

ZORAN v COTTRELLVILLE TOWNSHIP, No. 149199; Court of Appeals No. 320333.

PEOPLE v KOWALSKI, No. 149289; Court of Appeals No. 315495.

BUGBEE v BENNETT, No. 149339; Court of Appeals No. 318926.

Superintending Control Denied June 24, 2014:

WAXMAN v ATTORNEY GRIEVANCE COMMISSION, No. 148515.

CROFTON v ATTORNEY GRIEVANCE COMMISSION, No. 148682.

DE FILIPPIS v ATTORNEY GRIEVANCE COMMISSION, No. 148752.

KOTLARSKY v ATTORNEY GRIEVANCE COMMISSION, No. 148885.

Leave to Appeal Before Decision of the Court of Appeals Denied June 24, 2014:

BROWN v WONSAK, No. 149102; Court of Appeals No. 320730.

Reconsideration Denied June 24, 2014:

PEOPLE v ANDREW WILLIAMS, No. 147581; Court of Appeals No. 306191. Leave to appeal denied at 495 Mich 955.

PEOPLE v BUFORD, No. 148067; Court of Appeals No. 314109. Leave to appeal denied at 495 Mich 978.

PEOPLE v RUNNER, No. 148102; Court of Appeals No. 316526. Leave to appeal denied at 495 Mich 978.

PEOPLE v SHELTON, No. 148209; Court of Appeals No. 313609. Leave to appeal denied at 495 Mich 979.

PEOPLE v DUNCAN ALEXANDER, Nos. 148227, 148228, and 148229; Court of Appeals Nos. 302026, 302038, and 302045. Leave to appeal denied at 495 Mich 979.

Leave to Appeal Denied June 27, 2014:

In re BURT, No. 149388; Court of Appeals No. 318282.

In re PARRISH, No. 149467; Court of Appeals No. 318835.

Reconsideration Denied June 27, 2014:

THE SERVICE SOURCE, INC v DHL EXPRESS, INC, No. 147860; Court of Appeals No. 301013. Leave to appeal granted at 495 Mich 1003.

Leave to Appeal Denied July 18, 2014:

In re Z B J, No. 149460; Court of Appeals No. 317332.

Rehearing Denied July 22, 2014:

In re MORROW, No. 146802; opinion at 496 Mich 291.

Summary Disposition July 29, 2014:

PEOPLE v JIMMY MCCASKILL, No. 149347; Court of Appeals No. 312409. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals, and remand this case to the Court of Appeals to reconsider whether any error in admitting the police officer's identification testimony was harmless. The Court of Appeals found that the error was not harmless beyond a reasonable doubt. That standard applies to preserved constitutional questions. *People v Carines*, 460 Mich 750 (1999). For nonconstitutional preserved error, a defendant has the burden of establishing a miscarriage of justice under a "more probable than not" standard. *People v Lukity*, 460 Mich 484 (1999). If the

Court of Appeals determines that the error was harmless, it shall consider the remaining issues presented by the defendant on appeal. In all other respects, the applications are denied, because we are not persuaded that the remaining questions presented should now be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v ANTHONY, No. 148687; Court of Appeals No. 316045. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Macomb Circuit Court for further proceedings consistent with this order. Appointed counsel may file an application for leave to appeal the defendant's January 5, 2012 plea-based conviction to the Court of Appeals, as well as any necessary or appropriate postconviction motions in the trial court, within six months of the date of this order. If a postconviction motion is filed in the trial court, counsel may file an application for leave to appeal to the Court of Appeals within six months of the order disposing of that motion. The defendant, through no fault of his own, was deprived of the opportunity to have appointed appellate counsel file a timely motion to withdraw the plea and application for leave to appeal, due to the trial court's failure to timely respond to the defendant's March 3, 2012 request for counsel pursuant to MCR 6.425(G)(1)(a); due to clerical errors in the April 24, 2012 order appointing appellate counsel; and/or due to appellate counsel's oversights. See *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005); *Roe v Flores-Ortega*, 528 US 470, 477; 120 S Ct 1029; 145 L Ed 2d 985 (2000); and *Peguero v United States,* 526 US 23, 28; 119 S Ct 961; 143 L Ed 2d 18 (1999). We do not retain jurisdiction.

Leave to Appeal Denied July 29, 2014:

BEYDOUN v WILLS, No. 147332; Court of Appeals No. 304729.

PEOPLE v SANDERS, No. 148262; Court of Appeals No. 316894.

PEOPLE v ABELA, No. 148277; Court of Appeals No. 307768.

PEOPLE v LIGE, No. 148422; Court of Appeals No. 317726.

PEOPLE v FULLER, No. 148427; Court of Appeals No. 315468.

PEOPLE v CHEATHAM, No. 148428; Court of Appeals No. 319109.

PEOPLE v GORDON, No. 148445; Court of Appeals No. 315563.

PEOPLE v FARLEY, No. 148457; Court of Appeals No. 310254.

PEOPLE v MITCHELL-EL, No. 148488; Court of Appeals No. 317648.

PEOPLE v BARBIERI, No. 148489; Court of Appeals No. 315394.

VIVIANO, J., did not participate because he presided over this case in the circuit court and due to a familial relationship with the circuit court judge who presided over the motion for relief from judgment.

PEOPLE v STOKES, No. 148530; Court of Appeals No. 318845.

PEOPLE v LAJUAN BROWN, No. 148593; Court of Appeals No. 319146.

PEOPLE v KEVIN BROWN, No. 148609; Court of Appeals No. 317159.

PEOPLE v FRENCH, No. 148639; Court of Appeals No. 308774.

PEOPLE v TOTH, No. 148644; Court of Appeals No. 318980.

PEOPLE v HAYNES, No. 148646; Court of Appeals No. 319245.

PEOPLE v SHAYKIN, No. 148668; Court of Appeals No. 317649.

PEOPLE v JERRY BAILEY, No. 148672; Court of Appeals No. 319113.

PEOPLE v DESHAWN FOSTER, No. 148704; Court of Appeals No. 319095.

PEOPLE v BEAVER, No. 148705; Court of Appeals No. 309787.

PEOPLE v THERIOT, No. 148725; Court of Appeals No. 308640.

PEOPLE v PARIS SMITH, No. 148734; Court of Appeals No. 312481.

PEOPLE v MEREDITH, No. 148742; Court of Appeals No. 311814.

PEOPLE v SINQUEFIELD, No. 148747; Court of Appeals No. 317534.

PEOPLE v GATISS, No. 148755; Court of Appeals No. 316130.

PEOPLE v ELLIOTT, No. 148760; Court of Appeals No. 317796.

PEOPLE v CHRISTOPHER JENKINS, No. 148762; Court of Appeals No. 319433.

PEOPLE v SCOTT, No. 148764; Court of Appeals No. 318198.

PEOPLE v JIMMIE JONES, No. 148769; Court of Appeals No. 319162.

PEOPLE v DILTS, No. 148770; Court of Appeals No. 316884.

PEOPLE v HUMPHREY, No. 148775; Court of Appeals No. 316909.

PEOPLE v GRIFFES, No. 148776; Court of Appeals No. 316007.

PEOPLE v CHARLES JONES, No. 148786; Court of Appeals No. 317165.

PEOPLE v ANDERSON, No. 148789; Court of Appeals No. 318895.

PEOPLE v JASON THOMAS, No. 148791; Court of Appeals No. 312744.

PEOPLE v DEVANTE THOMAS, No. 148792; Court of Appeals No. 317483.

PEOPLE v CORTEZ WALKER, No. 148799; Court of Appeals No. 319584.

FANNIE MAE v HOEHN, No. 148804; Court of Appeals No. 316851.

PEOPLE v YANCEY, No. 148805; Court of Appeals No. 319355.

PEOPLE v NEVEL, No. 148807; Court of Appeals No. 318063.

AMERICORP FINANCIAL, LLC v BACDAMM INVESTMENT GROUP, INC, No. 148810; Court of Appeals No. 312522.

PEOPLE v DERRICK SMITH, No. 148814; Court of Appeals No. 319151.

PEOPLE v WORKMAN, No. 148816; Court of Appeals No. 319043.

PEOPLE v WALLACE, No. 148817; Court of Appeals No. 319413.

PEOPLE v GRAHAM, Nos. 148821 and 148822; Court of Appeals Nos. 308502 and 314314.

PEOPLE v NAKILA KING, No. 148826; Court of Appeals No. 310330.

PEOPLE v MATTHEWS, No. 148828; Court of Appeals No. 313021.

PEOPLE v JAMAL LEWIS, No. 148835; Court of Appeals No. 311813.

PEOPLE v MOSHER, No. 148836; Court of Appeals No. 312996.

PEOPLE v RONALD EARL WILLIAMS, No. 148838; Court of Appeals No. 305917.

OASIS OIL, LLC v MICHIGAN PROPERTIES, LLC, No. 148840; Court of Appeals No. 306700.

PEOPLE v ROSE, No. 148844; Court of Appeals No. 314967.

PEOPLE v SPENCER, No. 148849; Court of Appeals No. 311954.

PEOPLE v MANUEL, No. 148854; Court of Appeals No. 319258.

PEOPLE v MARTIN, No. 148858; Court of Appeals No. 312324.

BURTON v MACHA, No. 148860; reported below: 303 Mich App 750.

PEOPLE v COPELAND, No. 148871; Court of Appeals No. 311129.

PEOPLE v NOVAK, No. 148876; Court of Appeals No. 319323.

PEOPLE v ANTWAN JOHNSON, No. 148886; Court of Appeals No. 318857.

PEOPLE v COUNTRYMAN, No. 148887; Court of Appeals No. 312647.

PEOPLE v FORDHAM, No. 148888; Court of Appeals No. 317522.

PEOPLE v STAIR, No. 148892; Court of Appeals No. 315149.

HILL v HILL, No. 148893; Court of Appeals No. 312018.

KOZMA v CHELSEA LUMBER COMPANY, No. 148904; Court of Appeals No. 311258.

PEOPLE v TREVAUN BROOKS, No. 148913; Court of Appeals No. 316079.

PEOPLE v MCKASKLE, No. 148920; Court of Appeals No. 319558.

PEOPLE v HARDEMAN, No. 148935; Court of Appeals No. 316993.

PEOPLE v VIAVADA, No. 148937; Court of Appeals No. 310164.

PEOPLE v MARK JACKSON, No. 148946; Court of Appeals No. 318418.

LEVANDER v LEVANDER, No. 148961; Court of Appeals No. 317439.

In re PETITION OF SANILAC COUNTY TREASURER, No. 148964; Court of Appeals No. 316814.

SLADE DEVELOPMENT, LLC v TOWNSHIP OF SPRINGFIELD, No. 148972; Court of Appeals No. 312207.

PEOPLE v SIMMON, No. 148975; Court of Appeals No. 319405.

MARCELLI v WALKER, No. 148984; Court of Appeals No. 319069.

PEOPLE v CLOUSE, No. 149000; Court of Appeals No. 319686.

BROMLEY v MALLISON, No. 149001; Court of Appeals No. 312901.

PEOPLE v WALTON, No. 149006; Court of Appeals No. 319800.

PEOPLE v THOMAS JONES, No. 149007; Court of Appeals No. 310988.

PEOPLE v WILCOX, No. 149010; Court of Appeals No. 313547.

PEOPLE v LAVAR BURTON, No. 149011; Court of Appeals No. 319395.

PEOPLE v POWELL, Nos. 149012 and 149013; Court of Appeals Nos. 310439 and 310440.

PEOPLE v POKLADEK, No. 149015; Court of Appeals No. 320245.

PEOPLE v RANDALL BROOKS, No. 149019; reported below: 304 Mich App 318.

HARMONY MONTESSORI CENTER v CITY OF OAK PARK, No. 149023; Court of Appeals No. 312856.

CAVANAGH, J., not participating due to a familial relationship with counsel of record.

PEOPLE v MCCLOUD, No. 149034; Court of Appeals No. 319662.

PEOPLE v GREGORY MORRIS, No. 149037; Court of Appeals No. 319491.

PEOPLE v WILLAVIZE, No. 149042; Court of Appeals No. 320112.

MAY v DEPARTMENT OF CORRECTIONS, No. 149048; Court of Appeals No. 318338.

PEOPLE v VAN JENKINS, No. 149051; Court of Appeals No. 320114.

PEOPLE v ELLISON, No. 149060; Court of Appeals No. 313422.

PEOPLE v COULSON, No. 149066; Court of Appeals No. 318886.

PEOPLE v ERIC HALL, No. 149068; Court of Appeals No. 296860.

STAMPER v KING, No. 149069; Court of Appeals No. 320455.

PEOPLE v HOUTHOOFD, No. 149070; Court of Appeals No. 312977.

PEOPLE v HEWITT, No. 149075; Court of Appeals No. 320013.

PEOPLE v SEARCY, No. 149078; Court of Appeals No. 308101.

WARD v BELLAMY CREEK CORRECTIONAL FACILITY WARDEN, No. 149084; Court of Appeals No. 318723.

PEOPLE v DALE, No. 149088; Court of Appeals No. 319850.

PEOPLE v CLANTON, No. 149093; Court of Appeals No. 319769.

PEOPLE v SOLDAN, No. 149097; Court of Appeals No. 318315.

PEOPLE v BRANDON HALL, No. 149099; Court of Appeals No. 320118.

PEOPLE v CURRY, No. 149100; Court of Appeals No. 312265.

BANK OF NEW YORK MELLON v BELL, No. 149101; Court of Appeals No. 317635.

PEOPLE v DUSTIN BROWN, No. 149106; Court of Appeals No. 319759.

PEOPLE v WELCH, No. 149112; Court of Appeals No. 313085.

PEOPLE v DANTOINE BROWN, No. 149116; Court of Appeals No. 318719.

PEOPLE v BOBBY SMITH, No. 149118; Court of Appeals No. 310436.

PEOPLE v CHOATE, No. 149121; Court of Appeals No. 314438.

PEOPLE v GRAVES, No. 149131; Court of Appeals No. 312593.

PEOPLE v DEON TAYLOR, No. 149132; Court of Appeals No. 313677.

PEOPLE v KHATTAR, No. 149137; Court of Appeals No. 311752.

PEOPLE v GENERAL, No. 149138; Court of Appeals No. 313426.

THOMAS v SAM'S CLUB, No. 149149; Court of Appeals No. 318106.

LANDON v CITY OF FLINT, Nos. 149187, 149188, 149189, 149190, 149191, 149192, 149193, and 149194; Court of Appeals Nos. 311073, 311074, 311075, 311076, 311078, 311079, 311080, and 311081.

PEOPLE v LARRY JONES, No. 149204; Court of Appeals No. 319505.

PEOPLE v DARNELL HAYES, No. 149215; Court of Appeals No. 308527.

PEOPLE v BANKS, No. 149248; Court of Appeals No. 312558.

PEOPLE v LIFER, No. 149251; Court of Appeals No. 320724.

PEOPLE v FOWLER, No. 149255; Court of Appeals No. 319852.

PEOPLE v RONALD LEE WILLIAMS, No. 149263; Court of Appeals No. 320024.

PEOPLE v WILLIAMSON, No. 149296; Court of Appeals No. 313785.

PEOPLE v HARVEY, No. 149298; Court of Appeals No. 311174.

PEOPLE v DELMEREY MORRIS, No. 149330; Court of Appeals No. 311177.

PHILLIPS v PHILLIPS, No. 149376; Court of Appeals No. 315429.

PEOPLE v ERIC SMITH, No. 149402; Court of Appeals No. 315991.

LICARI v LICARI, No. 149406; Court of Appeals No. 314025.

POAG-EMERY v EMERY, No. 149411; Court of Appeals No. 318401.

In re APPLICATION OF INTERNATIONAL TRANSMISSION COMPANY, No. 149440; reported below: 304 Mich App 561.

MALCOM v WOMEN'S HURON VALLEY CORRECTIONAL FACILITY WARDEN, No. 149446; Court of Appeals No. 319875.

PEOPLE v KILLENBERGER, No. 149452; Court of Appeals No. 320830.

Leave to Appeal Before Decision of the Court of Appeals Denied July 29, 2014:

FELDKAMP v DEPARTMENT OF TREASURY, No. 149457; Court of Appeals No. 321735.

Superintending Control Denied July 29, 2014:

JENKINS v ATTORNEY GRIEVANCE COMMISSION, No. 149227.

Reconsideration Denied July 29, 2014:

WARD v CARSON CITY CORRECTIONAL FACILITY WARDEN, No. 147941; Court of Appeals No. 310968. Leave to appeal denied at 495 Mich 936.

PEOPLE v GIBBS, No. 147992; Court of Appeals No. 316226. Leave to appeal denied at 495 Mich 977.

PEOPLE v RYAN, No. 148014; Court of Appeals No. 315897. Leave to appeal denied at 495 Mich 948.

PEOPLE v JOHN ALEXANDER, No. 148088; Court of Appeals No. 316227. Leave to appeal denied at 495 Mich 949.

PEOPLE v DERRICK DAVIS, No. 148181; Court of Appeals No. 316043. Leave to appeal denied at 495 Mich 992.

PEOPLE v PAUL DAVIS, No. 148248; Court of Appeals No. 310706. Leave to appeal denied at 495 Mich 993.

PEOPLE v WILSON, No. 148273; Court of Appeals No. 317678. Leave to appeal denied at 495 Mich 993.

PEOPLE v ROBINSON, No. 148288; Court of Appeals No. 298929. Leave to appeal denied at 495 Mich 988.

MCCORMACK, J., not participating because of her prior involvement in this case as counsel for a party.

PEOPLE v RAYNARD WILLIAMS, No. 148290; Court of Appeals No. 315833. Leave to appeal denied at 495 Mich 993.

PEOPLE v BRIDINGER, No. 148293; Court of Appeals No. 303248. Leave to appeal denied at 495 Mich 980.

OLDHAM v A J STEEL ERECTORS, LLC, No. 148370; Court of Appeals No. 314937. Leave to appeal denied at 495 Mich 980.

WALTHALL v BELLAMY CREEK CORRECTIONAL FACILITY WARDEN, No. 148459; Court of Appeals No. 317546. Leave to appeal denied at 495 Mich 995.

IDA TOWNSHIP v SOUTHEAST MICHIGAN MOTORSPORTS, LLC, No. 148540; Court of Appeals No. 303595. Leave to appeal denied at 495 Mich 996.

BOLZ v BOLZ, No. 148754; Court of Appeals No. 319535. Leave to appeal denied at 495 Mich 986.

GUSMANO v GUSMANO, No. 148798; Court of Appeals No. 315908. Leave to appeal denied at 495 Mich 996.

Leave to Appeal Denied August 1, 2014:

In re CHEEKS, No. 149596; Court of Appeals No. 315523.

Rehearing Denied August 5, 2014:

STATE OF MICHIGAN EX REL GURGANUS v CVS CAREMARK CORPORATION, No. 146791; opinion at 496 Mich 45.